

Perfecting a General Notarial Bond: You Can't Have your Cake and Eat It! *ABSA Bank Limited v Go on Supermarket (Pty) Limited (The Spar Group Limited intervening) (9442/2022) [2022] ZAGPJHC 173 (24 March 2022)*



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Abstract

A general notarial bond registered over movable property grants the bondholder a real security right enforceable against third parties only if the bond has been perfected by transferring possession of the property to the bondholder. Based on the facts and judgment in *Absa Bank Limited v Go On Supermarket (Pty) Limited*, this analysis revisits the basic principles of and requirements for the perfection of a general bond. We ultimately criticise the judgment on three scores. Firstly, the court regarded the form of delivery (transfer of possession) applicable in this matter as symbolic delivery, but we point out that it amounted to *constitutum possessorium* – meaning that the attempted perfection of the bond was ineffective. Secondly, the parties conceded and the court accepted that the general bond could not be perfected over property subject to the special notarial bond of another creditor. We reason that this is incorrect. It is indeed possible to attach property subject to the security right of another creditor, although the first creditor's rights will be preferred over those of the creditor who subsequently attached the property. Thirdly, the court rejected the argument that the general bond could not be perfected over property owned by another creditor in terms of a reservation-of-ownership clause in a sale agreement. However, the court should not have rejected this argument, since it was correct. A general bond indeed cannot cover property belonging to someone other than the debtor, unless the person agreed, and thus it was not possible in this case to attach the property belonging to someone other than the debtor.

Keywords

Real security rights; notarial bonds; reservation of ownership; pledge; delivery; *constitutum possessorium*.

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1 Introduction

One way in which a business can provide security to its creditors is to register notarial bonds (either special or general) over its movable property in favour of its creditors as security for the payment of the amount owed. A business' creditor (specifically a supplier of goods on credit) may also protect its rights by reserving ownership of the goods sold to that business until the full purchase price has been paid. For a creditor, its security rights become important when a debtor is struggling financially and falls behind with its payment obligations. Furthermore, it is crucial for a creditor that its security right – and the preference that flows from it – is upheld when this business goes insolvent. The same is true when a debtor undergoes corporate rescue in the form of business rescue proceedings in terms of Chapter 6 of the *Companies Act* 71 of 2008.

The interaction between notarial bonds, the reservation of ownership and business rescue featured in *Absa Bank Limited v Go On Supermarket (Pty) Limited*.¹ The facts and judgment in this case raise some important questions regarding the perfection of a general bond, since the registration alone of a general bond over movable property does not grant the creditor a limited real right enforceable against third parties. Instead, the security under this bond must be perfected by placing the creditor in lawful possession of the movable property. The exact form this possession must take is a central question raised by this case. In our view, the arrangement made by the parties regarding possession, as well as the court's endorsement thereof, is open to criticism and could result in a misconception of the fundamental principles of real security if left unchecked. Our aim is to reaffirm the principle that, under current South African law, unless a special notarial bond is registered in compliance with certain statutory requirements, a general bond cannot be perfected (ostensibly vesting the creditor with a right of pledge) while leaving the movable property in the possession of the debtor. Simply put: you cannot have your cake and eat it! Although the judgment provides interesting food for thought, its practical impact should be approached with caution. In our opinion this judgment should not be read as providing a precedent for a new and more liberal approach towards the perfection of general notarial bonds.

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¹ *Absa Bank Limited v Go On Supermarket (Pty) Limited (The Spar Group Limited Intervening)* (9442/2022) [2022] ZAGPJHC 173 (24 March 2022) (henceforth "*Absa v Go On Supermarket*").

We first provide a contextual discussion of the legal principles applicable when movable property is used as collateral to secure the payment of a debt. Thereafter we summarise the facts and judgment of the case under discussion, after which we analyse certain aspects of the judgment and reflect on whether the court correctly applied the law in this regard. The focus of the analysis is firstly on whether the delivery method used in this matter qualifies as one that can result in the perfection of the security under the general notarial bond. Secondly, we also comment on the interaction between the different security devices appearing *in casu* and we ask, more specifically, if one creditor's reservation of ownership and special notarial bond had an impact on the other creditor's right to perfect its security under a general notarial bond.

2 Movable property as collateral

2.1 Introduction

Traditionally, movable property can be used as security for the payment of a debt by means of a pledge. This entails that the movable property is delivered to and remains with the creditor until the debt is paid. Secondly, a creditor can bypass the strict delivery requirement of the aforementioned possessory pledge and instead register a notarial bond over the debtor's movable property. Thirdly, a seller on credit can rely on ownership of the goods sold as a form of security, through the inclusion of a retention-of-title clause in the sale contract, whereby the creditor will retain ownership until the full purchase price is paid. These three options are summarised in more detail in what follows.

2.2 Delivery as a requirement to perfect a security right

In the case where a creditor concludes a pledge agreement with a debtor, the security right will become a limited real right – and thus be enforceable against third parties – only if the security is perfected via delivery of the movable property to the creditor. A pledge without delivery (a non-possessory pledge) is valid *inter partes* but does not grant the creditor a real right enforceable against third parties. Delivery can entail either an actual physical transfer of possession to the creditor or constructive delivery. Constructive delivery is used when the pledged object is not physically transferred to the creditor, but possession is deemed to have been transferred if certain elements are present.² The main examples of constructive delivery are:³ (1) delivery with the short hand (*traditio brevi*

² Scott and Scott *Wille's Law of Mortgage and Pledge* 63.

³ For more detail on the different forms of delivery, as well as references to other sources, see Muller *et al Silberberg and Schoeman's Law of Property* 199-220; Brits

manu); (2) delivery with the long hand (*traditio longa manu*); (3) symbolic delivery (*traditio symbolica* or *clavium traditio*); (4) attornment and (5) *constitutum possessorium*. As pointed out further below, *constitutum possessorium* will usually not be sufficient to constitute a pledge under South African law.

