

SOUTH AFRICA / JUDGMENT

Spar Group Limited v Ditisfolbring (Pty) Limited t/a Spar Vrede (3031/2020) [2020] ZAFSHC 157 (4 September 2020) [2020] ZAFSHC 157

COURT

Free State High Court, Bloemfontein

BEFORE

Grobler, AJ

CASE / FILE NUMBER

3031/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

(FREE

STATE DIVISION, BLOEMFONTEIN)

Case

Number: 3031/2020

In

the matter between:

SPAR
GROUP LIMITED
Applicant
and
DITISFOLBRING
(PTY) LIMITED t/a SPAR VREDE
Respondent
HEARD
ON: 26
AUGUST 2020

JUDGMENT

BY: GROBLER, AJ

DELIVERED ON: 26 AUGUST 2020

REASONS

DELIVERED ON: 4 SEPTEMBER 2020

INTRODUCTION:

[1] On 26 August 2020 I granted an order in terms of prayers 1, 2 and 3 of the notice of motion. I intimated that I will provide

reasons

in due course. I do so now.

[2] The Applicant (“Spar”) instituted an urgent application on 18 August 2020. It sought to perfect two notarial bonds. One a special notarial bond and the second a general one.

[3] The Respondent (“the Company”) did not oppose. This precipitated an application from Louisa Maria Heunis (“Mrs Heunis”) in terms of which she also asked for an urgent order which effectively would entitle her to oppose the application in her capacity as an interested party. She is a shareholder and director of the Company. I granted this order. It is necessary that I turn next to deal with the reason why the Company did not oppose and why it was necessary for Mrs Heunis to intervene thus. This is because it is common cause that Mrs Heunis and her husband Mr Heunis are at this stage embroiled in acrimonious divorce proceedings. Although that is irrelevant for purposes of this proceeding, it is relevant that they are the only directors

and shareholders of the Company. It would seem to a large extent because of the hostile relationship that now exists between

them, they are unable to adequately see to the affairs of the Company (I deal more fully with this below).

[4] There served before me also an application to strike out certain allegations made in the replying affidavit. I deal with those

first:

[5] Respondent argued that paragraphs 10, 11, 12, 13, 14, 21, 24, 36, 40, 41, 42 and 43 should be struck out because they introduced new matter for the first time in reply.

- [6] Without going into the content of each and every paragraph – which would be an exhaustive exercise – I did find that the cause of the Respondent’s complaint is unfounded. It seems to me the Applicant was merely answering to certain allegations that were made in the opposing affidavit. Moreover, the Applicant’s case from the outset was clear and I deal with the facts underscoring that case below.

THE

FACTS:

- [7] On or about 15 October 2018 the Company made an application to Spar for credit facilities in respect of Spar Vrede. The application was successful and so the Company became bound to Spar on it’s (i.e. Spar) standard terms of sale.
- [8] Pursuant to the conclusion of this agreement, Spar opened for the Company “stock accounts”, which incorporated “warehouse transactions” and “drop shipment transactions”. Each of these transactions had their own payment terms.
- [9] On strength of this agreement Spar continued to supply to the Company goods, the value of the supplies were debited to stock accounts in respect of the Company’s store and the Company made payment to Spar from time to time.
- [10] In securitization of the whole of the indebtedness the Company may have towards Spar, a special - and general notarial bond were passed by the company in favour of Spar on 23 November 2018. It had its own terms to the extent of the security given, etc., but relevant are three specific clauses. These are:

10.1 Clause 10.1 states that should the mortgagor be in default of any of the terms, conditions or stipulations of this bond,

10.2 Clause 10.2 states that should the mortgagor fail to make any payments whether due to the mortgagees or any other person whomsoever

and whatsoever when due, notwithstanding that the mortgagees may in terms of this bond have the right to make such payment or may already have paid the same, or

10.3 should the mortgagees at any time believe that the mortgagees’ interests are in any way imperilled by any action or omission on the part of the mortgagor, the mortgagors’ servants or anyone or more of the mortgagors’ creditors which in the opinion of the mortgagees may have an adverse effect on the ability of the mortgagor to meet his obligations to the mortgagees:

“.....then and in such case, the Mortgagees shall be entitled with the leave of a court to claim and recover from the Mortgagor the full amount of the Mortgagor’s indebtedness to the Mortgagees or any lessor portion thereof as the Mortgagees shall decide, notwithstanding that the same may not yet be due and payable and in order to recover the full amount of the Mortgagees’ indebtedness, the Mortgagees shall be entitled to:

10.8.1 take possession of and retain all or any of the moveable property (ad finem).”

[11] Clause 10.8.1 then sets out the Spar rights, and the relief that I granted is in exact accordance with the rights Spar so exercise. The Company also undertook to pay Spar’s costs on a scale as between attorney and client, should it be necessary for it to enforce its rights in terms of the bonds.

