THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 680/07

In the matter between:

PICARDI HOTELS LTD **APPELLANT**

v

THEKWENI PROPERTIES (PTY) LTD **RESPONDENT**

Neutral citation: *Picardi Hotels Ltd v Thekweni Properties (Pty) Ltd* (680/07) [2008] ZASCA 128 (30 September 2008)

Coram: MPATI P, FARLAM, CLOETE JJA, BORUCHOWITZ et KGOMO AJJA

Heard: 27 AUGUST 2008

Delivered: 30 SEPTEMBER 2008

Summary: Cession *in securitatem debiti* – of all cedent's rights to rentals and other revenues of whatsoever nature – clause providing that cession shall not be acted upon until certain conditions met – cession not conditional - transfer of rights to cessionary not suspended, only the exercise thereof – cedent divesting itself of right to sue for rentals – special plea disputing cedent's *locus standi* to sue for rentals, upheld.

ORDER

On appeal from: High Court, Durban & Coast Local Division (Levinsohn DJP sitting as court of first instance).

[1] The appeal is upheld with costs including those occasioned by the employment of two counsel.

[2] The order of the court a quo is set aside and the following is substituted in its stead:

'(i) The defendant's special plea is upheld;

(ii) The plaintiff's claim is dismissed;

(iii) The plaintiff is ordered to pay the costs of the action including those occasioned by the employment of two counsel.'

JUDGMENT

BORUCHOWITZ AJA (MPATI P, FARLAM, CLOETE JJA, KGOMO AJA concurring):

[1] The respondent instituted action against the appellant in the Durban High Court claiming payment of arrear rentals in terms of an agreement of lease. In a special plea the appellant alleged that the respondent had divested itself of the power to sue it for rental by virtue of a cession *in securitatem debiti* executed by the respondent in favour of a bank. The matter came before Levinsohn DJP who dismissed the special plea and granted judgment in favour of the respondent for R845 726.98 with interest and costs. The appellant appeals against this judgment with leave of the court a quo.

[2] The respondent's claim against the appellant arises from the latter's

occupation of certain immovable properties owned by the respondent which are situate at West and Gillespie Streets, Durban. When the respondent acquired the properties it entered into a number of related agreements with Investec Bank Ltd (the bank). These included a loan agreement and a covering mortgage bond (the bond) that was registered over the properties on 18 July 1996. Clause 8 of the bond reads as follows:

'8. CESSION OF RENTALS AND REVENUES

Should the Bank give its consent to the letting of the mortgaged property, the Mortgagor cedes, transfers and assigns to the Bank all the Mortgagor's rights, title and interest in and to all rentals and other revenues of whatsoever nature, which may accrue from the mortgaged property as additional security for the due repayment by the Mortgagor of all amounts owing to or claimable by the Bank at any time in terms of this bond, with the express right in favour of the Bank irrevocably and *in rem suam* –

8.1 to institute proceedings against lessees for the recovery of unpaid rentals, and/or eviction from the mortgaged property;

8.2 to let the mortgaged property or any part thereof, to cancel or renew and enter into leases in such manner as the Bank decides, to evict any trespasser or other person from the mortgaged property;

8.3 to collect on behalf of the Mortgagor any moneys payable in respect of the alienation by the Mortgagor of the mortgaged property or any portion thereof;

provided, however, that the cession, transfer, assignment and authorities and powers specified above shall not be acted upon by the Bank without the consent of the Mortgagor unless the Mortgagor has failed to comply with any term or condition of this bond or any loan secured thereby or has otherwise committed a breach thereof. The Bank is further entitled to charge a commission of five (5) percentum of the gross amount of all rentals and other revenues collected and to recover such commission under this bond.'