Delivery with the short hand implies that possession is already with the transferee but for a different reason (i.e. not to serve as security). Delivery then takes place when the parties' intentions change, that is, when they agree that the transferee would henceforth possess the property as a pledgee and no longer in its previous capacity. Delivery with the long hand takes place when the transferor points the property out to the transferee and allows the latter to exercise control over and remove the property. Symbolic delivery occurs when another object is used as a symbol, or rather an instrument, through which possession of the movable property is exercised. An example is a key to a warehouse in which the movables are stored or a bill of lading through which one exercises control over goods in transit.⁴ Attornment is a form of delivery where a third party exercises physical control over the property. Delivery takes place through a tripartite arrangement whereby the parties agree that the third party will no longer possess the property on behalf of the transferor but henceforth on behalf of the transferee. It is possible to pledge movable objects via any of these methods, but courts will always carefully scrutinise instances of constructive delivery to ensure that the parties are acting in good faith and that third parties are not misled by the fact that no physical passing of possession took place.

The fifth form of delivery, *constitutum possessorium*, can be used to transfer ownership but a pledge can be created in this manner only in rare circumstances. *Constitutum possessorium* is based on the notion that legal possession of the property is transferred to the transferee while physical possession remains with the transferor who henceforth exercises physical possession on behalf of the transferee. The basic reason for the aversion to *constitutum possessorium* in the pledge context is the risk of misleading third parties because it would seem to outsiders as if nothing had happened. Since there is no transfer of physical possession and, most importantly, since the debtor is still in possession, it would appear as if no delivery had taken place. If this method of delivery could constitute a pledge, it would in most instances amount to a non-possessory pledge, which is not available under South African law.

Real Security Law 121-140. See also the discussions further below in Part 4, where more sources are cited.

⁴ Delivery of the movables takes place by handing over that symbol.

It goes without saying that the traditional possessory pledge is not very workable in the modern commercial context, since most debtors would desire to maintain possession of their movables, such as machinery and stock, to use them in the course of their business. However, certain alternative security devices, namely notarial bonds and reservation of ownership, have been developed over the years in attempts to bypass the strict delivery requirements of the possessory pledge.

2.3 The legal nature of special and general notarial bonds

Section 102 of the *Deeds Registries Act 47 of 1937* defines a notarial bond as "a bond attested by a notary public hypothecating movable property generally or specially." After the bond is signed in the presence of and attested by a notary public, it must be registered in the deeds office to have the desired effect.⁵ From the aforementioned definition, a distinction is drawn between general and special notarial bonds. Simply put, a general bond purports to cover all the debtor's movable property in general, while a special bond is used to burden a specified movable (or more than one specified movables). Importantly, however, the mere registration of either a special or general bond will not necessarily be enough to grant the creditor a real security right enforceable against third parties. In this regard, a distinction must be drawn between certain situations.

In the first place, if a notarial bond complies with the requirements set out in the *Security by Means of Movable Property Act 57 of 1993* (henceforth "SMPA"), registration alone will grant the creditor a security right (a deemed pledge) enforceable against third parties without the need to take physical possession. Hence, a true non-possessory pledge can be created in this manner as a statutory exception to the general rule prohibiting a pledge without the transfer of possession.

The main requirement for creating this non-possessory pledge is that the notarial bond must specify and describe the relevant movable property in a manner that renders such property readily recognisable.⁶ This requirement is relatively strict and essentially entails that the exact movable must be identifiable with reference to the information in the bond alone, without reference to any external evidence.⁷ The SMPA therefore deals with special notarial bonds in which the specific movables covered by the bond are described with specific accuracy. Such a bond will not be suitable for movables that cannot be described in such a specific manner, such as generic objects or a revolving stock-in-trade.

⁵ See s 61 of the *Deeds Registries Act 47 of 1937*.

⁶ Section 1(1) of the *Security by Means of Movable Property Act 57 of 1993* (SMPA).

⁷ *Ikea Trading und Design AG v BOE Bank Ltd 2005 2 SA 7* (SCA) para 22.

Secondly, if a bond does not comply with the SMPA, a further step will be necessary to grant the creditor a security right enforceable against third parties: The bond must be "perfected" by placing the creditor in lawful possession of the movable property covered by the bond. This method is most commonly used where a general bond was registered over all the debtor's movables, but it is also relevant in the case of a special bond that does not comply with the SMPA.

Perfection is premised on a clause in the bond (a "perfection clause") that entitles the creditor to receive possession of the movables when certain conditions are met – typically when the debtor defaults or otherwise exhibits certain other factors that place the creditor's rights at risk. When a creditor invokes this right to take possession, the debtor may voluntarily decide to hand over the property to the creditor. However, if no voluntary delivery is forthcoming, the creditor must apply for a court order to perfect the bond, which is essentially a request for specific performance of the contractual promise made in the perfection clause. Such an order will then entitle the creditor to have the property attached and upon such attachment the creditor will have a security right in the form of a pledge enforceable against third parties – also upon the debtor's insolvency (and during business rescue).

The rules regarding the form that the creditor's possession must take correspond to those of the forms of delivery used to create a pledge.⁸ The simplest example would be to remove the movables from the debtor's premises and place them in safekeeping with the creditor or its representative. Effective perfection can also be achieved by taking control of the debtor's premises itself and thus taking and maintaining control of the movables by placing a representative of the creditor in charge of the premises. The form of possession necessary for effective perfection played a role in the case under discussion and thus we will return to it further below.

If a notarial bond does not comply with the SMPA and has also not been perfected effectively, the creditor will not have a security right enforceable against third parties. However, if the unperfected notarial bond qualifies as a "general" bond – in other words, if it covers all of the debtor's movables, nothing excluded – it will hold the added benefit of granting the creditor a statutory preference over concurrent creditors upon the debtor's insolvency.⁹ This "second to last" position might not involve a full security right enforceable against all third parties, but at least it will be enforceable against unsecured concurrent creditors upon the debtor's insolvency.

