THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 42/2024

In the matter between:

BRIAN GARTH BATTESON N O	**FIRST APPLICANT**
BAREND JOHANNES SAHD N O	**SECOND APPLICANT**
ELZETTE VAN ZYL N O	**THIRD APPLICANT**

and

DEBORAH JOUBERT N O	**FIRST RESPONDENT**
AMANDA RANDALL N O	**SECOND RESPONDENT**

Neutral citation: *Brian Garth Batteson N O and Others v Deborah Joubert N O and Another* (42/2024) [2025] ZASCA 129 (11 September 2025)

Coram: MOKGOHLOA, MOLEFE, KOEN and COPPIN JJA and MODIBA AJA

Heard: 27 August 2025

Delivered: 11 September 2025

Summary: Cession of insurance policy – whether in *securitatem debiti* – relevance of evidence in interpreting cession.

ORDER

On appeal from: Eastern Cape Division of the High Court, Makhanda (Dawood and Mjali JJ and Collett AJ, sitting as a court of appeal):

The application for special leave to appeal is refused with costs.

JUDGMENT

Koen JA (Mokgohloa, Molefe and Coppin JJA and Modiba AJA concurring):

Introduction

[1] This is an application in which the applicants, the trustees of the Batfarm Trust (the trust) seek special leave to appeal against an order of the full court of the Eastern Cape Division of the High Court, Makhanda (the full court). The issue at the heart of the application is whether a cession of a Sanlam Life Insurance Policy number 43025342X7 (the policy) held by the policy holder, the late Jan Hendrik Abraham Bezuidenhout (the deceased), to the trust, was a cession *in securitatem debiti* (in security of a debt) or an outright cession permanently divesting the deceased of all rights to the policy.

[2] The Eastern Cape Division of the High Court, Makhanda (the trial court), in an action by the respondents, the joint liquidators of Geheeltevrede Boerdery CC (the CC) against the trust, concluded that the cession was not a cession *in securitatem debiti*.[1] On appeal, with the leave of the trial court, the full court held that the cession was *in securitatem debiti*.[2]

---

[1] The trial court granted the following order:
'1. The plaintiffs' claim that the cession of the Santam life insurance policy . . . was a cession *in securitatem debiti* be and is hereby dismissed.
2. The cession referred to in paragraph 1 above is found to be an out-and-out cession.
3. The Batfarm Trust has become the owner of the life insurance policy referred to in paragraph 1 above.
4. The plaintiffs shall pay the defendants' costs of the action, such costs to include . . .'

[2] The full court granted the following order in respect of the issue which was separated for determination:
'1 The appeal be and is hereby upheld with costs including the costs of the translation of the transcribed evidence.
2 The orders of the court *a quo* dated 10 August 2022 are set aside and substituted as follows:

[3] On petition for special leave to appeal the judgment of the full court, this Court directed that the application for special leave be referred for oral argument in terms of s 17(2)*(d)* of the Superior Courts Act.[3] It also directed that the parties had to be prepared to address this Court on the merits of the appeal, should special leave be granted.

Background

[4] The deceased was the sole member of the CC. On 3 May 2012, the CC sold the immovable property, described as the remainder of portion 4 (Junction Camp) of the farm Tarka Bridge No 518 in the division of Cradock, with certain water rights of irrigation for 60 hectares and 30 dairy cows, to the trust.

[5] The terms of the sale agreement further included that: possession and occupation of the property would pass to the trust from the date of registration of transfer; the trust would raise a mortgage loan to effect payment of 70% of the purchase price; and the sale was inseparable from and to be read in conjunction with the terms of the agreement of lease to be entered into on the same date between the trust, as lessor, and the CC, as lessee. The mortgage loan, as foreshadowed in the sale agreement, was obtained from the Standard Bank.

[6] On the same day as the sale, the trust and the CC concluded an agreement of lease (the first lease). In terms of the first lease, the trust leased the grazing, water rights, agricultural lands and the improvements on the immovable property to the CC for a period of five years from the date of registration of the transfer of ownership of the property to the trust. The first lease was signed by the first

---

2.1 the cession of the Sanlam Life Insurance Policy No 4302534X7 was a cession *in securitatem debiti;*
2.2 the Defendants are to pay the Plaintiffs' costs, inclusive of the costs previously reserved and costs relating to the preparation of heads of argument filed in the trial.'

[3] Act 10 of 2013.

applicant, Mr Brian Garth Batteson, on behalf of the trust. The deceased signed the first lease on behalf of the CC and in his personal capacity.