[3] It is settled law that unless otherwise agreed, a cession *in securitatem debiti* results in the cedent being deprived of the right to recover the ceded debt, retaining only the bare *dominium* or a 'reversionary interest' therein. See *Bank of Lisbon and South Africa Ltd v The Master*;[1] *Land- en Landboubank van Suid-Afrika v Die Meester;*[2] *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd*;[3] *Louw v WP Koöperatief Bpk;*[4] *Standard General Insurance Co Ltd v SA Brake CC*.[5]

[4] The learned judge held that the proviso to clause 8 of the mortgage bond had the effect of suspending the operation of the cession pending fulfilment of the conditions therein mentioned. He also held that as neither of the conditions had been fulfilled, the cession had not come into effect and the appellant was not deprived of its right to recover the ceded debts. It is the correctness of this finding that falls to be determined in the present appeal.

[5] The matter is essentially one of interpretation. It is incumbent upon the court to ascertain the intention of the parties which, in the first instance, must be gathered from the language of the clause itself. The words of the cession must be given their plain, ordinary, popular and grammatical meaning, unless it clearly appears from the context that the parties intended them to have a different meaning. Absent ambiguity, the meaning conveyed by the words themselves must be given effect to unless this would give rise to absurdity, repugnancy or inconsistency with the rest of the bond. In order to ascertain what the parties intended by the language used the court is required to consider the bond as a whole rather than isolated expressions and is to have regard to its object. The relevant provision must also be construed in accordance with sound commercial principles and good business sense so that it receives a fair and sensible application. These well established principles are encapsulated in *Jaga v Dönges NO; Bhana v Dönges NO*;[6]

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[1] 1987 (1) SA 276(A) at 294C.
[2] 1991 (2) SA 761 (A) at 771C-F.
[3] 1993 (1) SA 77(A) at 87G-H.
[4] 1994 (3) SA 434 (A).
[5] 1995 (3) SA 806(A) at 814I-815B.
[6] 1950 (4) SA 653 (A) at 662G-H.

Swart en 'n ander v Cape Fabrix (Pty) Ltd[7] and *Coopers & Lybrand v Bryant*.[8]

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[6] The first sentence of clause 8 of the covering mortgage bond is of particular importance. The relevant portion provides:

' . . . the Mortgagor cedes, transfers and assigns to the Bank all the Mortgagor's rights, title and interest in and to all rentals and other revenues of whatsoever nature . . . .'

[7] The phrase 'cedes, transfers and assigns' incorporates all of the constituent elements of a cession, and is sufficient to constitute an effective transfer of rights. The use of the present tense is also a strong indication that an immediate transfer of rights was intended. *See Standard General Insurance Co Ltd* (supra).

[8] The central question is whether the proviso to clause 8 has the effect of overriding the clear indication in the first sentence that an immediate and unconditional cession and transfer of rights was intended.

[9] The relevant portions of the proviso provide as follows:

'. . . that the cession, transfer, assignment and the authorities and powers specified above shall not be acted upon by the Bank without the consent of the Mortgagor unless the Mortgagor has failed to comply with any term or condition of this bond or any loan secured thereby or has otherwise committed a breach thereof . . . .'

The court a quo found that these words were an indication that the cession was conditional and became effective only upon the happening of one or the other of the events stated in the proviso. I do not agree with this finding. Such interpretation strains the plain language that is used. The phrase 'shall not be acted upon' connotes nothing more than that the bank shall not be entitled to

[7] 1979 (1) SA 195 (A) at 202B-C.
[8] 1995 (3) SA 761 (A) at 767E-768C.

exercise any of the rights ceded to it including the powers specified in sub clauses 8.1, 8.2 and 8.3 until the happening of one or other of the stated events. What is suspended is the right to act upon the cession and not the cession itself. The words 'acted upon' imply the existence of some fact or state of affairs upon which an action could be effected. In context, this can only be a reference to the completed cession.

[10] In the case of *P G Bison Ltd and others v The Master and another*[9] this court had occasion to consider a clause which provided that:

'This cession will not be implemented unless the account is overdue by 30 days, and seven days' notice of the intention to implement this cession has been given.'