⁸ See 2.2 above.

⁹ Section 102 of the *Insolvency Act* 24 of 1936.

The perfecting of a security right, as well as the manner of perfection, is therefore crucial in the law of real security, since it impacts on the status of the creditor's security and the ranking of its claim in relation to the claims of other creditors. In cases where perfection is alleged to have taken place via a supposed transfer of possession, one must carefully investigate whether the delivery was legally effective or whether it amounted to an impermissible *constitutum possessorium*. The facts and judgment of the case under discussion present a good opportunity to undertake such an investigation – and to reaffirm some fundamental principles.

2.4 The legal nature of the reservation of ownership

A common occurrence in modern commercial practice is to include a reservation-of-ownership (retention-of-title) clause in a sale agreement whereby the supplier of goods (on credit) will retain ownership of the goods sold until the purchase price is fully paid. This construction is typical in instalment sale agreements as well as in financial leases, where possession is transferred to the purchaser/lessee, but ownership remains with the seller/lessor until certain conditions are met. The idea is that the reserved ownership will serve as the creditor's security for the repayment of the debt. Upon the debtor's default, the creditor (as owner) will be able to repossess the relevant property after cancelling the agreement. The nature and operation of reservation of ownership are not regulated by any statute¹⁰ or a specific common law concept, but are based on the application of the general principles of contract law on suspensive conditions and the general principles of property law on the transfer of ownership.

Having summarised the forms of delivery and the general principles applicable to notarial bonds and the reservation of ownership, the next part sets out the facts and judgment of the case under discussion.

3 Facts of the case and judgment

Go On Supermarket (Pty) Limited, a company trading as Lundhurst Superspar (henceforth "Lundhurst"), was a franchisee in terms of a franchise agreement with a franchisor, the Spar Group Limited (henceforth "Spar"). Because they were experiencing financial difficulties Lundhurst was eventually placed in business rescue in terms of Chapter 6 of the *Companies Act*. Absa Bank Ltd (henceforth "Absa") held a registered general¹¹ notarial bond in respect of Lundhurst's movable property as

¹⁰ Except for certain consumer protection measures in the *National Credit Act* 34 of 2005, for instance.

¹¹ From the facts, it is not perfectly clear that this truly was a *general* bond covering *all* of Lundhurst's movable property, since at para 1 the court described the bond as being "in respect of *certain* of the respondent's moveable property" (our emphasis).

security for a debt of R6 million. Because Lundhurst was in business rescue, the statutory moratorium under section 133 of the *Companies Act* prevented creditors from instituting legal proceedings or enforcement action against Lundhurst. One exception to this moratorium is if the business rescue practitioner (henceforth "BRP") grants the creditor permission to proceed with its action. Absa obtained such permission from the BRP and proceeded to bring an urgent application to be allowed to perfect its security in respect of the aforementioned notarial bond. As explained above, Absa had to take lawful possession of Lundhurst's movable property to perfect its security under the general bond.

Absa relied on, and the court agreed with, the following grounds for bringing the application for a perfection order on an urgent basis. Firstly, a creditor must be "vigilant in the protection of its interests and rights", which was exactly what Absa had been when it brought the urgent application for a perfection order.¹² Absa argued that it is neither "unjust or inequitable" for a creditor to want to perfect its security under a general notarial bond while the respondent is in business rescue.¹³ The second basis for bringing an urgent application was that some of the goods were perishable, and thus the passing of time would likely leave Absa with a security that was close to worthless.¹⁴ Moreover, since the business had started trading in cash since entering business rescue, Absa's third reason for bringing an urgent application was its desire to secure its position before the respondent was liquidated, should the business rescue be unsuccessful.¹⁵ Absa argued that the respondent was so financially distressed that it was reasonably unlikely that it would be able to pay its debts, meaning that the liquidation of the company was a likely prospect.¹⁶ Therefore, having agreed with these reasons, the court granted the order for the urgent relief sought by Absa.¹⁷

However, the court allowed Spar (the franchisor) to intervene in Absa's urgent application. Lundhurst had also registered notarial bonds (both a special and a general notarial bond) over its movable property in favour of Spar. The court did not clarify whether Spar's registered special notarial bond complied with the requirements of the SMPA, but one can probably assume that it did. Moreover, Spar (as the franchisor) had concluded a

Nothing in the case turned on this point, but it is important to reaffirm the principle that for a bond to enjoy the benefits of a statutory preference in terms of s 102 of the *Insolvency Act*, the bond must be "general" in the true sense. Thus, it must cover *all* of the debtor's movables, nothing excluded. See *Cooper v Die Meester* 1992 3 SA 60 (A) 80-85; *Brits Real Security Law* 199, 235-236.

¹² *Absa v Go On Supermarket* para 3.

¹³ *Absa v Go On Supermarket* para 3.

¹⁴ *Absa v Go On Supermarket* para 4.

¹⁵ *Absa v Go On Supermarket* para 4.

¹⁶ *Absa v Go On Supermarket* para 5.

¹⁷ *Absa v Go On Supermarket* para 7.

contract with Lundhurst (as the franchisee) in which Spar reserved ownership of the stock-in-trade which Spar supplied to the franchisee on credit.¹⁸

The right to intervene in an urgent application is regulated by Rule 12, read with Rule 6(14), of the Uniform Rules of Court. To intervene, Spar had to show that it had a "direct and substantial interest" in the outcome of the urgent application. Therefore, as Lundhurst's main creditor (with a claim of R17 million), Spar had a direct and substantial interest in the outcome of Absa's urgent application.¹⁹ The court agreed that Spar had a right to intervene, also because Spar had rights in the respondent's movable property and could be "adversely affected" if the court granted Absa the right to perfect its security under Absa's general notarial bond.²⁰ Furthermore, the court held that all creditors (including Spar in this case) are entitled to participate in any court proceedings against a debtor (Lundhurst in this case) that is in business rescue.²¹ Spar also contended that Absa and Spar were competing creditors, and as such, the BRP should not have granted Absa permission to perfect its security before also consulting with Spar.²² Consequently, Spar was granted leave to intervene in the urgent application.²³

In addition to granting Absa permission to bring the perfection application, the BRP had consented to Absa's perfecting its security in terms of Absa's general notarial bond, subject to certain conditions. The main conditions imposed by the BRP were that Absa would not be allowed "to take physical possession of the assets" and remove such property, and that the BRP must be allowed to use the movable property in the day-to-day trading of the franchise business.²⁴ The intention was that the BRP would act as Absa's agent for the purposes of exercising physical control and possession of Lundhurst's encumbered assets.