[7] Clauses 22 and 23 of the first lease provided:

'22. CESSION OF ASSURANCE POLICY

22.1 It is agreed that JAN HENDRIK ABRAHAM BEZUIDENHOUT shall cede as an absolute Cession, an existing Life Assurance Policy of R4 000 000 (FOUR MILLION RAND) on his life to and in favour of the LESSOR, so as to safeguard the LESSOR against payment of its rental and outstanding balance due by the LESSOR under its Mortgage Bond with a Financial Institution, in the event of the death of the Sole Member of the LESSEE, JAN HENDRIK ABRAHAM BEZUIDENHOUT.

22.2 In the event of the LESSEE exercising his option to repurchase the PROPERTY, then in that event, the LESSOR shall cede the aforesaid Assurance Policy back to the LESSEE against payment of all the LIFE Premiums paid by the LESSOR, whilst ceded to it, together with interest thereon at the prime bank overdraft rate.

23. OPTION TO PURCHASE AND RIGHT OF FIRST REFUSAL

23.1 The LESSOR hereby grants the LESSEE a right of first refusal to purchase the PROPERTY for the sum of R8 650 000.00 (EIGHT MILLION SIX HUNDRED AND FIFTY THOUSAND RAND), Value Added Tax excluded, provided, that such option is exercised within the initial period of the lease, as per Clause 2 supra.

23.2 In the event of the LESSEE not having exercised the option to purchase the PROPERTY in terms of clause 23.1 supra, then and in that event, such option to purchase the PROPERTY shall lapse and shall thereafter revert to a Right of First Refusal only to purchase such PROPERTY.'

[8] On 14 February 2013, almost a year after the conclusion of the first lease, the deceased signed a written notification of cession form with Sanlam. The circumstances in which this document was signed and who completed it, are not known.[4] It was indicated on the form, by a cross having been made in the applicable

[4] The deceased signed the document, but portion thereof was typed and a portion completed in manuscript. The portion completed in manuscript included information regarding the cessionary, the trust, such as that it was 'belastingpligtig' (liable to tax). This was answered in the affirmative. The deceased presumably had no personal knowledge to confirm whether the trust was 'belastingpligtig' casting some doubt as to when and how this form was completed. The handwriting on page three thereof also seems to be different to the handwriting on page 2. Not much, if anything, turns on this.

box, that the cession was 'Algeheel/Uit en uit' (totally/out-and-out). The form also contained a typed insert that the date upon which the 'regte oorgegaan het' (rights had transferred), was 14 February 2013.

[9] On 3 January 2017, the trust and the CC entered into a further agreement of lease (the second lease). It too was signed by the deceased on behalf of the CC and in his personal capacity. The second lease was for the period from 1 March 2017 until 28 February 2022. Clause 22 thereof was identical to clause 22 of the first lease. Clause 23 of the second lease was worded slightly differently:

'23 OPTION TO PURCHASE AND RIGHT OF FIRST REFUSAL

The LESSOR hereby grants the LESSEE a right of first refusal to purchase the PROPERTY for the Market Value at the time, Value Added Tax excluded, in the event, that the LESSOR wishes to dispose of the PROPERTY during the currency of the LEASE.'

[10] On 11 May 2017, the deceased addressed an email to his accountant Mr Andre David Pretorius (Mr Pretorius) and others, including 'Ben Sahd – Metcalf Sahd & Co'. It was in Afrikaans.[5] The relevant parts thereof, translated by me into English, recorded that:

'Just confirmation of our discussions in recent times regarding my will and estate. As bookkeeper and executor you are aware that I lease the farm and cattle from Batfarm trust. If something happens to me then you must immediately get into touch with Bennie Sahd of Metcalf Sahd & Co as to how the future process will unfold. Bennie's telephone numbers are as follows: . . . I