In commenting on the ordinary grammatical meaning of the word 'implement' Grosskopf JA said the following:

'The verb "carry out" is one of the dictionary meanings of "implement" and, in my view, that is what "implement" in the present context probably connotes. The additional clause accordingly provides that the cession will not be carried out (by the cessionary) unless the account is overdue and notice has been given (to the cedent). It certainly does not follow that the actual transfer of the rights is suspended. The appellants as cessionaries are merely prevented from personally exercising those rights until the corporation defaults and notice has been given.'

[11] The same reasoning is apposite to the interpretation of the words 'acted upon' in this matter. In their respective contexts 'acted upon' and 'carry out' and 'implement' (as considered in *P G Bison* supra) are all intended to connote the same thing, namely that a transfer of rights has been effected by means of the cession but that the right to act in accordance with such cession or to enforce such rights has been suspended.

[12] To interpret the cession in the manner contended for by the respondent

[9] 2000 (1) SA 859 (SCA).

would be destructive of the very purpose for which the cession *in securitatem debiti* was entered into, which was to provide security for the loan that the bank was to advance to the respondent. That purpose is specified in the first part of clause 8 which provides that the cession was to operate '*as additional security for the due repayment by the Mortgagor of all amounts owing to or claimable by the Bank at any time in terms of this bond* . . . .' The evidence shows that the bank required the respondent to furnish the maximum conceivable security for the loan. Were the respondent's interpretation correct, the bank would enjoy no security from the cession in the event of the respondent's insolvency. The bank's representatives conceded that it could never have been the intention of the parties that the bank would not be a secured creditor in respect of the respondent's rental revenues in the event of its insolvency.

[13] Counsel for the respondent submitted that the interpretation contended for by the appellant would have the following consequences: the transaction between the parties would be stultified, as the respondent would be unable to collect the rentals which it needed to be able to service the payments under the mortgage bond and to meet its expenses; the bank would have to change its methods of doing business including its standard agreements; and the bank would also have to create a rent collection department for the collection of the ceded rentals and would then have to account to the respondent in respect of such collections. I do not agree with these contentions. On the evidence neither the bank nor the respondent understood the transaction to operate in this way. There is no practical bar to the respondent in such a situation from simply continuing to collect the rentals, the cession notwithstanding. This is a question of mandate. It is not unusual for a creditor to permit a debtor to collect ceded debts. See for example *Goudini Chrome (Pty) Ltd*[10] and *Springtex Limited v Spencer Steward & Company*.[11] If however the respondent wished to sue for unpaid rentals it would have to obtain a recession of the ceded claims from the bank.

[10] supra at 87H.
[11] 1991 (1) PH A.7 (C).

[14] I am of the view therefore that an effective and unconditional transfer of rights occurred when the cession *in securitatem debiti* was executed. The consequence is that the respondent was divested of the power to sue the appellant in respect of the unpaid rentals. In order to sue for the recovery of the ceded debts the respondent should have taken recession of them from the bank.

[15] It follows that the court a quo should have upheld the special plea and dismissed the respondent's claim. It only remains to add that the decision in *Solomon NO v Spur Cool Corporation (Pty) Ltd*,[12] which is inconsistent with this conclusion, was wrongly decided and it is overruled.

[16] In the result the following order is made:

(1) The appeal is upheld with costs including those occasioned by the employment of two counsel.
(2) The order of the court a quo is set aside and the following is substituted in its stead:

'(i) The defendant's special plea is upheld;
(ii) The plaintiff's claim is dismissed;
(iii) The plaintiff is ordered to pay the costs of the action including those occasioned by the employment of two counsel.'

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P BORUCHOWITZ
ACTING JUDGE OF APPEAL

Appearances:

[12] 2002 (5) SA 214 (C).

For Appellant:	D A Gordon SC R D E Gordon Instructed by Bernadt Vukic Potash & Getz, Cape Town Lovius Block, Bloemfontein
For Respondent:	C G Marnewick SC Instructed by Murugasens, Chatsworth, Durban McIntyre & Van Der Post, Bloemfontein