With reference to the maxim *vigilantibus non dormientibus iura subveniunt* (the law should favour the vigilant creditor) and the general principle that a right of pledge is established when a creditor under a general bond takes possession of the movables, the court concluded that Absa was entitled to

¹⁸ *Absa v Go On Supermarket* para 9.

¹⁹ *Absa v Go On Supermarket* para 10.

²⁰ *Absa v Go On Supermarket* para 11.

²¹ See s 145(1)(b) of the *Companies Act* 71 of 2008.

²² *Absa v Go On Supermarket* para 15.

²³ *Absa v Go On Supermarket* para 12.

²⁴ *Absa v Go On Supermarket* para 8.

take possession of the pledged movable property to perfect its security under the general notarial bond.²⁵

The court also agreed that the BRP could act as Absa's agent for the purposes of taking possession of the movables and thus perfecting the bond. The court regarded the form of delivery applicable in this instance as symbolic delivery, akin to handing over the keys to the premises.²⁶ It seems that the idea was that the handing over of a written inventory of the movables (prepared by the sheriff) would be sufficient to place the BRP (as Absa's agent) in possession of the relevant movables. Importantly, Absa was not allowed to take physical control of the bonded property, but it had to remain with Absa's supposed agent, the BRP, who could continue to use the property (which included stock-in-trade) in the day-to-day operations of the business. For the court this arrangement did not qualify as *constitutum possessorium* since the goods supposedly did not remain under the physical control of the debtor.²⁷ As explained further below, we disagree with the court's findings in this regard.

Spar had two grounds for requesting Lundhurst's movables to be excluded from Absa's perfection order, namely: (1) some of the movable property was subject to Spar's special notarial bond; and (2) Absa could not obtain a perfection order in respect of stock-in-trade of which Spar was the owner in terms of the reservation-of-ownership clause in the sale agreement between Spar and Lundhurst. Absa conceded the first ground and the court rejected the second without giving a clear reason. Therefore, the court held that Absa had the right to perfect its security in terms of its general notarial bond over the movable property of Lundhurst, excluding only the movables covered by Spar's special notarial bond, but apparently including the movables owned by Spar in terms of the retention-of-title clause.²⁸ As explained further below, we support the opposite conclusion on both scores. We consider it possible to perfect a general bond over movables where the same movables are also covered by a special bond in favour of a different creditor, while we reject the possibility of perfecting a security right over property that does not belong to the debtor (goods subject to another party's reservation of ownership).

²⁵ See *Absa v Go On Supermarket* paras 18-20, where the court cited *Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd* 2003 2 SA 252 (SCA) (henceforth "Contract Forwarding") para 6.

²⁶ *Absa v Go On Supermarket* para 21.

²⁷ *Absa v Go On Supermarket* para 21.

²⁸ *Absa v Go On Supermarket* paras 23-24.

In view of the above factual matrix and the court's treatment of the legal principles concerned, the following parts of this note will consider more closely whether the court's approach towards the perfection of Absa's notarial bond was correct. We focus on two main aspects, namely: (1) the form of possession necessary to perfect the bond and (2) whether the perfection of a bond can cover movables subject to a special notarial bond or reservation of ownership in favour of another creditor.

4 Delivery method to perfect Absa's security under the notarial bond

4.1 Introduction

It is important to note that the granting of a perfection order does not itself have the effect of perfecting the creditor's security. The order must be followed by the transfer of possession from the debtor to the creditor, which will be facilitated via an attachment of the property by the sheriff in pursuance of a writ of execution issued on the authority of the perfection order. The form that this transfer of possession takes may vary depending on what makes sense in the circumstances, but it must generally reflect one of the recognised methods of delivery so that the creditor is placed in effective control of the property and the debtor no longer has any control. The latter is important because the debtor should not be in a position where it can continue to deal with the property and possibly mislead outsiders as to the legal status of those movables and their availability for prospective creditors.

4.2 Symbolic delivery

As stated above, the court *in casu* regarded symbolic delivery as the way in which the creditor (the BRP on behalf of Absa) was placed in possession of the bonded movables. The idea seems to be that the movables were to be attached *in situ* by the sheriff (thus without removing them from the debtor's premises) and that the sheriff's written inventory would then serve as a symbol representing the attached movables. Moreover, handing over this written inventory (as symbol) to the BRP would supposedly amount to a transfer of possession of the movables denoted by that inventory to Absa (as represented by the BRP).

Symbolic delivery (*traditio symbolica*) does not entail delivery that is symbolic in the literal sense. One cannot designate an arbitrary object (like a photograph) as the symbol of another object and transfer possession of

that object by passing the symbol to the intended transferee.²⁹ Instead, the symbol should be in the nature of an instrument that gives its holder effective and exclusive control of the relevant movables. Hence, the delivery of a key (*clavium traditio*) is a more accurate characterisation of this form of constructive delivery. In addition to the classical illustration of a key of the facility in which the movables are stored, other examples include a bill of lading representing goods in transit on a ship, and a receipt, like a warehouse or silo receipt, that gives its holder exclusive access to the content of the warehouse or silo.

