



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

REPUBLIC OF SOUTH AFRICA

CASE NO: 2020/39800

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE: 9.09.2022

SIGNATURE: *ML SENYATSI*

In the matter between:

TUHF LIMITED

Applicant

and

266 BREE STREET JOHANNESBURG (PTY) LTD

First Respondent

10 FIFE AVENUE BEREA (PTY) LTD

Second Respondent

28 ESSELEN STREET HILBROW CC

Third Respondent

68 WOLMARANS STREET JOHANNESBURG (PTY) LTD

Fourth Respondent

HILBROW CONSOLIDATED INVESTMENTS CC

Fifth Respondent

MARK MORRIS FARBER

Sixth Respondent

JUDGMENT

SENYATSI J:

- [1] In this opposed application the applicant, TUHF Limited ("TUHF") seeks enforcement of the terms of the loan agreement by way of cession of any rental pertaining to Metro Centre. TUHF seeks that rental be paid to it in accordance with the cession provisions in the mortgage bond registered in its favour on Metro Centre.

BACKGROUND

- [2] The parties concluded a loan agreement in terms of which TUHF funded the purchase and refurbishment of the Metro Centre, downtown Johannesburg City Centre during 19 October 2016 to 2 November 2016.
- [3] The loan facility was for the sum of R20 937 842 and the amount was disbursed in favour of the first respondent, 266 Bree Street Johannesburg (Pty) Ltd.
- [4] The second to fifth respondents stood as surety in favour of TUHF for the fulfillment of the loan repayment obligations by the first respondent.
- [5] All the respondents are related entities operated and controlled the by the sixth respondent, Mr. Farber. In almost all of them, he is the sole director and shareholder and their mind.
- [6] As further security for the fulfilment of their obligations by the first respondent to TUHF, the first respondent registered a covering and continuing security by way of mortgage bond on the Metro Centre. The mortgage bond which made provision for cession of rental payments by the tenants of the first respondent in favour of TUHF in the event of any breach of loan agreement terms.
- [7] The common facts are that the loan agreement provided that certain events would constitute an event of default, namely:

- 7.1. The first respondent's failure to pay any amount due by it in terms of the loan agreement on the due date for payment thereof or breached any other provision of the loan agreement and fail to remedy any such breach within any applicable cure period;
- 7.2. The first respondent or any surety committing a breach of any of the terms and conditions of a loan agreement or security to which it is a party;
- 7.3. The first respondents' failure to comply with all and any municipal by-laws;
- 7.4. Any representation, warranty or statement made, or repeated deliberately in connection with the loan agreement or the security or in any document delivered by or on behalf of the first respondent, or any surety, is incorrect in any respect when made or deemed to be made or repeated,
- 7.5. Any written undertaking or warranty made by the first respondent and /or any surety is breached;
- 7.6. The first respondent, or any surety breaches or repudiates or evidences and intention to repudiate any of the provisions of the agreement or security to which it is a party and fails to remedy any such breach within any applicable notice or cure period calling upon it to do so; and
- 7.7. Any security or any part thereof for any reason ceases to be in full force and effect under any applicable law, or any part thereof otherwise ceases to constitute valid security, and the first respondent fails to restore or procure the restoration of such security or fails to provide additional security to the satisfaction of TUHF within 10 business days of being required to do so.

[8] The loan agreement also provided that, in Common Terms thereof, that upon the occurrence of an event of default and at any time thereafter, if such event

continues, TUHF would be entitled by notice to the first respondent, amongst other things to:

- 8.1. suspend any amounts available but undrawn under the loan facility or declare any amounts available but undrawn under the loan facility to be automatically cancelled and to declare that no further advance be made available for drawn down under the loan facility; and /or
- 8.2. accelerate and declare all amounts owing in terms of the loan agreement immediately due and payable, notwithstanding that such amounts may not otherwise have been due and payable, whereupon the same shall become immediately due and payable including any fees, penalties, costs and charges, and /or
- 8.3. Charge penalty interest at the highest interest rate applicable to any part of the outstanding indebtedness under the loan agreement.

[9] In addition, the second to fourth respondents also concluded unlimited suretyship agreements in favour of TUHF for the fulfilment of the repayment obligations by the first respondent in favour of TUHF.

