IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: **5856/2022**

In the matter between:

DEON MARIUS BOTHA N.O. 1st Applicant

RALPH FARREL LUTCHMAN N.O. 2nd Applicant

AGRI-COM COOPERATIVE LTD 3rd Applicant
(Registration number: 2000/0000025/24)
(in Liquidation)

and

LEGO BOERDERY CC 1st Respondent
(Registration number: 2004/057421/23)

LENEL GERHARD OOSTHUIZEN 2nd Respondent

JUDGMENT BY: REINDERS J

HEARD ON: 25 MAY 2023

DELIVERED ON: 4 SEPTEMBER 2023

This judgment was handed down in open court and circulated to the parties' representatives by electronic mail communication on 4 September 2023 at 15h00.

[1] On 14 April 2022 the third applicant, Agri-Com Co-Operative Ltd (in liquidation) [Agri-Com] was placed under final liquidation by this court at the behest of The Land and Agricultural Development Bank of South Africa (Land Bank). In an urgent application heard on 9 February 2023 the first and second applicants, acting in their capacities as the joint liquidators of Agri-Com, obtained on an ex parte basis an interim order in terms whereof it be entitled to perfect various securities granted in favour of Agri-Com by the first respondent, Lego Boerdery CC (Lego Boerdery). The interim relief was granted under Part A of the notice of motion and the *rule nisi* was extended by agreement between the parties. The applicants now move for confirmation of the *rule nisi* as well as the relief claimed under Part B against Lego Boerdery and the second respondent (a member of the first respondent) jointly and severally, the one paying, the other to be absolved. Under part B the applicants claim payment in the amount of R 2 717 854.90 together with interest thereon.

[2] Lego Boerdery and the second respondent (duly authorised to act on behalf of the first respondent) oppose the relief sought by the applicants and pray for discharge of the *rule nisi* and dismissal of the relief sought under Part B. In its answering affidavit the applicants' *locus standi* to perfect the security under the notarial bonds (numbers BN8214/2023; BN8662/2014; BN2906/2016; BN5535/2016) are disputed by the respondents. The contention is firstly that there was an out-and-out cession by Agri-Com to Land Bank of Agri-Com's claim against Lego resulting therein that Agri-Com has no further *locus standi* to claim from Lego Boerdery – put differently the contention being that Land Bank should have enforced the claim herein. The second contention is that there is no underlying causa for perfection of these bonds, as first respondent's indebtedness to Agri-Com has been extinguished and, whereas the security held under the notarial bond is accessory to the existence of the principle debt, the applicants are not entitled to an order for the perfection of security. Moreover, so the opposition goes, based on the aforementioned grounds of opposition a material dispute of facts exists which cannot be resolved on the papers.

[3] That the third applicant and the first respondent entered into five credit agreements from November 2013 to February 2018, is common cause. Four of the five agreements entailed summer production loans, whilst one was a loan for the purchase of lime (the liming loan). The applicants allege that the respondents are indebted to the third applicant (jointly and severally) in the amount as claimed under Part B in respect of these loans and, more in particular, the fifth loan agreement being a reconciliation loan.

[4] During January 2011 Land Bank and Agri-Com entered into a deed of cession (annexed as "DB5" to the founding papers – the deed) which formed the Land Bank's security for monies lent and advanced to Agri-Com. Agri-Com ultimately ceded its book debts to Land Bank, which included the five credit agreements between itself and Lego Boerdery. The nature of this cession and the concomitant consequences flowing therefrom is in dispute between the parties.

[5] The deed defines Agri-Com as "the cedent" and Land Bank as "the cessionary", and the more important clauses for purposes of this judgment are quoted:

> *"1.3 The **Cessionary** requires from the **Cedent** to furnish security to it for the due and punctual:*
>
> *1.3.1 repayment to the **Cessionary** of the aforementioned cash credit accounts (working capital overdraft facilities) or installments*
>
> *…*
>
> *2.2 The **Cedent** hereby cedes to the **Cessionary** in securitatem debiti, all its right, title and interest in all to all amounts which the Debtors may be owing to or in future become owing to the **Cedent**, together with all rights or action which **Cedent** may have or obtain in respect of or against the Debtors (hereinafter jointly referred to as "the Ceded Amounts") as security for the due and punctual compliance by the **Cedent** of all its obligations to the **Cessionary** under indebtedness.*
>
> *2.3 The **Cessionary**, by its signing of this Deed of Cession at the end hereof, accepts the Cession in securitatem debiti, subject to the terms and conditions contained herein.*

*2.4 It is hereby recorded and agreed that, notwithstanding anything to the contrary elsewhere contained in this Deed of Cession, the **Cessionary** shall be entitled, in its sole discretion, at any time during the currency of this Deed of Cession, to elect to convert any one or more of the cessions in securitatem debiti referred to in clause 2.2, into out-and-out security cessions in favour of the Cessionary, in which event:*

*2.4.1 The **Cessionary** shall inform the relevant **Cedent** in writing of its decision to do so:*

*2.4.2 The **Cessionary** shall authorize the relevant **Cedent** to collect all ceded amounts for and on behalf of the **Cessionary** on such conditions as the Cessionary deems appropriate; and*

*2.4.3 The **Cessionary** shall not be entitled to cede its rights or delegate its obligations in terms of this Deed of Cession to any third, other than a successor bank of the **Cessionary**, should the **Cessionary** cease to exist for whatever reason.*

…

*5.1 The **Cedent** hereby undertake and warrants that the **Cedent** has not entered into any agreements restricting or excluding the transferability of the Ceded Amounts;*

…

*5.3 If the **Cedent** has, contrary to the warrant in terms of clause 5.1, already ceded the Ceded Amounts to another party, then this Deed of Cession shall operate as a cession of the **Cedent's** reversionary rights to the **Cessionary**, including all rights of action against the prior **Cessionary**.*

*6. For the duration of this Deed of Cession and until the cessionary notifies the **Cedent** in writing that its authority is revoked, the **Cedent** is authorized to:*

6.1 Collect all monies due or to become due and payable to the cedent under the ceded amount, in its own name and to issue valid receipt thereof;

6.2 Take, either itself or through the nominees or agents, all the requisite steps to collect the ceded amounts when they become due and payable from the debtors, including the institution of appropriate legal proceedings against those debtors, in any court of law which has jurisdiction."