[5] The original text of the email, which is in Afrikaans, reads as follows:
'Net 'n bevestiging van ons gesprekke die laaste tyd rakende my testament en boedel. As boekhouer en eksekuteur is jy bewus dat ek die plaas en beeste huur van Batfarm Trust. As ek iets oorkom moet julle onmiddelik met Bennie Sahd van Metcalf Sahd & Co in verbinding tree oor hoe die proses vorentoe sal verloop. Bennie se telefoon nommers is as volg: . . . Ek het ook onder jou aandag gebring dat daar 'n polis op my lewe is waarvan Batfarm tans die eienaar is. Bennie en Brian het toegestem dat die polis weer my eiendom word mits ek aan sekere voorwaardes voldoen. Dit het gebeur aangesien Batfarm volle beheer oor die grond verkry het. Bennie en Brian is persone van integriteit en sal nie terug gaan op hulle woord nie. Bennie se kantoor is tans in die proses om die nodige papierwerk reg te kry.
Die voorwaardes wat Bennis opgestel het is as volg:
1. Ek moet al die premies wat Batfarm Trust betaal het terug betaal met rente by gereken.
2. Die polis moet sydelings sedeer word as sekuriteit aan Batfarm Trust. Hulle skulde word eers betaal voor die res van die geld na my boedel uitbetaal.
3. Die sekuriteit (Polisgeld) sal aangewend word vir uitstaande huurgeld, kragvoer en ruvoer aankope indien daar nie beskikbaar is met afsterwe en as die bees getalle nie volledig is nie. As daar bees kort sal dit daarteen af gereken word.'

also brought to your attention that there is a policy on my life of which Batfarm is presently the owner. Bennie and Brian agreed that the policy can again become my property provided that I comply with certain requirements. This happened because Batform obtained full control of the land. Brian and Bennie are persons of integrity and will not go back on their word. Bennie's office is in the process of getting the necessary paperwork done.

The conditions that were set by Bennie are as follows:

1. I must pay back all the premiums which Batfarm has paid with interest calculated thereon.
2. The policy must be ceded laterally as security for Batfarm. Their debt must be paid first before the rest of the money is paid to my estate.
3. The security (policy proceeds) shall be applied for outstanding rental money, electricity supply and basic feed purchases if not available on my death and if the cattle complement is not complete. If there are cattle short then it will be accounted against it.

. . ..'

[11] The deceased died on 1 September 2019 during the currency of the second lease. His widow and Mr Pretorius were appointed as the joint executors of his deceased estate. Sanlam, pursuant to the terms of the policy, paid an amount of R5 089 118 to the trust. The CC was provisionally liquidated on 27 February 2018 and finally wound up on 27 March 2018. The respondents were appointed as its joint liquidators by the Master of the High Court.

[12] The trust, represented by the second applicant, Mr Barend Johannes Sahd submitted a written claim against the CC, which he alleged was 'based on Clause 22 of the Lease Agreement' and the email of 11 May 2017 (which he said he did not receive and which was 'factually incorrect'),[6] on 8 December 2017 for a total of R13 103 337. This included an amount of R7 650 000 for rental and R1 786 780 in respect of the Standard bank mortgage liability. The proceeds of the policy, in the sum of R5 089 118, were set off against the total claim against the CC, to arrive at a nett claim of R8 014 219.

[6] The reference is to the email in paragraph 10 above.

[13] The founding affidavit referred to a similar claim made by the trust against the CC, but for an amount of R14 826 117. This claim included the same amounts, as in the claim of 8 December 2017, in respect of unpaid rental and the Standard bank mortgage liability. After the set off of the proceeds of the policy, the nett claim was for R9 736 999.

[14] In the action before the trial court, the joint liquidators of the CC, having taken cession of the claim of the joint executors of the estate of the deceased, claimed payment of the sum of R3 600 013, being the difference between the proceeds of the policy in the sum of R5 089 118 and the rental accepted to be outstanding in the sum of R1 489 105. Alternatively, they claimed payment of the sum of R1 089 118, being the difference between the proceeds of the policy in the sum of R5 089 118 and the value of the policy ceded, in the sum of R4 000 000.

[15] The trust pleaded that the deceased had agreed to cede the policy as an absolute cession and that it had become the owner of the total proceeds of the policy. Accordingly, it contended that it was not liable to refund any amount.

[16] At the commencement of the action, the trial court separated the following issues for determination. First, whether the cession of the policy was a cession *in securitatem debiti.* Second, whether the trust had become the owner of the policy.

The reasoning of the full court and the contentions of the trust

[17] In concluding that the cession was *in securitatem debiti* the full court emphasised that regard had to be had to the underlying *causa* of the cession, the intention of the parties, and the substance rather than the form of the cession. It viewed the provisions of clause 22.2 as a separate transaction not dependent on the death of the deceased. It held that the conflation of the terms of clause 22.2 and the cession in clause 22.1 was misplaced and did not afford support for the cession being regarded as an absolute cession in the true sense.