[10] The suretyship agreements provided, *inter alia*, as follows:

- 10.1. sureties bound themselves irrevocably as surety for and co-principal debtor in *solidium* with the first respondent, for the due and proper performance by the first respondent of all its obligations in terms of and arising from the loan agreement;
- 10.2. sureties warranted that the suretyship agreements are in all respects binding and valid. ("the warranty");
- 10.3. if there were to be a breach of warranty, the sureties in the suretyship

- agreements assumed unlimited liability of the first respondent; and
- 10.4. the sureties in the suretyship agreements indemnified TUHF against any loss of whatsoever nature which TUHF may suffer as a result of any breach of the warranty.

[11] The mortgage bond provides for essentially similar terms as the loan agreement in respect to warranties and events of default. For that reason, those warranties and events of default will not be repeated.

[12] In addition and especially clause 4 of the mortgage bond read together with the loan agreement (Clauses 11 and 15) provides amongst others, as follows:

- 12.1. that the first respondent irrevocably and in *riem suam* (but as a severable undertaking given for the purpose of facilitating the enforcement of the right) cedes, assigns and transfers to TUHF all the respondent's rights, title and interest in and to any rent which is due in respect of the tenancy, or otherwise over the Metro Centre.
- 12.2. the first respondent irrevocably authorizes TUHF to let the Metro Centre and to receive rent due from any present and future tenants of the Metro Centre and to give valid receipts in respect thereof; and
- 12.3. that TUHF will be entitled to charge 10% on any amount collected in terms of 13.2 above;
- 12.4. the amounts collected by TUHF shall be appropriated as follows:
- 12.4.1. to any due and unpaid penalty fee, to the extent applicable;
 - 12.4.2. to any due or unpaid initiation fee, to the extent applicable;
 - 12.4.3. to any due and unpaid interest charges; and
 - 12.4.4. in reduction of the outstanding indebtedness.

- [13] TUHF avers that due to earlier breaches, it issued legal proceedings against the respondents during May 2020 in respect of money judgment for R26 475 404.32. The money judgment action is still to be finalised.
- [14] Following the proceedings referred to above, the respondents in their pleas raised a defence that the first to fourth suretyship agreements concluded by the respective sureties have ceased to be in full force and effect under any applicable law and ceased to constitute valid security. This defence, so avers TUHF, constituted an intention to repudiate the provisions of the loan agreement and the mortgage bond. TUHF also contends that the security breach has also occurred as a result of the breach of the written warranty by the second to fifth respondent suretyship agreements are valid and binding.
- [15] Following the alleged breaches TUHF demanded through its attorneys' written notice on 2 October 2020 that the respondents remedy their breach of the loan agreement and suretyship agreements by retracting their allegation that the suretyship agreements are void, remedying their breach of the warranty and paying the arrear undisputed municipal installments. With respect to the latter, it must be stated that this was also a term of the agreement, that the municipal rates and taxes would be paid and be up to date, especially if the amount is not disputed.
- [16] The respondents replied to the demand through their attorneys and confirmed that payment to the municipality had recently been made and denied a breach of the loan agreement and suretyship agreements.

- [17] The respondents failed to retract that the surety agreement had ceased to be valid and of any force and effect.
- [18] TUHF avers that as a consequence of the respondents breach, it is entitled to collect rentals which would otherwise be owed to the first respondent by any tenants of the Metro Centre in terms of any agreements concluded between the first respondent and its tenants.
- [19] TUHF seeks the intervention of this court to give effect to the cession of rental by the tenants of Metro Centre in terms of the loan agreement and the mortgage bond.
- [20] The first respondent in its defence prays that the proceedings should be stayed because of the fact that at the hearing of this matter, the initial application instituted during May 2020 had not yet been finalised. This is raised as a *lis pendens* defence. The respondents contend that the court should exercise its discretion by staying the present application.
- [21] The respondents also contend that the cession provision in terms of the mortgage bond which permits TUFH to take cession of and to appropriate Metro Centre tenants prior to it being determined that the first respondent is indebted to TUHF is contrary to public policy, unconscionable, unfair, unreasonable and unduly harsh. The first respondent contends furthermore that the cession amounts to an unjustifiable limitation of the first respondent's Constitutional right, *inter alia*, not to have its property deprived in the manner sought by TUHF in terms of the section 25 (1) of the Constitution of the

Republic of South Africa. The respondents also contend that the mortgage bond is ancillary to the loan agreement.

- [22] The respondents further contend that since there are two actions all instituted by TUHF against the respondent, namely, an application instituted in March 2020 and another one instituted in May 2020, the current one instituted in November 2020, TUHF has engaged in the abuse of the process of court as an effort to "out- spend" the respondents in the litigation. The respondents argued that the action should not be continued with. They also argued that the loan agreement has lapsed due to fulfillment of a suspensive condition provided for in clauses 6.1 and 43.3 of the loan agreement.

