

SOUTH AFRICA / JUDGMENT

Pick n Pay Retailers (Pty) Ltd v Cascade Avenue Trading 158 (Pty) Ltd (150/2024) [2024] ZANCHC 18 (26 February 2024) [2024] ZANCHC 18

COURT

Northern Cape High Court, Kimberley

BEFORE

Phatshoane

CASE / FILE NUMBER

150/2024

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IN THE HIGH COURT OF SOUTH AFRICA,

NORTHERN CAPE DIVISION, KIMBERLEY

Not Reportable

Case No: 150/2024

In the matter between:

PICK 'N PAY RETAILERS (PTY) LTD

APPLICANT

And

CASCADE AVENUE TRADING 158 (PTY) LTD

RESPONDENT

Neutral citation: Pick 'n Pay Retailers (Pty) Ltd v Cascade Avenue Trading 158 (Pty) Ltd (Case no 150/2024) (26 February 2024)

Heard: 14 February 2024

Delivered: 26 February 2024

Judgment

Phatshoane DJP

- [1] The applicant, Pick 'n Pay Retailers (Pty) Ltd, seeks judicial sanction on an urgent basis to perfect its security pursuant to the provisions of a General Notarial Bond: B[...] 1[...] (the bond) and to exercise its rights as provided for in clauses 6.1.1 to 6.1.10 of the bond against the respondent, Cascade Avenue Trading 158 (Pty) Ltd, by inter alia, taking possession of the respondent's movable assets and vesting control of its business in its hands.
- [2] One of the bases for the respondent's opposition is that the application is not urgent because the applicant waited 13 days, since delivery of the notice of breach, in which it demanded payment within 48 hours, before it launched the present application. Insofar as the applicant alleged that the respondent became indebted to it from 18 December 2023, it was argued, that there appeared to have been no reason why the application was not brought at the time.

Therefore, the urgency was self-created.

- [3] The circumstances allegedly giving rise to urgency upon which the applicant relies are multifarious. It was argued for it that in the event the matter was not disposed of on an urgent basis, further payments of approximately R1 400 000 each week will become due and payable on the 28-day cycle. This would significantly increase the respondent's indebtedness to the applicant each week. It was further argued that the respondent has been unable to trade out of its loss-making position and is not able to discharge its indebtedness to the applicant.
- [4] It was further argued for the applicant that had it approached the court after the first default around 25 December 2023, the respondent would have complained of prejudice. The applicant's brand, so it was argued, is well known and it cannot without more seek to perfect its bond immediately after a retailer defaults on a payment. The applicant maintains that the stock it supplies to the respondent is its largest tangible security. Each day that passes the respondent

is selling the stock, but not effecting payment of what is due and thereby diminishing the applicant's security.

- [5] The applicant went on to argue that the respondent continues to order groceries and allied products from it but fails to pay the amounts due. It submitted that it has observed that customers and the general public do not distinguish between it and the respondent when the respondent's store appears to be under-stocked. To obviate negative publicity and to protect its brand, the applicant contended that it was important for it to perfect its security in order to manage the store. The manner in which the respondent has dealt with the applicant, if allowed to continue, it was argued, will result in the closure of the store and prejudice not only the applicant's interests but also the well-being and lives of the employees, customers, and the general community of Galeshewe and surrounding areas

who depend on the applicant to stock the store.

[6] The respondent is of the view that the applicant's concerns are not legitimate because it failed to act soon upon the notice of breach. In my view, a sustained commercial loss would require that the matter be disposed of on a truncated basis. The applicant would not be afforded substantial redress at a hearing in due course. I am satisfied that the applicant acted conscientiously and promptly enough in bringing the application. All the necessary affidavits, albeit on suitably abridged time periods, were filed and the issues fully ventilated through argument. I can conceive of no prejudice. The point taken that the jurisdiction of this Court is not engaged had been abandoned.