The order made in the case under discussion was that delivery would take place by the sheriff's drawing a written inventory of the relevant movable property and handing it to the BRP. The latter would then receive the written inventory (and thus possession of the property) on behalf of Absa as a creditor – all while the movables remained on the debtor's premises.³⁰ The court seemed to have envisioned the sheriff's written inventory as the symbol of the attached movables, and that delivery of this symbol to Absa's representative (the BRP) resulted in the perfection of Absa's security.³¹

As useful as an inventory drafted by a sheriff might be for various purposes, we are not aware of any authority in South African law for the prospect that such an inventory can function as a "symbol" of the attached movables for purposes of making symbolic delivery or holding symbolic possession of such movables. The court also did not reference any authority in this regard.

The affixing of an attachment order and inventory on the premises where the movables have been attached *in situ* could sometimes be sufficient to indicate that the movables are legally no longer under the control of the debtor but under the control of the creditor in whose favour attachment took place. An example is the attachment of movables subject to a landlord's tacit hypothec in terms of section 31 of the *Magistrates' Courts Act* 32 of 1944. If attachment involves the removal of the property and placing them in a storage facility, the sheriff's inventory could conceivably also function as a receipt that gives its holder control over and access to the attached property.

²⁹ See *EA Platt v H Escombe and Ramasammy Naidoo* (1879-1880) 1 NLR 69 72.

³⁰ *Absa v Go On Supermarket* para 29(4).

³¹ See e.g. also *Absa v Go On Supermarket* para 21, where the court relied on *Contract Forwarding* for the principle that symbolic delivery can be used to perfect a general bond.

Therefore, although there might be circumstances where a sheriff's inventory could validly be used as a symbol of the attached property, the way in which this was done *in casu* is not convincing. We are sceptical about any attachment (and delivery of the document evidencing the attachment) that allows the debtor to continue using the attached movables without any restrictions – basically, as if there were no attachment. If one adds the fact that the person receiving symbolic delivery is the BRP (who is responsible for the management of the debtor during business rescue),³² one cannot arrive at any conclusion other than that this supposed symbolic delivery amounted to nothing other than *constitutum possessorium*, which should generally not be permitted in the pledge context. Put differently, the supposed symbolic delivery (and possession) *in casu* occurred under circumstances that, as explained below, were too reminiscent of *constitutum possessorium*. For symbolic delivery to work, the symbol must allow the creditor (or its agent) to exercise exclusive and effective control of the delivered property,³³ which did not take place *in casu*, since the debtor was not divested of all (if any) control.³⁴

4.3 *Constitutum possessorium*

Constitutum possessorium as a form of delivery occurs where the transferor retains physical possession of the property but undertakes to hold such possession on behalf of the transferee. Although physical possession remains with the transferor, legal possession is passed to the transferee through the parties' mere change of intention. There is ample authority that *constitutum possessorium* can be used to transfer ownership.³⁵ However, the prospect of relying on *constitutum possessorium* to create a right of pledge is very limited, since courts will recognise it as valid only in very rare circumstances. This window is very small, and its exact parameters are not clear, but the presumption certainly seems to be against the validity of *constitutum possessorium*.³⁶

In one of the rare cases in which it was allowed, *Stratford's Trustees v The London and South African Bank*,³⁷ the court explained that certain exceptions to the general rule could be allowed if "the exigencies of

³² See part 4.3 below.

³³ *S v Buitendag* 1980 2 SA 152 (T) 154D.

³⁴ Also see *Francis v Savage and Hill* (1881-1884) 1 TS 33 35-36; *Quin v Mego* (1895) 2 Off Rep 141 142.

³⁵ See the cases listed by Brits *Real Security Law* 132 fn 129.

³⁶ Also see the strong opposition to this form of delivery by Voet 20.1.12 (as discussed in Gane *The Selective Voet* 486-488).

³⁷ *Stratford's Trustees v The London and South African Bank* (1883-1884) 3 EDC 439 (hereafter "*Stratford's Trustees*").

commercial transactions" require it, but that there must be a contract regarding continued possession by the debtor and that such possession must be compatible with good faith and should not "hold out false colours" to creditors.³⁸ In *Lighter & Co v Edwards*³⁹ the court emphasised that allowing *constitutum possessorium* in the pledge context is an exception to the rule and should not be permitted if the movable property is to remain with the debtor to be used by it for its own benefit in the same way as before.⁴⁰ More recent cases have also revealed that courts will almost never accept *constitutum possessorium* as a valid way to pledge movable property.⁴¹ The main objection against using *constitutum possessorium* as a delivery method to constitute a pledge is that parties could use it "to cloak the true nature of a transaction".⁴²

If the court *in casu* regarded the delivery as falling within the scope of *constitutum possessorium*, it probably would have had to regard the perfection of the bond as ineffective based on the weight of authority against the use of this form of delivery in the pledge context. Conversely, the court could have expressly allowed *constitutum possessorium* in these circumstances on the basis that the parties devised a legitimate exception to the general rule. The court did neither of these things because it regarded symbolic delivery – not *constitutum possessorium* – as the form of delivery applicable to the facts.

The court *in casu* relied on and quoted from the Supreme Court of Appeal's judgment in *Contract Forwarding*⁴³ to support the conclusion that a security right can be perfected via symbolic delivery but not *constitutum possessorium*.⁴⁴ In *Contract Forwarding* the general bond had been perfected by the sheriff securing the premises on which the relevant movables were stored, drawing up an inventory of the movables and handing the keys of the premises to the creditor's agents (its attorneys). The creditor then "exercised effective control over the business, placed security guards around it and placed a candidate attorney in charge of the business."⁴⁵ Therefore, in *Contract Forwarding* the creditor received total control of the movables, while the debtor did not retain possession of the

³⁸ *Stratford's Trustees* 453.

³⁹ *Lighter & Co v Edwards* 1907 TS 442 (hereafter "*Lighter & Co*").

⁴⁰ *Lighter & Co* 445-446. See also *Zandberg v Van Zyl* 1910 AD 302 313-314; *Goldinger's Trustee v Whitelaw & Son* 1917 AD 66 (hereafter "*Goldinger's Trustee*").