- [23] Clause 6.1 and 43.3 of the loan agreement provides as follows:

"6.1. Subject to the fulfilment or waiver, as may be , if they Advance Conditions, and/ the Special Conditions, and subject to there being no event of default, the borrows shall, at any time during the drawdown period, be entitled to request an advance against the facility amount by delivering to the lender a drawdown request.

43.3. It is a condition of this loan agreement that the borrowing entities as referred to enclose 43.2 comply with certain conditions;"

ISSUES FOR DETERMINATION

- [24] The respondents also issued a counter- application for the stay of the main application and raised defence is relevant to:

- 24.1. whether the mortgage-bond is ancillary to the loan agreement, and if so, whether the indebtedness of the first respondent in terms of the loan agreement first has to be proven;
- 24.2. whether the matter is list pendants due to the action;
- 24.3. whether clauses 6.1 and 43.3 of the loan agreement provide for suspensive conditions;
- 24.4. whether the application is an abuse of court process; and
- 24.5. whether provisions in the mortgage-bond are contrary to policy.

LEGAL FRAMEWORK AND REASONS

- [25] I now deal with each issue raised in the defence in relation to the legal framework.

The loan agreement vs the mortgage bond

- [26] The respondents contend that the mortgage bond is ancillary to the loan agreement, and that the first respondent's indebtedness to TUHF needs to be proven in terms of the loan agreement.
- [27] The express wording used in the mortgage bond, which was registered as continuing covering security, and an event of default in terms of the mortgage bond would occur if the first respondent " ... *commits a breach of any of the provisions*" in the loan agreement or if the first respondent is at "...*any time in breach of any obligation whatsoever*".
- [28] The approach on how our courts deal with the effect of cession of rights is settled in our law. In *Picardi Hotels Ltd v Thekwini Properties (Pty) Ltd*¹ court considered

¹ 2009 (1) SA 493 (SCA) at para 7

the cession provision in a mortgage bond and held that :

"[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."

- [29] It is therefore settled law that unless otherwise agreed, a cession in *securitate in 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.² In the present case, there is no talk of the rental having been ceded to anyone else other than TUHF and by so doing and provided the cedent being the first respondent has indeed transferred its rights over the rental to TUHF provided that any breach of the loan agreement is established by TUHF.
- [30] It is also settled law that the relevant provisions in the mortgage bond must be construed in accordance with "*... sound commercial principles and good business sense so that it receives a fair and sensible application.*"³
- [31] If any other interpretation of the plain language used in the mortgage bond on cession, such as that the cession can only be enforced if the indebtedness is proven in the pending action, would lead to a conflict with the plain meaning, the court will not give the wording used other than the one intended by the parties.⁴
- [32] The enforcement of TUHF's cession of rental rights is founded by the events of default provided for in clauses 18.1.6 to 18.1. 10 in the loan agreement read with

² See *Bank of Lisbon and South Africa Ltd v The Matser* 1987 (1) SA 276 (A) at 294C; *Standard Genera; Insurance Co Ltd v SA Brake CC* [1995] ZASCA 46; 1995 (3) SA 806 (A) AT 814 I- 815 B

³ See *Bothma- Botha Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) at [10]

⁴ See *Grobler v Oosthuizen* 2009 (5) SA 500 (SCA) at [24]

clause 14.1.2 in the mortgage bond. The parties agreed to these terms at the conclusion of the agreement. The agreement was not conditional on proving the indebtedness of the first respondent to TUHF but on the occurrence of any of the events of default.

- [33] I am of the view that the contention that the mortgage bond is ancillary to the loan agreement is without factual merit. The terms of the loan agreement and mortgage bond were agreed to by the parties when the agreements was concluded. The enforcement of the cession provision was not dependent on default in payment only but breach of any term whatsoever. My reading of the loan agreement and mortgage bond does not reflect what the respondents contend, which is that cession of rental repayment will only be enforced if the indebtedness is first proved. This in my respectful view, is the reason there are various of defaults provisions as well as warranty provisions the breach of which will entitle TUHF to enforce its rights including giving the right to insist that the cession of rental payments by the tenants of the first respondent on the Metro Centre be given effect to.