[7] Approximately 15 years ago, on 25 October 2008, the applicant and the respondent concluded a written franchise agreement. To secure the respondent's continuing indebtedness, it executed the bond in favour of the applicant which was registered in the Deeds Registry, Kimberley, on 25 August 2008. In terms of the franchise agreement the respondent agreed to pay all amounts owing by it to the applicant in respect of the purchase of goods and check-out packaging on the 28th calendar day of the cut-off date as would be reflected in the relevant end of week statement. The respondent would purchase stock

every week and thus weekly payments would fall due in terms of the 28-day cycle and weekly statements issued.

[8] The bond would be executable against the respondent where, inter alia, it commits any breach of any of its terms and conditions or the franchise agreement; it fails to pay any amount due to the applicant promptly on due date; or the applicant believes that its interests are being imperilled by any action of the respondent or its officers,

servants or creditors.

[9] During the period 25 December 2023 to 15 January 2024, the applicant intimated, the respondent failed to honour payment of the amounts that became due and payable at the end of every week and therefore became indebted to it in the amount of R5 737 214.62 which increased to R6 740 050.24 as at 6 February 2024. The following amounts, according to the applicant, became due and payable on the dates referred to in the relevant end of week statements and remain unpaid:

[9.1] R 5 69 272. 48 became due and payable under weekly statement no 202439 on 25 December 2023.

[9.2] R 1 234 986.29 became due and payable under weekly statement no 202440 on 1 January 2024.

[9.3] R 1 842 551.41 became due and payable under weekly statement no 202441 on 8 January 2024 and

[9.4] R2 090 404.44 became due and payable under weekly statement no 202442 on 8 January 2024.

[10] As already alluded to, on 10 January 2024, the applicant directed the notice of breach to the respondent to rectify the non-payment of its account within 48 hours. The notice went unanswered. According to the applicant, following this notice, the respondent once more defaulted on its weekly payments and the debt increased by R 2 090 404.44.

[11] The respondent disputed the quantum of the debt and attached proof of payments made from the period 27 December 2023 to 05 February 2024 (appendices GA1-GA17) which totalled R11 641 140. The applicant admitted that the payments were made but said these would ordinarily be appropriated towards defraying the respondent's

historical debt first. Therefore, the payments were allocated to the respondent's account as follows:

11.1 The payment of R 570 358.53 reflected on annexure "GA1", made on 27 December 2023, was allocated to invoice no 202436 which was due on 27 December 2023.

11.2 The payment of R 800 000 reflected on annexure "GA2", made on 29 December 2023, was allocated as follows: R 250 555.57 to invoice no 202437 which was due on 11 December 2023 and R 599 444.43 to invoice no 202436 which was due on 27 December 2023.

11.3 The payment of R 400 000 reflected on annexure "GA3", made on 31 December 2023, was allocated to invoice no 202437 which was due on 11 December 2023.

11.4 The payment of R 300 000 reflected on annexure "GA4", made on 2 January 2024, was allocated as follows: R 271 401.71 to invoice no 202437 which was due on 11 December 2023 whereas R 28 598.29 to invoice no 202430 which was due on 2 January 2024.

11.5 The payment of R 634 986.29 reflected on annexure "GA5", made on 2 January 2024, was allocated to invoice no 202437 which was due on 11 December 2023.

11.6 The payment of R 919 802.96 reflected on annexure "GA6", made on 6 January 2024 was allocated as follows: R 475 825.42 to invoice no 202437 which was due on 11 December 2023 and R 443 977.54 to invoice no 202438 which was due on 18 December 2023.

11.7 The payment of R 900 000 reflected on annexure "GA7", made on 8 January 2024, was allocated to invoice no 202438 which was due on 18 December 2023.

11.8 The payment of R 242 551.41 reflected on annexure "GA8", made on 8 January 2024, was allocated to invoice no 202438 which was due on 18 December 2023.

11.9 The payment of R 300 000 reflected on annexure "GA9", made on 10 January 2024, was allocated to invoice no 202438 which was due on 18 December 2023.