[18] The trust maintains that the full court disregarded the pleadings and the burden of proof, ignored the evidence of the accountant of the deceased, Mr Pretorius, and erred in interpreting the cession as one *in securitatem debiti.* It contends that, properly interpreted, the cession was not one *in securitatem debiti*.

The requirement of special leave to appeal

[19] The primary issue before this Court is whether special leave to appeal the order of the full court should be granted. An appeal will lie against an order of a full court, on appeal to it, only with the special leave of this Court. Special leave requires more than reasonable prospects of success: such as that the appeal will deal with a substantial point of law, or is a matter of great importance to the parties or the public; or that the prospects of success on appeal are so strong that the refusal to grant leave to appeal would result in a denial of justice for the party seeking leave to appeal.[7] This list is not exhaustive.

[20] The trust contends, as regards special leave, that the intended appeal involves the following: it raises substantial points of law regarding the interpretation of documentation and evidence in contested action proceedings; it raises a substantial point of law regarding the adjudication of action proceedings on appeal where the appeal court ostensibly disregards the pleadings and the evidence led during action proceedings and proceeds to consider the matter *de novo* (afresh) akin to motion proceedings; it has strong and substantial prospects of success, in that, the CC, as *dominus litis* (master of the legal suit) in the action proceedings, failed to establish its claims; it seeks to avoid a manifest denial of justice to the trust, as would follow if leave was refused; and, is of great importance to the public and to the parties, in that, the issue of the treatment of action proceedings on appeal and the full bench

[7] *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) at 561E-F; *Stu Davidson and Sons (Pty) Ltd v Eastern Cape Motors (Pty) Ltd* [2018] ZASCA 26; 2018 JDR 0426 (SCA).

being bound to the record of the action proceedings, is foundational to the administration of justice.

[21] Contrary, to the trust's submission, the appeal which will follow, should special leave to appeal be granted by this Court, does not deal with a substantial point of law. The law as to what is meant by a cession *in securitatem debiti* is well settled.[8] The issue for determination really turns on the application of the peculiar facts of this matter to the law.

[22] Neither is it a matter of great importance to the parties, beyond their respective commercial interest to achieve success, which does not constitute special circumstances. Nor is it a matter of great importance to the public. The trust correctly did not advance the other considerations, save for that referred to below, with much vigour.

[23] The main consideration persisted with by trust in support of the application for special leave is that there are such strong prospects of success that the refusal of special leave to appeal would result in a denial of justice. It follows that if the prospects of success are poor, or non-existent, the application for special leave should be dismissed. I turn then to consider the prospects of success with respect to the specific grounds advanced by the trust.

The pleadings, the burden of proof and the evidence of Mr Pretorius

[24] The trust relies firstly: on the particulars of claim having alleged that the cession was *in securitatem debiti* but only in respect of the rental payments payable by the CC; that the CC had the evidential burden to prove this version on a balance of probabilities; and that having regard to clauses 22.1, 22.1, 23.1 and 23.2 of the

[8] See for example *Grobbelaar v Shoprite Checkers* [2011] ZASCA 11; 2011 JDR 0197 (SCA), *Louis Pasteur Hospital Holdings (Pty) Ltd v Bonitas Medical Fund* [2018] ZASCA 82 *and Engen Petroleum Ltd v Flotank Transport (Pty) Ltd* [2022] ZASCA 98; 2022 JDR 1745 (SCA) and the authorities cited therein.

first lease, the CC had failed to do so. Whether the cession was confined to the rentals, or extended to safeguarding the trust in respect of any mortgage liability, was however not the issue for determination before the trial court. The issue was simply whether the cession was one in *securitatem debiti*. What liability the cession properly safeguarded, if found to be a cession in *securitatem debiti,* is for the high court to decide in due course.

[25] The onus to prove that the cession was one *in securitatem debiti* was undoubtedly on the CC. Whether it is *in securitatem debiti,* or an outright cession, with the deceased having permanently divested his estate of all proceeds of the policy, entails a proper interpretation of the lease agreements. Oral evidence may be of some assistance in conducting that exercise, but only insofar as such evidence is legally admissible.

[26] It is trite law that the interpretation of a contract entails a consideration of the words used, the context in which they were used and the purpose of the contractual provision.[9] Oral evidence is relevant and admissible, for example as to the context and purpose enquiries. Evidence of how parties subsequently implemented the terms of an agreement will also be admissible.[10]

[27] The CC adduced the evidence of Mr Pretorius to place the relevant documents before the trial court. During cross examination he was asked to express a view on what the wording of the relevant clauses meant and what the deceased had intended. He responded that he was not a legal expert and had not prepared the agreements. He confirmed that he had discussed the issue with the deceased who intended that the policy had to go to the trust 'as sekuriteit' (security). He confirmed that the deceased had not paid any premiums after the policy was ceded.