⁴¹ See e.g. *Vasco Dry Cleaners v Twycross* 1979 1 SA 603 (A) 612; *Bank Windhoek Bpk v Rajie* 1994 1 SA 115 (A) 143-144; *Contract Forwarding* para 14.

⁴² *Goldinger's Trustee* 74.

⁴³ *Contract Forwarding* para 14.

⁴⁴ *Absa v Go On Supermarket* para 21.

⁴⁵ *Contract Forwarding* para 11.

movables in any way, shape or form, which means that no *constitutum possessorium* was present.

Accordingly, symbolic delivery (handing over of the keys) was regarded as effective to perfect the creditor's security in *Contract Forwarding*. However, the arrangement between Absa and Lundhurst's BRP in the case under discussion cannot plausibly fit into the scenario approved by the Supreme Court of Appeal in *Contract Forwarding*. Absa was not placed in effective control of the property, did not receive any keys and did not place security guards or any other representatives in charge of Lundhurst's premises. Appointing the debtor itself (via its management, that is, the BRP) as the creditor's agent for the purposes of possessing the movables is the quintessential example of *constitutum possessorium* and, if *Contract Forwarding* is anything to go by, would likely not have been met with the Supreme Court of Appeal's approval.

A slim possibility remains that the court might have regarded the delivery *in casu* as a legitimate exception to the general rule against *constitutum possessorium*. However, the parties would have had to convince the court that: (1) their arrangement was demanded by the needs of commerce; (2) they were acting in good faith; (3) no third parties could be deceived; and (4) the property would not be used by the debtor for its own benefit in the same way as before. In our view, one might be able to make a case for the first three reasons but not the fourth. After all, the idea was that the movables would be used in the normal course of the debtor's business and the stock would even be sold and replenished, which falls squarely within the fourth indicator for when *constitutum possessorium* will not be allowed.

Absa and Lundhurst's BRP tried to set up an arrangement regarding the perfection of Absa's security that might make sense to both parties. However, in our view this is a matter where the court should not have endorsed the parties' plan but instead should have found that "You can't have your cake and eat it". This is an instance where the creditor (Absa) wanted to perfect its security while the debtor (Lundhurst, represented by its BRP) wanted to retain possession and continue using (including selling and replenishing) the pledged property. The parties' commercial aims are understandable, but the reality is that such an arrangement – which entails a non-possessory pledge – is possible in current South African law only via the registration of a (special) notarial bond that complies with the SMPA. Fictitious delivery that amounts to *constitutum possessorium* has long been regarded as all but ineffective to create a pledge with third-party effect – and, in our view, the case under discussion does not justify a change in

direction. Although symbolic delivery can be used to perfect a security right, it cannot be done in the form contemplated by the facts of this case, since it still amounted to *constitutum possessorium*. Indeed, we regard the parties' attempt (and the court's endorsement thereof) to set up a symbolic delivery of the bonded movables as an artificial strategy to bypass the prohibition against *constitutum possessorium*.

Moreover, to regard the BRP not as being in the position of the debtor (the company in business rescue) but as an independent third party that could act as the agent of a creditor was not only artificial but also a *fraus legis*. Section 140(1)(a) of the *Companies Act* provides that for the duration of a company's business rescue proceedings the BRP "has full management control of the company in substitution for its board and pre-existing management". In other words, for all intents and purposes the BRP represents the company. Therefore, if the BRP (who represents the debtor) agrees to act as the agent for purposes of holding possession on the creditor's behalf, it is the quintessential example of *constitutum possessorium* and should not have been permitted by the court.

As a side note, we doubt whether it is permissible or appropriate for a BRP to act as the agent of one of the company's creditors. Section 140(3)(b) of the *Companies Act* provides that the BRP "has the responsibilities, duties and liabilities of a director of the company, as set out in sections 75 to 77". Since a director (and thus also the BRP) must act "in the best interests of the company",⁴⁶ there would in our view be a conflict of interest if the BRP were to act as the agent of one of the company's creditors as well. We also doubt whether it would be appropriate for a BRP to favour one creditor over others in this manner, especially the creditor with a smaller claim than another creditor, considering the nature of the proceedings and the general function and duties of the BRP.

Be that as it may, even if it were legal for a BRP to act as the agent for a creditor of the company in business rescue, the BRP will *de jure* always be in the position of the company's board and management. The BRP is not an independent third party or somehow separate from the company in business rescue. It is the management and thus the primary representative of that company for all intents and purposes. If the managing director of a company possesses property of the company in that capacity, legally it is the company itself that possesses the property. It is not possible for the managing director of a company to possess the company's property on

⁴⁶ Section 76(3)(b) of the *Companies Act* 71 of 2008.

behalf of a creditor – at least not for the purposes of perfecting that creditor's security. To hold otherwise would make a mockery of the principles surrounding delivery (especially the prohibition against *constitutum possessorium*) in the law of real security.

4.4 Other possible delivery methods

4.4.1 Attornment

On the surface, one might be able to identify attornment in the scenario *in casu* as well. Attornment is where legal control passes from the transferor to the transferee while neither has physical control. Instead, physical control is held by a third party who first acts on behalf of the transferee and then, pursuant to tripartite agreement, agrees to henceforth act on behalf of the transferee. It is accepted that a pledge can be created in this manner.⁴⁷ Thus, a possible hypothesis is that the BRP is the third party who holds possession of the property and that delivery takes place when, pursuant to a tripartite agreement, the BRP agrees to henceforth no longer hold possession on behalf of the company (Lundhurst) but instead on behalf of the creditor (Absa).