Abuse of court process

- [34] The respondents contend that TUHF is abusing the court process and its actions are designed to harass the respondents, and as already stated to 'out-spend' the respondents prior to the determination of their legal proceedings. They contend that the present application should be stayed.
- [35] The legal framework on the principles to stay civil proceedings to prevent an abuse of the process of the court is settled. In *Clipsal Australia (Pty) Ltd and Others*⁵ the court held as follows:

⁵ 2010 (2) SA 289 SCA at [17]

"[17] it is clear that the court does have the power to stay civil proceedings in certain circumstances, e.g. to prevent an abuse of the process of the court (see Corderoy v Union Government (Minister of finance) 1918 AD 512 at 517) and if an action is already pending between the same parties on the same cause of action"

[36] In the present case, although the pending action is against the same parties, the cause of action is not the same. The present case deals with the enforcement of cession provisions in the mortgage bond. The pending action deals with non-repayment of the loan advanced to the first respondents in which the second to the fifth respondents stood surety for the due fulfillment of all obligations by the first respondent to TUHF.

[37] It follows that I am not persuaded to exercise discretion in favour of the respondents by staying the proceedings on the enforcement of the rights pertaining to cession of rental payments on the Metro Centre.

[38] I therefore hold the view that the current application does not constitute an abuse of court process.

Pactum Commissorium

[39] The respondents contend that clause 14.2.3 of the mortgage bond is illegal and invalid to the extent that it permits TUHF to appropriate rentals prior to a determination of the first respondent to TUHF.

[40] The submission made by counsel for the respondent is not supported by any evidence, for instance that the loan repayments are up-to-date. For that reason alone, I fail to understand why this court should declare illegality on a term of the

agreement that was agreed to by the parties. It should be remembered that it is not denied that TUHF advanced over R20 million to the first respondent to acquire and refurbish the Metro Centre. If any prejudice is suffered, TUHF is heavily prejudiced because of the financial exposure to the first respondent.

[41] The respondents also contend that cession of the rentals as contained in the mortgage-bond is contrary to public policy and invalid in as much as it amounts to an unlawful *pactum commissorium*. I do not see how the cession provisions in the mortgage bond in this agreement can be equated to *pactum commissorium*. First, the cession provisions do not authorize TUHF to be the owner of the Metro Centre but on the contrary, as agreed to by the parties permits rentals to be ceded and paid to TUHF. The cedent being the first respondent has agreed to divest itself the right to collect rental from the tenants, if it commits any event of default which included stating that the securities provided by it and its sureties cannot be enforced in law because of the alleged failure to meet the requirements of section 45 of the Companies Act. The exercise of the cession rights as agreed does not amount to TUHF becoming the owner of Metro Centre as ownership still remains with the first respondent.

[42] It is also important to restate the legal principles applicable when interpreting the express provisions of the contract, in this case, the cession provision in the mortgage bond. In *Natal Joint Municipal Pension Fund v Endumeni Municipality*⁶ held as follows on the contract interpretation:

"... the present state of the law can be expressed as follows: Interpretation is the process of attributing meaningful to the words used in a document, be it legislation,

⁶ 2012 (4) SA 593 (SCA) at para [18]

some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in light of the document as a whole and the circumstances attendant upon its meaning into existence...Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusiness like results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

- [43] The rules of contract interpretation were also considered in *Diener NO v Minister of Justice and Correctional Services and Others*⁷ where the court held that:

"[51] Given that some ambiguity arises when sections 135(4) and 143(5) of the Companies Act are read together, it is necessary to interpret the sections having regard to their purpose and context."

⁷ 2019 (4) SA 374 (CC) at para 51

- [44] In the present case, the mortgage Bond was registered as continuing covering security and an event of default in terms of the mortgage bond would occur if the first respondent, "... *commits a breach of any provisions*" of the loan agreement or if the first respondent is at "... *anytime in breach of any obligation whatsoever*." The context of the language used is clear. The enforcement of any right that TUHF is not dependent on the determination of a dispute relating to payment. It follows therefore that the rights accorded to TUHF in terms of the cession provision in the mortgage bond are not ambiguous. Consequently, the provisions relating to the enforcement of the cession are not *contra bonos mores*. In fact public policy encourages business to conduct its affairs in any manner as long as it is lawful. Courts cannot be expected to substitute their own terms of agreement to what the parties in the conduct of their business have agreed to.

