THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case 2026-092513

(1)	REPORTABLE: Yes☐/ No ☒
(2)	OF INTEREST TO OTHER JUDGES: Yes☐ / No ☒
(3)	REVISED: Yes ☒ / No ☐
Date: 03 May 2026	[redacted]

In the matter between:

THE SPAR GROUP LIMITED	Applicant
and	
DURBANVILLE INVESTMENTS (PTY) LTD t/a BUCCLEUCH KWIKSPAR & TOPS	Respondent

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JUDGMENT

DU PLESSIS J

Introduction

[1] This is an urgent application in which the applicant seeks an order authorising the perfection of its security under a general notarial covering bond registered in its favour over the respondent's movable property.

[2] The respondent opposes the application. It disputes the applicant's reliance on urgency, denies that it made any unequivocal admission of insolvency, contends that

the relief sought is unduly invasive, and submits that the applicant has overstated the risk to its security.

Background

[3] In September 2024, the respondent executed a general notarial covering bond in favour of the applicant, registered under bond, to secure present and future indebtedness arising from goods sold and delivered, drop shipment transactions, monies lent and advanced, interest, and enforcement costs.

[4] The bond is framed in wide terms. It records that the applicant may, upon the occurrence of specified trigger events, seek to perfect its security by taking possession of the respondent's movable assets and, in broad terms, exercising control necessary to preserve and realise the security. The applicant alleges that, as at 21 April 2026, the respondent was indebted to it in the amount of R3 160 794.56.

[5] The applicant further relies on a telephone conversation on 21 April 2026 between Mr Timothy Smit, the applicant's attorney, and Mr Stephen Mutale, the respondent's sole director, during which, according to the applicant, Mr Mutale stated that the respondent was insolvent and that Nedbank would not extend further credit to it. The applicant also alleges that during the same conversation, Mr Mutale disclosed the existence of a further notarial bond in favour of Nedbank over the respondent's movable property.

[6] Based on those matters, the applicant contends that the triggering provisions of the bond have been engaged, that its interests are imperilled, and that liquidation or perfection by another creditor is imminent.

[7] The respondent does not dispute the existence of the bond, the parties' contractual relationship, or the applicant's status as a secured creditor under the bond. Instead, its opposition concerns urgency, insolvency, impairment, proportionality, and remedy.

[8] The respondent submits that any urgency is self-created because the applicant has known of the indebtedness, the parties' trading difficulties, and the existence of the Nedbank bond for some time.

[9] It disputes the existence of any unequivocal admission of insolvency. It contends that, at most, its director conveyed that the businesses were under financial pressure. The respondent also relies on asset schedules, valuations, and sale-of-business documents to show that the stores remain going concerns with value in their stock, movable assets, and goodwill. It submits that immediate perfection will destroy going-concern value, terminate the business in practical terms, and thereby produce a punitive rather than protective outcome.

[10] In the alternative, the respondent proposed a structured order under which perfection would be recognised in principle, but its implementation would be suspended, subject to strict reporting, inspection, and payment conditions.

Urgency

[11] It is so that the parties' broader commercial difficulties and the indebtedness did not arise overnight. The papers show that the engagements extended over a considerable period, and the applicant was aware of the Nedbank bond before launching the application.

[12] However, the applicant's case is not based merely on the historical existence of debt. It is tied to what it alleges was a fresh disclosure on 21 April 2026 of insolvency and the unavailability of further banking support, which, if accepted, materially altered the risk profile facing the applicant as a bondholder.

[13] In applications to perfect security under a general notarial bond, the risk that a concursus creditorum or competing enforcement may intervene is capable of rendering the matter urgent in a real commercial sense.

[14] In the circumstances, the matter is sufficiently urgent to warrant a hearing on the urgent roll.

Merits

[15] Having regard to the papers, the applicant has, in my view, made out a case for substantive relief. There is no real dispute about the agreements concluded. The respondent obtained credit facilities from the applicant, became bound by the applicant's standard terms, executed acknowledgements of debt, and furnished a general notarial covering bond to secure its present and future indebtedness.