However, we do not believe that this construction of attornment works, essentially for the same reasons presented under the discussion of *constitutum possessorium* above. The BRP cannot be seen as a third party independent of the company whose management the BRP has taken over. Attornment does not work if the third party is the embodiment of one of the other parties, such as the BRP of the debtor-company. The tripartite agreement would then effectively involve two parties, since the BRP would have to agree on behalf of the company and on behalf of him- or herself as the third party, which is artificial at best. If one adds to this that the movables remain on the debtor's business premises as if nothing happened, one is directed back to the only possible conclusion, namely that we are dealing with *constitutum possessorium*.

4.4.2 Delivery with the long hand

A further possibility might also be that the facts entailed a delivery with the long hand (*traditio longa manu*). This form of delivery is where the transferor points out the property to the transferee under circumstances where the latter can henceforth exercise exclusive control over the property.⁴⁸

⁴⁷ See e.g. *Payn v Yates* (1891-1892) 9 SC 494; *Sterling v Landau* 1921 WLD 117.

⁴⁸ *Groenewald v Van der Merwe* 1917 AD 233 239.

Although a pledge can be created through delivery with the long hand, simply pointing out the property is not sufficient. The pledged movables must be separated from other (unpledged) objects and the creditor must take control of the movables in some way so that the debtor no longer has control.⁴⁹

The case of *Matabeleland v Bikkers* is interesting for present purposes, since its facts are roughly comparable to those of the case under discussion. A son had pledged certain movables (cattle) to his father. Although a notarial bond had been registered, delivery was also necessary to perfect the security. The latter was done when the son pointed the relevant cattle out to his father, who counted them, took physical control of them, had them earmarked and placed them in the charge of his employees. However, the cattle were never removed from the son's farm or separated from his other (unpledged) cattle. The son was also allowed to use some of the cattle at times, with his father's permission. The court was very sceptical about this arrangement, since to outsiders it would appear as if no delivery had taken place, which could prejudice other creditors.⁵⁰ Nevertheless, the court accepted the magistrate's finding on the facts that there was a *bona fide* delivery and that the father had taken effective control of the cattle by residing on the farm in order to safeguard his interests.⁵¹ The court described this matter as a "borderline" case and only reluctantly endorsed the parties' arrangement due to their good faith and the court *a quo*'s findings on the facts. Therefore, the judgment cannot be taken as authority for much more than that delivery with the long hand can be used to create a pledge, provided that the creditor took and continued to exercise effective control of the property under circumstances where there was no bad faith involved.

In other words, a hypothesis might be that the BRP (representing the debtor) "pointed out" the property to Absa. However, for this to work a duly authorised representative of Absa would have had to visit the premises, since this form of delivery must take place in the presence of both parties. In addition, Absa as creditor should have been given sufficient control over the property. Leaving the property in the hands of the debtor (represented by the BRP) would not be sufficient, since it would once again amount to nothing other than *constitutum possessorium*. In addition, *Matabeleland v*

⁴⁹ See e.g. *Erasmus v M Rosenberg Ltd* 1910 TPD 1188 1191; *The Matabeleland Trading Association Ltd v Bikkers* 1927 SR 78 (henceforth "*Matabeleland v Bikkers*") 82-83.

⁵⁰ *Matabeleland v Bikkers* 84.

⁵¹ *Matabeleland v Bikkers* 84-85.

Bikkers is too much of an outlier case to be of much assistance to a creditor in Absa's position. It entailed a unique set of facts and its outcome does not set a principled example of how delivery can be achieved while leaving the relevant property on the debtor's premises.

4.5 Concluding remark on the delivery method

One can try to bring the ostensible transfer of possession from Lundhurst to Absa under the umbrella of several permissible forms of constructive delivery (symbolic delivery, attornment or delivery with the long hand). However, as we argue above, the arrangement in this matter cannot really be classified as anything other than *constitutum possessorium*. The fact is that the debtor (via its representative, the BRP) retained full use and control of the relevant property, which was to be used in exactly the same way as before. Conversely, Absa received no effective control over the property, not even by supposedly appointing the BRP as its agent. Leaving aside the lawfulness of the BRP's being appointed as an agent for one of the company's creditors, in our view it did not create the kind of agency necessary for holding effective possession on behalf of a creditor in this context.

In other words the delivery attempted in this case was a classic example of *constitutum possessorium* and, in our opinion, should not have been endorsed by the court – at least not without a much more thorough investigation into the parties' good faith and the impact on other creditors. Even if the parties acted in good faith and no creditors could be deceived by the state of affairs, we are still hesitant to support the use of *constitutum possessorium* in a case like this. Since the property will be used exactly in the same way as before, a non-possessory pledge was effectively permitted by the court, who thus allowed Absa to "have its cake and eat it".

Our argument that the court should have rejected the supposed delivery in this matter might seem – and undoubtedly is – commercially unsatisfactory. The case illustrates that the current system of notarial bonds is neither commercially nor legally efficient. If we had a proper security device that granted the creditor a real security right enforceable against third parties without the need to take delivery, and which was more flexible and efficient than the special notarial bond under the SMPA, the unsatisfactory outcome of this case could have been avoided. The case also shows that, if real security devices are not kept up to date with modern trends and the needs of commerce, parties might resort to alternative arrangements that courts might start endorsing. This is not the ideal way to deal with the current outdated legal framework, since it could lead to great uncertainty and

confusion regarding the application of the fundamental principles of real security law.

5 Relationship between three security devices: general bond, special bond and reservation of ownership

This paragraph speaks to the following two points of contention: can a general bond be perfected over movables that: (1) are subject to a special notarial bond of another creditor or (2) are owned by another creditor in terms of a reservation-of-ownership clause in a sale agreement? Both questions relate to objections raised by Spar against the perfection of Absa's general bond. On the one hand, the court (as well as Absa) agreed with Spar that the movables covered by Spar's special bond should not fall under Absa's perfection order. On the other hand, the court did not exclude the movables subject to Spar's reservation of ownership from Absa's perfection order. As explained below, we disagree on both counts.