---

[9] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA).
[10] *Grobler v Oosthuizen* [2009] ZASCA 51; 2009 (5) SA 500 (SCA) ; [2009] 3 All SA 508 (SCA) para 14; *Comwezi Security Services (Pty) Ltd v Cape Empowerment Trust Ltd* [2012] ZASCA 126; 2012 JDR 1734 (SCA).

[28] The trust submitted that the evidence of Mr Pretorius, the Sanlam notice which refers to an 'out and out cession' and ownership having passed, and clause 22.1 of the lease which refers to an 'absolute' cession', incontrovertibly showed that the deceased knew and intended to cede the policy as an out-and-out cession, which would permanently divest him of any claim to any part of the proceeds of the policy. It complains that the full court misdirected itself as it: gave no weight to this evidence and the pleadings, nor to the assessment of the evidence and the findings made by the trial court; and interpreted clause 22.1 without reference to the evidence or the overall evidential onus borne by the CC, to the exclusion of clauses 22.2 and 23 of the lease agreements.

[29] The evidence of Mr Pretorius as to what the deceased recorded in his email, constitutes inadmissible hearsay evidence insofar as tendered as the truth thereof. The deceased was no longer available to explain why he expressed certain legal conclusions or used words of a technical legal nature in his email to Mr Pretorius. As a layman his use of legal terminology would not necessarily be technically correct.

[30] However, insofar as this evidence is admissible to show how the deceased understood the cession would be implemented, it is significant that the deceased viewed the policy as having been ceded to the trust as 'security'. Further, that the liabilities of the trust had to be paid first before the remainder of the proceeds would be paid to his estate.

The interpretation of the cession

[31] The primary issue in determining the trust's prospects of success is the proper interpretation to be assigned to the words which recorded the cession. As was said in *Airports Company*:

'. . .[T]he point of departure in an interpretative process is always the language of the agreement in what is ultimately a unitary exercise. But it is only the starting point in an exercise to establish the contractual intention of the parties. Equally important in this analysis is the context within which the language is used in the light of the document as a whole, the circumstances attendant upon its coming into existence, the apparent purpose to which it is directed and the material known towards those responsible for its production. Importantly, a sensible meaning is to be preferred to one that leads to "un-business like" results or undermines the apparent purpose of the document.'[11]

[32] The interpretation enquiry is fruitfully commenced with a brief reminder of what the nature and effect of cessions entail. This will assist in answering the question whether the words used in the leases, expressing the intention of the trust and the deceased, resemble that of a cession *in securitatem debiti,* or not.

[33] Cession is the legal means by which incorporeal rights are transferred: the cedent is divested of certain rights in the subject matter of what is ceded, in favour of the cessionary. It generally involves an agreement to cede *(pactum cedendo),* often, but not necessarily always, followed by the conclusion of a deed of cession,[12] which is an abstract legal act independent of the underlying agreement to cede.[13]

[34] The extent to which a cedent is divested of his or her rights depends on the nature of the cession and the underlying *causa.* Conversely, whether a cession is *in securitatem debiti* or not, depends on the extent to which, on a proper interpretation of the words used, the cedent is divested of rights.

[35] A cession which results in a complete transfer of the rights of the cedent and the cedent thus being permanently divested of all rights and benefits in and to the

---

[11] *Airports Company South Africa v Big Five Duty Free (Pty) Ltd and Others* [2018] ZACC 33; 2019 (2) BCLR 165 (CC); 2019 (5) SA 1 (CC) para 107.
[12] There are often the two transactions: the obligationary agreement to cede and then the cession itself – see *Johnson v Incorporated General Insurances Ltd* 1983 (1) SA 318 (A) at page 331G-H. But the agreement to cede is not always followed by a cession document.
[13] *Grobbelaar and Others v Shoprite Checkers Ltd* [2011] ZASCA 11; 2011 JDR 0197 (SCA) at para 18; *Brayton Carlswald (Pty) Ltd and Another v Brews* [2017] ZASCA 68; 2017 (5) SA 498 (SCA) at 504 A-C.

subject matter of the cession, and the cessionary becoming the unqualified owner of what was ceded, is often described as an 'outright' or 'out-and-out' cession. But the labelling of a cession as an outright or out-and-out cession, is not necessarily decisive of the nature and effect thereof.