11.10 The payment of R 360 000 reflected on annexure "GA10", made on 13 January 2024, was allocated to invoice no 202438 which was due on 18 December 2023.

11.11 The payment of R 940 000 reflected on annexure “GA11”, made on 15 January 2024, was allocated as follows: R 399 318.25 to invoice no 202438 which was due on 18 December 2023 and R 540 681.75 to invoice no 202438 which was due on 18 December 2023.

11.12 The payment of R 960 404.30 reflected on annexure “GA12”, made on 18 January 2024, was allocated to invoice no 202439 which was due on 25 December 2023.

11.13 The payment of R 1 130 000 reflected on annexure “GA13”, made on 23 January 2024, was allocated as follows: R 569 272.48 to invoice no 202439 that was due on 25 December 2023 and R 560 727.52 to invoice no 202440 which was due on 1 January 2024.

11.14 The payment of R 1 454 225.56 reflected on annexure “GA14”, made on 29 January 2024, was allocated as follows: R 424 258.77 to invoice no 202440 that was due on 1 January 2024 and R 1 029 966.79 to invoice no 202441 which was due on 8 January 2024.

11.15 The payment of R 450 000 reflected on annexure “GA15”, made on 3 February 2024, was allocated to invoice no 202441 which was due on 8 January 2024.

11.16 The payment of R 450 000 reflected on annexure “GA16”, made on 4 February 2024, was allocated to invoice no 202442 which was due on 15 January 2024.

11.17 The payment of R 828 811,40 reflected on annexure “GA17”, made on 5 February 2024, was allocated as follows: R 312 584.62 to invoice no 202441 that was due on 8 January 2024 and R 516 226.78 to invoice no 202442 which was due on 15 January 2024.

[12] The applicant contended that it was entitled to allocate payments received as it deems fit, as set out in clause 9.3 of the agreement which stipulates that:

“The franchisor [the applicant] and financier shall be entitled in their reasonable discretion, but subject to any legal constraint to the contrary, to appropriate any amounts received by them from the franchisee [the respondent]] towards the payment of any cause or debt or amount then owing by the franchisee to either of them under, in terms of or pursuant to the agreement”

[13] When all the above payments had been accounted for, the applicant submits, the respondent remained indebted to it in the amount of R 1 124 177.66 which did not take account of weekly statements that became due and payable after 15 January 2024. As at 6 February 2024 the respondent owed the applicant R6 740 050.24. A reconciliation of the respondent’s account reflecting this is attached to the replying affidavit. Accordingly, so it was contended, the respondent breached clause 8.2.1; 8.2.5 and 8.2.8 of the bond in that it failed to pay the amounts owing promptly on due dates which entitles the applicant to perfect its security.

[14] As already stated, the respondent disputed its indebtedness. It sought to challenge from the bar the applicant's reconciliation of its account and contended that the applicant had impermissibly attempted to supplement its case in the replying affidavit. The rule against new matter in reply is not absolute and should be applied with a fair measure of common sense.[1] An applicant is entitled to introduce further corroborating evidence by means of a replying affidavit should the contents of an answering

affidavit call for such facts.[2] It was not the respondent's case that it did not have historical debt. To the extent that the respondent alleged that it

paid the amounts due, the applicant was entitled to adduce proof to the contrary in reply in order to substantiate its stance in the founding papers on non-payment of its debt by the respondent.

[15] Belatedly, halfway through its address in reply, when the shoe started pinching, the respondent sought leave, without any substantive application, that it be allowed to file a further affidavit to deal with the reconciliation of its account. The respondent had ample opportunity, at least four court days prior to the hearing of the urgent application and in the morning of the hearing on 14 February 2024 to seek leave that it be allowed to introduce a further affidavit. This it did not do. Special circumstances may exist where something unexpected or new emerged from the applicant's replying affidavit which would necessitate the filing of fourth set of affidavits. Nothing unforeseen or startling evidence surfaced from the replying affidavit. Consequently, the application was refused.