Arrears and breach:

[12] As at 14 August 2020 the Company was indebted to Spar in the amount of R2,636,784.26. The Company failed to make payment to Spar in the amount of R805,005.75 on 20 July 2020 in respect of owing warehouse transactions. The Company disputed this and to my mind, payments that it said it did make, were indeed recorded and reflected as per annexure “FA8” to the founding affidavit, and Respondent was in arrears with the amount mentioned herein before.

[13] Ms Nortje for the Company in a most able argument, tried to persuade me that as the Company was not in arrears and it was not in breach of the primary sales transaction. This means, she argued, that as the terms of the security bond are accessory to the primary debt, if there is no debt there is no accessory obligation.

[14] She relied heavily on the decision of *Lief N.O. v Dettman*, 1964 (2) SA 252 (A). At para 259, Van Wyk JA held as follows:

“Creditors of the Mortgagee cannot rely on the acknowledgment of indebtedness in the bond as correctly reflecting the debt owed to the Mortgagee by the Mortgagor at any particular time subsequent to registration. The only real rights in favour of the Mortgagee created by the registration of the bond are rights in respect of the mortgaged property, e.g. the right to restrain its alienation and the right to claim a preference in respect of its proceeds on insolvency of the Mortgagor. These real rights, however, can only exist in respect of a debt, existing or future, and it follows that they cannot be divorced from the debts secured by them.”

[15] For Ms Nortje the high-water mark of the defence is that I should accept that the Applicant was not in arrears as alleged, and thus there was no breach in terms of the goods agreement and there was thus “no primary debt”.

[16] The difficulty I had with this argument is twofold. Firstly, the contention that the Company had indeed made payment of the R805,000.00 odd rand, that this had not been taken into account on the part of Spar seems to be flawed. As I have said earlier, it seems to me that this amounted to a misreading of annexure “FA8”.

[17] Secondly, it certainly is so that SCA held in the *Lief* matter above that the principal debt and the “debt” created by the mortgage bond cannot be divorced from one another. But what that case truly illustrates is that one cannot coexist without the other – and this does not require adroit lateral thinking. The point is that the debt remained, and it was common cause that at least in excess of R2 million was owed to Spar at the date that the application was issued and

argued. Thus there was a debt, and even if timeous payment had been made, this did not destroy the primary debt.

Further clauses:

[18] But even if I am wrong and if indeed Ms Nortje was correct in her submission that there was no breach of the terms of the sale agreement, the following facts illustrate that in any event, Spar was entitled to call upon the bonds and have it perfected:

[19] I have already said it is common cause that Mr and Mrs Heunis – the directing minds behind the Respondent – are at loggerheads

as to its further operation.

[20] On 11 August 2020, Mrs Heunis' attorney wrote to Spar and stated that as a result of Mrs Heunis' ongoing divorce proceedings

with Mr Heunis, Mr Heunis' behaviour and decisions concerning their business – Spar Vrede – are of great concern to her client and it is her priority to protect the success of the business as well as the reputation of the Spar brand.

[21] Mrs Heunis herself on 12 August 2020 stated to Spar:

“Due to ongoing disputes between the owners of the store, the Company is under deadlock and therefore unfortunately Spar Vrede will not be able to honour the payments of 12 August 2020 and 19 August 2020. Spar has my full cooperation to rescue the business.”

[22] Of course Mrs Heunis tried to shy away from these revelations that were made prior to the institution of the proceedings in her opposing affidavit. But with respect to her the evidence carries little weight and smacks of a desperate attempt at avoiding the consequences of her previous actions.

[23] Ms Nortje ably once again tried to pursued me on this basis that Spar really had no reason to fret and essentially because payments were being made and kept up to date. To my mind however this was not sufficient, because of the wording of the bonds and their terms. Certainly Spar was entitled to form an opinion that its interests - and at least those that extend beyond the rites and involves to a great extent the reputation attached to the Spar brand – were being imperilled.

[24] In this regard it is necessary to mention that the bond does not serve merely as an instrument of hypothecation, but it also is an instrument of debt in and of itself. That is to say, it is a record of the principle obligation and its terms and the contractual

relationship between the holder of the bond and the debtor. See in this regard *Coloured Development Corporation Ltd v Sahabodien*, 1981 (1) SA 868 (C) at 870.

[25] I thus agreed with Mr van Niekerk, who appeared for Spar, that the Applicant is entitled to the order that it sought.

[26] I consequently granted the order.

S. GROBLER, AJ

On behalf of the Applicant: Adv. van Niekerk

On instruction of

Cliffe Dekker Hofmeyr

On behalf of the Appellant: Adv. Nadia Nortje

On instruction of:

ML Schoeman Attorneys

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Prepared on 11 October 2026 · Esheria