PERFECTING YOUR NOTARIAL BOND: CAN THE DEBTOR AVOID THIS BY ASKING A COURT TO SAY NO?

The Spar Group Limited v Meadowview Trading 147 CC t/a Meyerton Spar and Tops (2022/013036) [2022] ZAGPJHC 637 (5 September 2022)

Security held by a creditor for the other party's obligations under a loan is, for obvious reasons, paramount. Notarial bonds, hypothecating all or specified movable property of a debtor, came under the spotlight here. Because the notarial bond allows for the debtor to hypothecate the movable property that serves as security without having to deliver the property to the creditor, a further step is required if the creditor seeks to act in terms of the bond, achieved by way of "perfecting the bond" upon application to a court and then taking possession of the goods and selling them. The debtor here argued that a Court has a discretion and may refuse to grant the order.

Not without more.

The Judgment can be viewed here.

FACTS

To secure the borrower's obligations under certain loan agreements, the Spar Group Limited ("the S Group") passed two general notarial bonds ("the bonds") over movable goods belonging to Meadowview Trading 147 CC t/a Meyerton Spar and Tops ("MT") during 2014 and 2017 respectively.

When MT fell into arrears under the agreements, the S Group, in terms of an acceleration clause in the loan agreements, claimed the full outstanding debt. (Since the calling up of the debt, MT has paid certain arrears but remained indebted to the S Group in an amount exceeding R1 million.)

It was further common cause that MT was indebted to its landlord in an amount of approximately R700 000. The landlord undertook not to exercise a hypothec securing the arrears.

The S Group launched an urgent application seeking leave to perfect its security in terms of the two bonds. ("Perfect" in this context is necessary because a general notarial bond does not confer any real security unless the property subject to the bond has been "perfected". To perfect a general notarial bond, the bondholder must obtain control of the bonded articles through attachment, as achieved on application to a Court for an order to that effect.)

The S Group alleged that MT was trading under insolvent circumstances and that the possibility exists that a liquidation application can be brought by a creditor. If granted it would mean that S Group's security in terms of the two bonds (i.e., the movable goods) would be lost. S Group would become a concurrent creditor in the liquidated estate.

MT argued, on the other hand, that enforcement of the bonds would amount to an order for specific performance under the bonds and that the Court should exercise its discretion against making such an order of specific performance. MT stated that ordering specific performance will be unduly harsh under the circumstances of the case.

HELD

The discretion which could be exercised in matters pertaining to the perfection of notarial bonds

- In *Dev Bank of South Africa Ltd v Van Rensburg NNO*, the Supreme Court of Appeal acknowledged that a bondholder who applies for leave to attach the hypothecated goods in terms of a perfection clause under a bond, is in effect asking for specific performance.
- It was found that where specific performance is sought, a court had a discretion whether or not to grant the order.
- However, a Court will not exercise its discretion adverse to the bondholder where the latter has no other remedy, such as a claim for damages available to it. In addition, an applicant (bondholder) has a right to take possession of the pledged article.
- The principles relating to the limited discretion to refuse specific performance apply only where the creditor has another remedy at its disposal. And even so, a claim for damages cannot replace a claim for real security.
- Thus, 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."
- The S Group in this matter does not have an alternative remedy for damages and, even if it did, such a claim cannot replace its claim for real security over the respondent's movable property as was agreed between the parties.
- The discretion should only be exercised in a case of specific performance where another remedy exists.

CONCLUSION

The S Group therefore succeeded in obtaining the order to perfect their notarial bonds.

Cape Town	T: 021 406 9100	Blouberg	T: 021 521 4000	Centurion	T: 012 001 1546
Claremont	T: 021 673 4700	Tyger Valley	T: 021 943 3800	Bedfordview	T: 011 453 0577
Fish Hoek	T: 021 784 1580	Illovo	T: 011 219 6200	East London	T: 043 721 1234
Helderberg	T: 021 850 6400	Fourways	T: 010 001 2632		