[16] The respondent submitted that the perfection of security was a radical measure which is punitive in nature and only granted in exceptional circumstances. It further argued that perfection would prejudice it and its direct creditors with whom it has maintained a good business relationship since 2008 with adverse consequences to all its stakeholders including its employees. The obverse of the coin is that perfection of security may well prevent negative consequences as it will afford the applicant the opportunity to, inter alia, conduct the business of the respondent, in its name, place and stead and to pay itself and other creditors.

[17] I could find no authority for the proposition that perfection of security is available only in exceptional circumstances. Equity and empathy cannot override contractual arrangements between parties. In *Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd and Others*[3] Harms JA trenchantly stated:

"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 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."

- [18] In *Juglal NO v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division*[4] Heher JA held that the provisions of the bond in that matter (almost identical to the provisions in the current bond), did not possess the pernicious tendencies which would warrant and require the court to strike them down as contrary to public policy. In paras 26-27 he said:

"[26]...Although neither the contract nor the common law required a court order for the exercise of the additional powers in clauses 14.2.2 to 14.6, the respondent expressly sought approval for the exercise of the power to conduct the business in the manner provided in clause 14.2.2, to sell and dispose of the business or assets in terms of clause 14.3 and to proceed as contemplated in clauses 14.5 and 14.6. I have already made it clear that it did require court sanction to take possession in terms of clause 14.2.1, which it also obtained. That the respondent subjected the terms of the contract and its implementation to the intervention and oversight of the court takes much of the sting out of the appellant's complaint about the arbitrary, unreasonable and oppressive nature of the contractual powers conferred on it. While the taking over of a business as a going concern to secure a debt is a fairly drastic step which can, if abused, inflict hardship on a debtor, the context of the contractual powers in the bond under consideration renders the provision and exercise of the power commercially intelligible and combines adequate protection of the (largely perishable) security with realisation of it in a manner calculated to achieve a realistic price (which would certainly be a lesser prospect were the creditor tied to a forced sale). Moreover, as counsel for the respondent pointed out, in exercising the discretionary powers inherent in operating and selling the business and the assets the respondent is obliged to act reasonably and to exercise reasonable judgment (arbitrio boni viri): NBS Boland Bank Ltd v One Berg River Drive CC and Others; Deeb and Another v ABSA Bank Ltd; Friedman v Standard Bank of SA Ltd 1999

- (4) SA 928 (SCA) ([1999] 4 B All SA 183) at 937A - F (SA). Moreover, the effect of clause 14.2.2 is that the mortgagee acts to all intents and purposes as the agent of the mortgagor in exercising its powers and subject to the duties in law that flow from that relationship.

- [27] Counsel for the appellant suggested that clauses 14.2.2 and 14.3 both permit the mortgagee to carry on the business indefinitely while maintaining an ongoing indebtedness by the mortgagor to itself by the simple expedient of continuing to purchase on credit on the mortgagor's behalf. This, he submitted, demonstrated the oppressive force of the provisions. I do not agree that the clauses have that tendency whatever the speculative limits of their misapplication. Clauses 14.2 and 14.3 must be read subject to clause 14.1. As soon as the default or imperilment which gave rise to the enforcement of the rights they provide has been overcome the causa for the retention of the business would fall away and the respondent would be obliged to restore the business to the appellant (if it has not already been lawfully sold or the franchise agreement cancelled). If the respondent were to seek improperly to manipulate the powers to draw out its hold on the business the appellant would have its remedies. Of course, the likely concomitant of a sale of the business is a cancellation of the franchise agreement which is the trigger for the assignment or transfer of the lease, the closure of the store and the cessation of trading at the location. These are all consequences

which the respondent is entitled to bring into operation under the franchise agreement. They are not under attack. That they exist

independently of the bond, illustrates once again that the supposedly unhappy results of the exercise of the powers under the bond are in reality no more radical than the appellant has willingly and, commercially speaking, fairly exposed itself to without complaint under the contract.”