5.1 General and special bonds over the same property

In our view it was not necessary for Absa to concede Spar's argument that the movables subject to Spar's special bond should be excluded from the court order perfecting Absa's general bond. The court also should not have upheld Spar's objection. There is nothing in South African law that prohibits the creation of more than one security right over the same property. More specifically, the registration of a special bond that complies with the SMPA (assuming that it did *in casu*) does not mean that other security rights cannot be created in that property after the registration of the first notarial bond. Indeed, the SMPA expressly mentions that the right created upon registration will be subject to pre-existing security rights,⁵² which implies that more than one security right can exist over the same movable property.

Since the debtor is still in possession of the bonded property, the property can be delivered in pledge or a second (or third, etc.) special bond can be registered in favour of another creditor. Importantly, though, the "prior in time, prior in law" rule will apply and thus the right that was created first will be preferred over subsequently created rights when it comes to distributing the proceeds of the property.⁵³ It is also not impermissible for a creditor to have movables attached in execution where such movables are subject to

⁵² Section 1(1)(a) of the SMPA.

⁵³ The maxim *prior tempore potior iure* is a fundamental principle of property law. The general priority rule is that the ranking of creditors is determined by the time of creation – first in time will be stronger in right.

the security right of another creditor. The attachment creditor's right will just be subservient to the pre-existing security rights of other creditors.⁵⁴

Therefore, if a general bond was registered over the debtor's movable property, the perfection of that bond through attachment (having the same effect as delivery in pledge) should be permitted with reference to goods subject to a special bond as well. However, the general bondholder's rights will be subject to those of the special bondholder and, for instance, the former will not be able to sell the property without regard to the latter's rights.

5.2 General bonds and reservation of ownership

As mentioned above, Spar also objected to Absa's application for a perfection order as far as the order would apply to stock-in-trade that still belonged to Spar in terms of the reservation-of-ownership clause in the sale agreement between Spar and Lundhurst. The court rejected Spar's objection and thus permitted the perfection of Absa's bond in respect of movable property belonging to Spar.⁵⁵ This outcome is clearly incorrect. Neither a general bond nor any other security right can cover property belonging to someone other than the debtor,⁵⁶ unless the third party agreed to offer its property as security for the debt of another, which did not happen here. It is also rather astounding that the court effectively permitted Absa to attach property belonging to Spar to enforce a debt owed by Lundhurst – something for which there is no basis in law. Therefore, since Absa's bond covered only property belonging to its debtor (Lundhurst), only such property could be attached to perfect Absa's security, not property belonging to a third party like Spar, who had not committed its assets as security towards Absa.

6 Conclusion

The judgment in *Absa v Go on Supermarket* should be approached with caution. As indicated in the analysis above, our main problem with the judgment is the way in which the principles of delivery were applied to the supposed perfection of Absa's notarial bond. Although the court regarded Absa as having received possession of the bonded property via symbolic delivery to its agent (Lundhurst's BRP), we argued that the arrangement between the parties amounted to nothing other than *constitutum*

⁵⁴ *Lesedi Secondary Agricultural Co-operative Ltd v Vaalharts Agricultural Co-operative* 1993 1 SA 695 (NC) 100; *De Wet v Die Bank van die OVS Bpk* 1968 2 SA 73 (O) 77; *Schoeman v Aberdeen Trading Co (Pty) Ltd* 1955 1 SA 100 (C) 104, 106.

⁵⁵ *Absa v Go On Supermarket* para 24.

⁵⁶ The only exception is the controversial principle that a landlord's tacit hypothec can cover movable property present on the leased premises but belonging to a third party, but only if certain strict requirements are met. See *Bloemfontein Municipality v Jacksons Limited* 1929 AD 266 271.

possessorium. In other words, through its BRP, Lundhurst retained full physical control of the property after supposedly delivering legal control to Absa and continued using the property as before. Therefore, delivery was ineffective and in our view Absa's security did not become perfected.

This outcome is clearly unsatisfactory from Absa's point of view, since a creditor like Absa would obviously prefer a security device in terms of which it can receive an effective real security right over a general category of property (such as stock) while allowing the property to be used by the debtor. The commercial value of such a device makes sense but unfortunately this option currently does not exist in South African law for property that cannot be bonded through a special bond that complies with the SMPA. The creative and ultimately incorrect use of the principles surrounding symbolic delivery to avoid the unfavourable consequences of *constitutum possessorium* was regrettably endorsed by the court *in casu*. This could lead to great uncertainty in practice regarding exactly when a general bond is considered perfected, while a loose treatment of the principles surrounding the different forms of delivery could also defeat the purpose of the delivery requirement, namely to protect third parties by creating publicity of the security right. This is also not the first case in which there was confusion concerning the correct application of the law relating to general notarial bonds, especially in the context of franchise agreements.⁵⁷

One can do away with the possession requirement only if something effective is put in its place to create publicity and protect third parties. Therefore, in our opinion a better solution is to reform South African law by developing a new statutory regime entailing a simple, transparent and flexible electronic registry through which a wide variety of movable property can be pledged without requiring the delivery of possession to perfect the pledge. The confusion surrounding instances where more than one security device is applicable to the same assets should also be addressed in such law reform. If a general bond covers movable property that includes some property covered by a special notarial bond of another creditor and if the debtor also possesses movable property still owned by the supplier of such property in terms of a reservation-of-ownership clause, it is understandable that there will be confusion and conflict. Although South African law does provide answers to such conflicts, clearer rules in legislation would assist in avoiding confusion and potentially incorrect judgments.

⁵⁷ See e.g. *FirstRand Bank Limited v The Spar Group Limited* 2021 2 All SA 680 (SCA); see *Juglal v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division* 2004 5 SA 248 (SCA); *Pick 'n Pay Retailers (Pty) Ltd v Pine Valley Supermarket (Pty) Ltd* (8209/2014) [2015] ZAKZDHC 27 (20 March 2015).

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List of Abbreviations

BRP

Business rescue practitioner

SMPA

Security by Means of Movable Property Act
57 of 1993