[36] With a cession *in securitatem debiti* the intention is not for the cedent to be divested permanently and totally of the subject matter of the right ceded. The subject matter of the cession is transferred for the limited purpose of securing an indebtedness. A cession *in securitatem debiti* has been described as 'in effect an outright or out and out cession on which an undertaking, or *pactum fiducia* (fiduciary agreement), is superimposed, that the cessionary will re-cede the principal debt to the cedent on satisfaction of the secured debt.'[14] It has also been remarked that, the truth probably is that the cedent by way of security retains his reversionary right, that is to say his right to enforce the ceded right of action after the secured debt has been discharged.

[37] There are thus two forms of security cession. The first form is really a pledge, where the cedent retains ownership of the right[15] and a reversionary interest in the subject matter (the policy) of the cession. Upon the debt secured being discharged, the subject matter of the cession reverts to the cedent (the reversionary interest having remained vested in the cedent).[16] With this theory there is no need to cede the subject matter of the cession back, or for any other formality to be complied with, for the cedent to be restored to the legal position prior to the cession. The second form is the outright cession theory where a *pactum fiduciae* is superimposed that the cessionary will re-cede the subject matter of the cession to the cedent on satisfaction of the debt[17] secured by the cession.

---

[14] *Grobler v Oosthuizen* [2009] ZASCA 51; 2009 (5) SA 500 (SCA) ; [2009] 3 All SA 508 (SCA) para 17.
[15] *Holzman NO and Another v Knights Engineering* 1979 (2) 784 (W) at 788C-G.
[16] *Louis Pasteur Hospital Holdings (Pty) Ltd v Bonitas Medical Fund* [2018] ZASCA 82 para 32.
[17] *Engen Petroleum Limited v Flotank Transport (Pty) Ltd* [2022] ZASCA 98; 2022 JDR 1745 (SCA) para 15.

[38] It is now accepted that a cession *in securitatem debiti* can take either of the aforesaid two forms. This Court in *Engen* held:

'Although the pledge construction has been recognized as the default form of security cession, there is no support for a conclusion that it has subsumed the field of security cessions. This is so since our law favours a recognition of both constructions of security cession. It therefore remains open to the parties to structure a cession either as a pledge or as an out-and-out cession, upon which a *pactum fiduciae* is superimposed. This is to be determined by reference to the clear intention of the parties.'[18]

[39] Common to both forms of cession *in securitatem debiti* is that ultimately the cedent is not divested of rights in the subject matter of the cession *in toto* (altogether) and in perpetuity. The determining factor, as to whether a cession is one *in securitatem debiti,* is to be gathered from the intention of the parties.[19] It is ascertained from an interpretation of the agreement to cede containing the underlying obligationary agreement, the *pactum de cedendo*.[20] The ordinary principles of interpretation, that is, having regard to the text, the context and purpose,[21] not applied in a mechanical fashion but in a coherent manner,[22] apply.

[40] Form should not override substance. If properly construed the object of the cession is to secure a debt of the cessionary, then it is a cession *in securitatem debiti,* whatever the parties choose to call it.[23] Having described a cession as an out-and-out cession, is accordingly not of itself decisive.[24] Nor is a statement that ownership was transferred conclusive of the cession being an outright cession, if the transfer of ownership, properly construed, was subject to a *pactum fiduciae,*

---

[18] Ibid para 15.
[19] *Bank of Lisbon of South Africa Ltd v The Master and Others* 1987 (1) SA 276 (A) at 294E; *Grobler v Oosthuizen* [2009] ZASCA 51; 2009 (5) SA 500 (SCA); [2009] 3 All SA 508 (SCA) para 10; *National Bank of South Africa Ltd v Cohen's Trustee* 1911 AD 235 at 244 and 246.
[20] *Brayton Carlswald (Pty) Ltd and Another v Brews* [2017] ZASCA 68; 2017 (5) SA 498 (SCA) para 15.
[21] *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC) para 66; *The Natal Joint Municipal Pension Fund v Endumeni Municiaplity* 2012 (4) SA 593 (SCA) para 18.
[22] *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 (SCA) para 25.
[23] *National Bank of South Africa Ltd v Cohen's Trustee* 1911 AD 235 at 246.
[24] *Grobler v Oosthuizen* [2009] ZASCA 51; 2009 (5) SA 500 (SCA); [2009] 3 All SA 508 (SCA)para 10.

even if implied, that the subject matter of the cession, or what remains thereof, would revert to the cedent once it has served its purpose.