[19] The reason the applicant registered a notarial bond is not too far to seek. It did so in order to enable it to secure its position

in the event of the respondent falling into financial difficulty or distress and breaching the agreement or the bond. The

bond is enforceable at the behest of the applicant provided it is executable in accordance with its terms. An event leading to

executability came to pass because there is no evidence to controvert that the respondent, as set out in clause 8.2 5 of the bond, failed to pay some amounts due to the applicant promptly. In so doing it breached the franchise agreement. Counsel for the respondent conceded that there were trigger events in that the respondent did not pay on due dates.

[20] Clause 17.1 provides that “Notwithstanding anything to the contrary contained herein, the creditor shall be entitled to exercise the rights granted to it hereunder only if at the time there is actual obligation or indebtedness owing by the Mortgagor to the Creditor.” In terms of clause 9.3 of the bond the certificate of indebtedness, in the absence of evidence to the contrary, constitutes sufficient proof for purposes of obtaining any judgment or order. A day prior to the issuing of the application, on 22 January 2024, the certificate of indebtedness attached to the founding papers, which was not seriously challenged, showed that the respondent owed the applicant R 5 737 214.62. Insofar as the respondent claimed to have paid R11 641 140.45, as already discussed, the payments were appropriated towards its historical debt which the applicant was entitled to do in terms of clause 9.3 of the franchise agreement.

[21] As a continuing covering security the respondent declared to bind in favour of the creditor (Pick ‘n Pay Retailers/the applicant) all its movable property and effects of every description, corporeal or incorporeal, nothing excepted and submitted them to constraint and execution as the law directs. Clause 8 of the bond stipulates that the applicant is entitled, without notice to the respondent and without first obtaining any court order to perfect its security. In *Bock & others v Duburoro Investments (Pty) Ltd* Harms JA reaffirmed that the immediate execution clause in a mortgage bond, permitting the mortgage creditor to execute without recourse to the mortgage debtor or the court by taking possession of the property and selling it, is void. It is trite that to perfect security in respect of the general notarial bonds, such as the present, the court's imprimatur is required.[5]

- [22] Nothing had been placed before the Court to stymie the applicant in its quest to take immediate steps to protect its rights as agreed with the respondent. It follows that the application should succeed. Where the bond becomes executable under clause 8 thereof the applicant shall be entitled to perfect its security and exercise powers conferred upon it as contained in clause 6.1.1 to 6.1.10 of the bond. To obviate prolixity, such authority is foreshadowed in the order I propose to make.
- [23] What remains is the question of cost. Clause 47.1 of the franchise agreement provides that where the applicant takes legal action or obtains legal advice against the respondent, pursuant to any breach of the terms of the agreement by the respondent, the respondent shall be liable to pay the applicant on an attorney and own client scale all reasonable legal costs incurred in so doing. The applicant is only asking for costs on attorney and client scale. Therefore, they must follow the result.
- [24] As to the wasted costs occasioned by the postponement of 09 February 2024, the applicant argued that they be borne by the respondent as it filed its answering affidavit late. To the converse, the respondent argued that the applicant pay those costs because it had filed the application on a truncated basis which necessitated the exchange and filing of the pleadings late. The answering affidavit was filed one day late, on Monday 06 February 2024, outside the time allowed in the

Notice of Motion. Three days later, on the eve of the hearing of the application, the applicant filed a replying affidavit and prepared the court file. The late filing of the papers and the late preparation of the record largely occasioned the postponement of 09 February 2024.

- [25] It is common cause that the applicant issued a similar application, on the same date as the present application, against the respondent's sister company in the Free State Division which involved the same legal teams. Some delays were bound to occur. As I see it both parties are jointly accountable for the delay. I am therefore unpersuaded that any of them should be mulcted in the wasted costs of 09 February 2024. Each party is to bear its own costs. An order is therefore made.