[16] The respondent's indebtedness to the applicant in a substantial amount is likewise established on the papers. Even where the respondent seeks to contextualise its position, it does not place in genuine dispute the broad fact of substantial arrears and the applicant's status as secured creditor under the bond.

[17] The applicant is thus not merely a creditor that complains about the breach of a commercial agreement. As a secured creditor, holding a notarial bond with a perfection clause, it seeks possession of the movables to establish a real right. This is the position under South African law: a general notarial bond does not itself create a real security right; only upon lawful delivery and possession does the bondholder acquire a pledge enforceable against third parties. This has various implications, as stated in *Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd*[1], namely:

> [6] Real rights are stronger than personal rights and in the case of conflicting real rights the principle prior tempore potior iure applies. The right in question, a pledge, is a real right, which is established by means of taking possession and not by means of an agreement to pledge. The bondholder who obtains possession first thereby establishes a real right. If I may be permitted some more Latin: vigilantibus non dormientibus iura subveniunt, meaning that the laws aid those who are vigilant and not those who sleep. (Both principles provide a safer guide to the correct answer than the Court below's 'just and equitable' principle.11 The fact that it is 'fortuitous' that the vigilant person perfects his rights first does not make the act either unjust or inequitable.)

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[1] [2002] ZASCA 143; [2003] 1 All SA 267 (SCA); 2003 (2) SA 253 (SCA).

[18] In this case, it means the following: A creditor in the applicant's position does not seek possession for its own sake. It seeks possession because, absent perfection, the practical value of the security may be lost or materially diluted if a concursus creditorum intervenes before possession is obtained.

[19] The respondent contends that the applicant faces no real risk from the Nedbank bond because, as the prior registered bondholder, the applicant would be protected by the doctrine of notice, as explained in *Contract Forwarding*: Nedbank, having actual knowledge of the applicant's prior bond, cannot perfect its later bond in disregard of it.

[20] The doctrine of notice may well constrain Nedbank from perfecting in disregard of the applicant's priority, but it does not prevent Nedbank from applying for the respondent's liquidation, nor does it prevent the onset of a concursus creditorum by other means. Once liquidation commences, the applicant's right to perfect is entirely lost, regardless of its prior ranking: an unperfected general notarial bond affords only a statutory preference over the free residue of the insolvent estate, not secured creditor status.[2] The applicant is therefore entitled to act now, before any such event, rather than rely on the uncertain proposition that Nedbank will refrain from pursuing its own remedies.

[21] The respondent's arguments on proportionality, practical hardship, and the potential loss of going-concern value were thoroughly presented and carefully considered. Perfection by possession may indeed have severe consequences. Once a creditor gains control of the stock and operations, the debtor's business may cease to function independently in any meaningful way. However, in this case, these factors do not justify denying the applicant the primary relief to which they are entitled.

[22] *Contract Forwarding* also states that the court does not have a broad discretion to refuse an order once an applicant has established a right to take possession.[3]

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[2] For a discussion on this, see Jansen, M. (2003). "More legal security regarding security by means of general notarial bonds: case comments." *SA Mercantile Law Journal*, 15(3), 486-497.

[3] Para 10. The court states: "Although aware of dicta by Didcott J to the effect that there is a discretion, I cannot see how a court, in the exercise of its discretion, can refuse an order to an applicant who has a right to possession of a pledged article to take possession. The principles relating to the limited discretion to refuse specific performance apply only where the creditor has another remedy, such as a claim for damages, at its disposal. A claim for damages cannot replace a claim for real security. In the absence of a conflict with the Bill of Rights or a

However drastic the consequences of an order for perfection of a notarial bond might be, they do not justify refusing perfection altogether.

[23] In *Beadica 231 CC v Trustees for the time being of the Oregon Trust*[4] the Constitutional Court reaffirmed that fairness and reasonableness are not freestanding bases for declining to enforce contractual terms, and that public policy, rooted in constitutional values, generally favours the enforcement of contracts freely and voluntarily concluded. The respondent's arguments rely mainly on insolvency law principles and the preference for rescue over the demise of a company. That does not assist.