[41] The cedent acquires a right of reversion in the subject matter of the cession once the debt secured by the cession has been discharged.[25] In *Bank of Lisbon* this Court held:

'When book debts are ceded *in securitatem debiti*, . . . the cedent cedes to the cessionary the exclusive right to claim and receive from the existing and future "book debtors" the amounts owing by them . . . Any amount collected in excess of the cedent's debt belongs to the latter. Thus it cannot be said that by such a cession it was intended to pass ownership.'[26]

[42] Consequently, if on a proper analysis of a transaction a cession was made for the purpose of securing a specific debt(s), then the cession is one in *securitatem debiti*.[27] Whether a cession was intended to be *in securitatem debiti*, is a conclusion of law,[28] but it is one inextricably intertwined with the facts of the case.

Was the cession by the deceased one *in securitatem debiti*?

[43] The policy ceded was one of R4 000 000 and it was ceded to safeguard the payment of rental which would become due to the trust and a mortgage liability to the Standard Bank. Specifying the value of the policy would, primarily, only be necessary to ensure that the policy ceded addressed its purpose, that is to be of sufficient value to 'safeguard' the trust against non-payment of rentals and what might remain due to the Standard Bank on the death of the deceased. Stipulating the value is therefore consistent with the cession being one *in securitatem debiti.* If the cession was not to safeguard the trust against exposure to liability, but an

---

[25] *O'Shea N O v Van Zyl N O and Others (Shaw N O and Others intervening)* [2011] ZASCA 156; 2012 (1) SA 90 (SCA); [2012] 1 All SA 303 (SCA) para 36.
[26] *Bank of Lisbon and South Africa Ltd v The Master and Others* 1987 (1) SA 276 (AD) at 294C-D.
[27] Ibid at 294D-E.
[28] *Engen Petroleum Ltd v Flotank Transport (Pty) Ltd* [2022] ZASCA 98; 2022 JDR 1745 (SCA) para 16; *Government of the Republic of South Africa v Von Abo* [2011] ZASCA 65; (2011 (5) SA 262 (SCA); [2011] 3 All SA 261 (SCA) paras 18-19.

outright cession vesting *dominium* (ownership) of the policy in the trust, then the amount of the policy would be irrelevant, not requiring specification.

[44] To construe the cession as an out-and-out cession transferring all rights in the policy to the trust, as the trust contends, would be destructive of the stated purpose of the agreement to cede, namely to 'safeguard' the trust against a future or contingent debt. If the *dominium* of the policy, following the cession, vested in the trust, then the word 'safeguard' and the reference to the payment of rental and any outstanding mortgage liability, would be superfluous. The policy would belong to the trust for it to deal with as it sought fit and for whatever purpose, not only to safeguard against outstanding rental and potentially bond liability.

[45] It would be unbusinesslike and devoid of any plausible or rational reason for the deceased, at the stage of concluding the first lease agreement and before transfer of the property to the trust, to have provided an absolute out-and-out cession, permanently divesting him and his estate of the proceeds of the policy, when there was yet no liability for outstanding rental or any liability to the Standard Bank. But agreeing to provide a cession *in securitatem debiti,* with the right of reversion in respect of any unutilized balance remaining after safeguarding the trust against potential liability for future rentals that would fall due, and for any outstanding liability once the mortgage bond had been registered, would be sensible and businesslike.

[46] The reference in the cession to it being 'absolute', if viewed in isolation, might suggest that an outright cession and not *in securitatem debiti,* was intended. Similarly, with the wording in the Santam documentation which referred to the cession as 'uit-en-uit'. Focusing only on these isolated words fails to address the substance of the cession agreement in its full context. It would place form above substance.

[47] Having regard to the potential forms of cession *in securitatem debiti* in our law, the use of these words does not make the cession one not *in securitatem debiti.* The cession was, according to its wording, intended to safeguard two forms of specified indebtedness, at a particular point in time. This clear intention favours the cession, although described as 'absolute', being one subject to a *pactum fiduciae* that the balance of the proceeds of the policy, after discharging what was sought to be safeguarded, reverting to the estate of the deceased after his death. The cession was not intended to 'safeguard' anything beyond the two listed forms of liability.