Lis Pendens

- [45] The respondents contend that the present application is *lis pendens* due to the pending action for the recovery of the loan amount. I have already ruled that this cannot be so because in the pending action proceedings cause of action is default in the loan repayment whereas in this present case, action is the enforcement of the cession of rental from the Metro Centre tenants, which cession has been agreed to by the parties.
- [46] In *Nestle (SA) (Pty) Ltd v Mars Incorporated*⁸ the court considered the principles of *lis alibi pendens* and held as follows:

"[16] The defence of lis alibi pendens shares features in common with the defence of res judicata because they have a common underlying principle which is that

⁸ [2001] 4 All SA 315 (A) at [16] to [17]

there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it the suit must generally be brought to its conclusion before that tribunal and should not be replicated (lis alibi pendens). By the same token the suit will not be permitted to be revived once it has been brought to its proper conclusion (res judicata). The same suit, between the same parties, should be brought only once and finally.

[17] There is room for the application of that principle only where the same dispute, between the same parties, is sought to be placed before the same tribunal (or two tribunals with equal competence to end the dispute authoritatively). In the absence of any of those elements there is no potential for a duplication of actions. In my view none of those elements is present in this case. Indeed, it is difficult to see how they can exist where the matters in issue have been placed before two quite different tribunals (as in this case), the one operating consensually and the other by force of statute, each having its own peculiar functions, powers and authority. For in such a case each tribunal will, by definition, be inquiring into and ruling upon different matters, and neither will be capable of ruling authoritatively on the issue that falls within the competence of the other."

I am unable to exercise the court's discretion to stay the proceedings for reasons already provided.

The validity of the loan agreement

- [47] I have already made reference to both clauses where in this judgement. When consideration is given to the context of both clauses, it is apparent to me that the clauses relate more to the drawdown conditions of the amount of the loan facility to the first respondent. In fact clause 4.3 is more to do with cession of the loan

facility to a third-party without the prior permission of TUHF. I hold the view that an averment by the respondents that the suspensive conditions of the loan agreement were never fulfilled and that led to the lapse of the loan agreement is without factual basis.

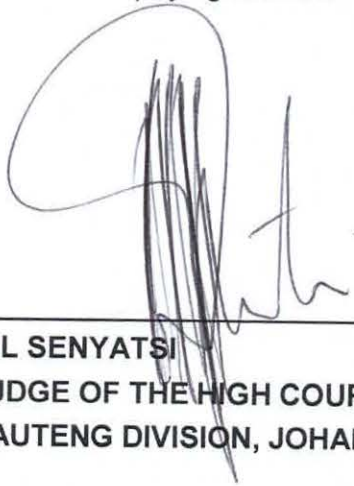
[48] TUHF has in my respectful view, succeeded in proving its case.

ORDER

[49] The following order is made:

1. The Applicant is with immediate effect authorized to take cession of any rental amounts payable by every tenant occupying the immovable property known as Metro Centre ("Metro Centre tenants") to 266 BREE STREET JOHANNESBURG (PTY) LTD ("the First Respondent"), alternatively the Respondents, further alternatively its duly authorized agent, ("the cession");
2. The Respondents sign all documents necessary to facilitate the cession in 1 above, failing which the Sheriff is authorized to sign all documents necessary to give effect to the cession;
3. The Respondents furnish the Applicant, within 15 days of this order, with the names and contact information of the Metro Centre tenants together with: -
 - 3.1. Copies of any written lease agreements concluded between the First Respondent, alternatively the Respondents, further alternatively its duly authorized agent, and the Metro Centre tenants;

- 3.2. Particularity in respect of the terms of any implied and/or oral terms of any lease agreement concluded with the Metro Centre tenants; and
 - 3.3. Particularity and copies of any existing property management mandates for the management of and rental collection at the Metro Centre.
4. The Applicant may take steps necessary for purposes of collecting rental amounts from the Metro Centre tenants; and
 5. The respondents are ordered to pay the costs jointly and severally the one paying the other absolved on the scale as between attorney and client.

A handwritten signature in dark ink, appearing to be 'ML Senyatsi', is written over a horizontal line. The signature is stylized with a large loop on the left and a series of vertical strokes in the center.

ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

DATE APPLICATION HEARD: 27 October 2021

DATE JUDGMENT DELIVERED: 9 September 2022

APPEARANCES

Counsel for the applicant: *Adv A Botha SC*
Adv E Eksteen

Instructed by: *Schindlers Attorneys*

Counsel for the first to sixth respondents: *Adv G Wickins SC*
Adv M De Oliveira

Instructed by: *Gavin Simpson Attorneys*