[24] There is, in the present matter, no proper basis to conclude that enforcement of the perfection clause would itself be contrary to public policy. On the contrary, the respondent, a commercially savvy actor, voluntarily granted the bond as security for substantial commercial indebtedness, and the circumstances now confronting the parties are precisely those for which such security was intended.

[25] The dispute concerning the alleged admission of insolvency does not alter the position in any decisive way. Even if that issue is approached cautiously, and even if the respondent is given the benefit of the dispute on motion,[5] the applicant has shown substantial arrears, ongoing financial distress, and the existence of a further bond in favour of Nedbank over the same movable property. Viewed cumulatively, those features establish a present and material risk to the efficacy of the applicant's security. The applicant accordingly succeeds. Costs follow the result.

Order

[26] Accordingly, the following order is made:

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rule to the contrary, a court may not under the guise of the exercise of a discretion have regard to what is fair and equitable in that particular court's view and so dispossess someone of a substantive right."

[4] [2020] ZACC 13 para 83 onwards.

[5] Following *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

1 The Applicant is authorised for the purposes of perfecting its security in terms of the General Notarial Covering Bond registered in, inter alia, Pretoria as BN000032704/2024 to enter upon the Respondent's premises or any other place where any of the Respondent's movable property, of whatever description and nature and wherever situated and held, ("the movable property") and –

1.1 to enter upon the Respondent's premises and take physical possession and control of the movable property;

1.2 to hold the movable property as security for payment of all amounts owing by the Respondent to the Applicant and to retain such possession for so long as the Applicant may deem fit;

1.3 to dispose of the movable property or any of same by public auction or by private treaty or otherwise in the Applicant's sole discretion and on such terms and conditions as the Applicant in its sole discretion may deem fit as an arms-length transaction and at the best possible price and to convey good valid and free title to the purchaser or transferee thereof;

1.4 have the movable property excussed and/or attached by legal process;

1.5 to apply for provisional sentence and to execute upon all or any of the movable property;

1.6 to carry on and manage the Respondent's business in the name of and on behalf of and as agent for and for the account of the Respondent for such period as the Applicant may deem fit and to perform, for the said purpose, such managerial and/or operational acts as the Applicant may deem necessary or desirable;

1.7 to –

1.7.1 have access to, operate and draw on any account of the Respondent at any deposit-taking institution and to sign any instruments or documents and make use of any username, one-time-pin and/or passwords and to perform all such acts as may be necessary or desirable in connection therewith; and

1.7.2 open a bank account in the name of the Applicant for the sole purpose of operating the Respondent's businesses in terms of any perfection order granted by a Court;

1.8 to make payments to the Applicant in reduction of the Respondent's indebtedness to it of all funds in any account of the Respondent at any deposit-taking institution or from any funds which the Respondent (or the Applicant on behalf of the Respondent) may receive or which may accrue from time to time;

1.9 to take occupation of or to sub-let the premises in which the Respondent conducts its businesses and/or to cede or assign the lease(es) in respect of the premises;

1.10 to transfer and/or renew any licenses, permits, registration certificates and the like relating to the Respondent's businesses, to sign all application forms, documents, consents and instruments in the name of the Respondent and to perform all such acts as may be necessary or desirable in that regard;

1.11 to conclude, perform and execute such agreements, deeds, and other documents in connection with the alienation or disposal of the movable property;

1.12 to secure, receive, demand, claim, sue and recover all goods, debts, amounts and movable property that may be due, owing and payable or belonging to the Respondent, either in the name of the Respondent or in the name of the Applicant;

1.13 in accordance with the applicable laws and employment contracts, to engage or dismiss employees of the Respondent, on its behalf, on such terms and conditions as the Applicant may deem fit; and/or

1.14 to employ such other remedies to take such other steps against the Respondent as allowed in law; and

2 That the Respondent pays the costs to be taxed on scale B.

[redacted]

WJ du Plessis
Judge of the High Court, Gauteng Division,
Johannesburg

Date of hearing: 29 April 2026

Date of judgment:	3 May 2026
For the applicant:	D van Niekerk instructed by Cliff Dekker Hofmeyr Inc
For the respondent:	N Kinstler of Kinstler Attorneys Inc