[48] It is significant that in submitting its total claim against the CC, referred to in paragraphs 12 and 13 above, which included liability for rental and the bond, the trust set off against its claims, the proceeds of the policy. If the cedent had divested himself completely of all rights to the policy, then there would have been no reason for the trust to set off the proceeds of the policy against its claim. The trust could deal with the proceeds of the policy however it saw fit. There would be no reason to give the CC in liquidation the benefit of the trust's claim being reduced by the amount of the proceeds of the policy, unless the cession was to secure that part of the claim.

Further concluding observations

[49] The provisions of clause 22.2 do not assist with the interpretation of the cession. First, it contemplates a repurchase by the CC, which is not what happened. Clause 22.2 was accordingly not specifically addressed. Notably, even a second cession *in securitatem debiti,* of the subject of any reversionary right, would not necessarily have been precluded. Second, insofar as clause 22.2 refers to the policy being ceded 'back' in the event of the lessee exercising the option to repurchase the property, possibly suggesting an outright cession, this is also consistent with a *pactum fiduciae* to cede the subject matter of the cession back, by virtue of the

reversionary interest held by the cedent, once the cession had served its purpose. That is still consistent with the cession being one *in securitatem debiti*.

[50] The above interpretation also accords with the deceased's understanding recorded in his email of 11 May 2017 to Mr Pretorius that the cession was in security and that he would receive the proceeds after the trust's liabilities were paid. If this was not the intention of the parties, then the trust could have offered evidence to the contrary. It was not suggested that Mr Batteson, who concluded both the leases, was not available to testify on the context of this provision and the purpose it might have had, if the intention was that the cession was not *in securitatem debiti*.

[51] It was also suggested that because the cession did not secure debts of the deceased, but debts of the CC (and also the trust), that it was not a cession *in securitatem debiti* of debts of the deceased as the cedent. The CC was however wholly owned by the deceased as its sole member. It is not uncommon for a member, *a fortiori* (all the more) a sole member of a limited liability corporate entity, to be required to guarantee payment of the corporate entity's debts, whether as surety, or such a liability even being undertaken as principal.[29] It is, in any event, permissible to provide security for another person's debt by way of a pledge or cession *in securitatem debiti.*[30] This argument accordingly does not detract from the construction that the cession was *in securitatem debiti.*

Conclusion

[52] Borrowing from the wording of Galgut AJA in *Bank of Lisbon,* following De Villiers CJ in *Cohen's Trustee*:

---

[29] *List v Jungers* 1979 (3) SA 106 (AD).

[30] *Millman NO and Another v Twiggs* 1995 (3) SA 674 (AD) at 678F-G and more specifically *Twiggs v Millman NO and Another* 1994 (1) SA 458 (C) 461G-I referring to Voet 13.7.2 being authority for the view that a person may, without taking upon himself the obligation of a surety, bind himself as pledgor for the debt of another.

'. . . if the cession was made "with the avowed object"[31] of only securing a debt it would be impossible to hold that *dominium* had passed to the cessionary.'[32]

The cession in this application was made with that avowed object.

[53] Having had the benefit of the full record, the evidence and oral argument, which the justices of this Court who considered the application for leave to appeal did not have, I am not persuaded that the full court erred in reaching the conclusion it did. There are no reasonable prospects of success in any further appeal to this Court.[33] The trust has not established that there are special circumstances dictating that special leave to appeal should be granted.[34]

Order

[54] The following order is granted:

The application for special leave to appeal is refused with costs.

_____

P A KOEN

JUDGE OF APPEAL

---

[31] *National Bank of SA Ltd v Cohen's Trustee* 1911 AD 235.
[32] *Bank of Lisbon of South Africa v The Master* 1987 (1) SA 276 (A) at 294E.
[33] *MEC for Health, Eastern Cape v Mkhitha and Another* [2016] ZASCA 176 paras 16-17.
[34] *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A)and *National Union of Metalworkers of South Africa and others v Fry's Metals (Pty) Ltd* [2005] ZASCA 39; [2005] 3 All SA 318 (SCA); 2005 (5) SA 433 (SCA); (2005) 26 ILJ 689 (SCA); 2005 (9) BCLR 879 (SCA); [2005] 5 BLLR 430 (SCA).

Appearances

For the applicants:	I J Smuts SC and T S Miller
Instructed by:	Wheeldon Rushmere & Cole Inc., Makhanda
	Symington De Kok Attorneys, Bloemfontein
For the respondents:	D H de la Harpe SC
Instructed by:	McCallum Attorneys, Makhanda
	E G Cooper Majiedt Inc., Bloemfontein.