Order:

1. The applicant, Pick 'n Pay Retailers (Proprietary) Limited, is hereby authorised and empowered through its duly authorised representative or the Sheriff of this Court, for the purpose of perfecting its security in terms of Notarial General Covering Bond no B[...] 1[...] registered in Kimberley on 25 August 2008 (Bond), to exercise the rights as contemplated in clauses 6.1.1 to 6.1.10 of the Bond and to:

1.1 claim and recover from the respondent, forthwith all and any sums for the time being secured by the bond, whether then due for payment or not;

1.2 enter upon the premises of the respondent (for the purpose of perfecting its security) or any other place where any of its assets are situated, and to take possession of its assets including, without limitation, at Pick n Pay Family Supermarket Galashewe situated at Erf 9954 – 9955 Galashewe, Kimberley, 8345 and Shop No.8 Galashewe Plaza, Nobengula Street, Kimberley, 8301; and/or

1.3 conduct the business of the respondent in the name, place and stead of the respondent and to do all such things in respect of or incidental to the business as the respondent would itself have been able to do including, but without limiting the generality of the foregoing, to:

1.3.1 engage and dismiss staff in its absolute discretion, and on such terms as it may determine, subject to applicable labour laws;

1.3.2 purchase goods of every description provided that the applicant shall be restricted to the normal course of the respondent's business;

1.3.3 subject to the landlord's consent, to hire, cancel and vary the terms of the leases of the premises of the respondent;

1.3.4 lock, and change the locks on the premises of the respondent;

1.3.5 receive, uplift, open and keep in its custody post whether addressed to the business or the respondent;

1.3.6 operate on any banking account conducted by the respondent;

1.3.7 discharge the debts of the respondent and other liabilities including its liabilities to the applicant in terms hereof;

1.3.8 sue and recover from any debtor of the respondent all and any debts owing and arising from whatsoever cause;

1.3.9 draw and endorse cheques, bills of exchange, promissory notes and other negotiable instruments; and/or

1.4 discharge the respondent's liabilities to it in terms of the Bond by selling the business of the respondent and any of its assets either as a going concern or piecemeal and whether as principal or agent as the applicant in its absolute discretion determines, by public auction or, on reasonable notice to the respondent not exceeding 7 (seven) days, by private treaty; and/or

1.5 take over the respondent's business as a going concern or the respondent's assets at a valuation placed thereon by an independent chartered accountant or other independent expert appointed by the applicant's auditors; and/or

1.6 apply for and procure the transfer of all licences, quotas, permits, registration certificates and the like that may have been issued to the respondent; and/or

1.7 sign or subscribe on behalf of the respondent to all applications or agreements for or transfer of licences, quotas, permits, registration certificates and the like that relate to the assets hereby mortgaged; and/or

1.8 sub-let, cede and/or assign such rights and/or obligations in respect of any leases or sub-leases of the premises of the respondent; and/or

1.9 do all such other acts as may be necessary or desirable to record the sale, disposal and/or transfer, as the case may be, of any assets hereby mortgaged; and/or

1.10 employ such other remedies and to take such other steps against the respondent as are in law allowed;

2 The respondent is to pay the costs of the application on an attorney and client scale, including the costs consequent upon the employment of senior counsel.

3 In respect of the costs of 09 February 2024, it is ordered that each party bears its own costs.

MV PHATSHOANE DJP

Appearances:

For the applicant: Adv HJ Smith SC Instructed by: DLA Piper South Africa (RF) Inc, Johannesburg Duncan & Rothman Inc, Kimberley. For the respondents: Adv DM Pool Instructed by: Seton Smith & Associates, Cape Town. Majiedt Swart Inc, Kimberley.

[1] Smith v KwaNonqubela Town Council 1999

(4) SA 947 (SCA) para 15.

[2] See Erasmus: Superior Court Practice, DE Van Loggerenberg - RS 18, 2022, D1-67 and authorities cited therein.

[3] 2003 (2) SA 253 (SCA) at 260B-D.

[4] 2004 (5) SA 248 (SCA).

[5] Bock & others v Duburoro Investments (Pty) Ltd 2004

(2) SA 242 (SCA) para 7.

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Prepared on 10 October 2026 · Esheria