…

*7.2 The **Cessionary** is entitled at any time and irrespective of whether the **Cedent** is in breach with any provisions of the Deed of Cession, to revoke the authority given to the **Cedent** in terms of clause 6 above, pursuant whereto the **Cessionary** will have the irrevocable authority to, in rem suam perform the actions in terms of clause 6 above."*

[6] The respondents contend the true nature and implementation of the cession to be inconsistent with its ostensible form and to be, on a purposeful and contextual interpretation thereof, not a true cession in *securitatem debiti*, but rather an out-and-out cession. Relying on ***Engen Petroleum Ltd v Flotank Transport (Pty) Ltd*** (*876/20) [2022] ZASCA 98 (21 June 2022)* for the distinction between the two aforementioned cessions, it was submitted by counsel for the respondents that the cession catered for in the deed, constitutes an act of transfer rendering the claim which is ceded to not fall within the insolvent estate.

[7] Counsel for applicants placed specific reliance on clause 6 pertaining to the collection of ceded amounts in terms whereof the parties agreed that Agri-Com is authorized to collect. It was submitted that, as the liquidators are therefore entitled to recover and administer the claims of the third applicant when it was placed in liquidation, they have the necessary *locus standi* to bring the application.

[8] In ***Engen*** *supra* Savage AJA writing on behalf of the full bench held as follow (referencing in accordance with the judgment):

> " [12] …The true character of a cession *in securitatem debiti* depends on the intention of the parties,[1] with the wording of the cession being the appropriate point of departure to determine such intention.[2] In

[1] *Grobler v Oosthuizen* [2009] ZASCA 51; 2009 (5) SA 500 (SCA) (*Grobler*) para 11; *Thorogood v Hoare* 1930 EDL 354; *Fisher v Schlemmer* 1962 4 SA 651 (T); *Nahrungsmittel GmbH v Otto* [1992] ZASCA 228; 1993 1 SA 639 (A); *African Consolidated Agencies (Pty) Ltd v Siemens Nixdorf Information Systems (Pty) Ltd* 1992 (2) SA 739 (C) at 744.
[2] *Grobler* para 11.

Grobler v Oosthuizen (*Grobler*)[3] this Court, recognised the existence of opposing theories in our law regarding cessions *in securitatem debiti*, namely the 'pledge theory' and the 'outright cession theory'. However, it found it unnecessary to resolve the debate between these theories one way or another.[4]

[13] On 'the pledge theory' the principal debt is 'pledged' to the cessionary on the basis that the cedent retains 'bare dominium' or a 'reversionary interest' in the claim against the principal debtor.[5] On such construction, only the right to enforce the right upon non-payment is ceded.[6] Since a cession ordinarily entails a transfer of a right, it is the retention by the cedent of the very substance of the right around which the doctrinal debate regarding the pledge theory has centred. This Court, in *Grobler*, recognised however that such debate had been resolved, primarily for pragmatic reasons, with the pledge theory accepted as the default position.[7] On this basis a cession *in securitatem debiti* is now taken to resemble a pledge, unless the intention of the parties is different.[8]

[14] On the alternative theory –

'. . . a cession *in securitatem debiti* is in effect an outright or out-and-out cession on which an undertaking or *pactum fiduciae* is superimposed that the cessionary will re-cede the principal debt to the cedent on satisfaction of the secured debt. In consequence, the ceded right in all its aspects is vested in the cessionary. After the cession *in securitatem debiti* the cedent has no direct interest in the principal debt and is left only with a personal right against the cessionary, by

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[3] *Grobler* paras 11-15.
[4] *Grobler* para 15. *National Bank of South Africa Ltd v Cohen's Trustee* 1911 AD 235.
[5] *Grobler* para 15 with reference to *Picardi Hotels Ltd v Thekweni Properties (Pty) Ltd* [2008] ZASCA 128; 2009 (1) SA 493 (SCA) para 3 and other authorities.
[6] Ibid para 16 with reference to *Land- en Landboubank van Suid-Afrika v Die Meester* 1991 (2) SA 761 (A) 771C-G; *Development Bank of Southern Africa Ltd v Van Rensburg* 2002 (5) SA 425 (SCA) para 50.
[7] *Grobler* para 17 with reference to *Leyds N O v Noord-Westelike Koöperatiewe Landboumaatskappy Bpk* 1985 (2) SA 769 (A) at 780E-G; *Bank of Lisbon and South Africa Ltd v The Master and Others* 1987 (1) SA 276 (A) at 291H-294H; *Incledon (Welkom) (Pty) Ltd v Qwa Qwa Development Corporation Ltd* [1990] ZASCA 85; 1990 (4) SA 798 (A) at 804F-J; *Millman N O v Twiggs* [1995] ZASCA 62; 1995 (3) SA 674 (A) at 676H; *Development Bank of Southern Africa Ltd v Van Rensburg* fn 6 para 50.
[8] *Grobler* para 17.

virtue of the *pactum fiduciae,* to claim re-cession after the secured debt has been discharged.'[9]

[15] Although the pledge construction has been recognised as the default form of security cession, there is no support for a conclusion that it has subsumed the field of security cessions.[10] This is so since our law favours a recognition of both constructions of security cession.[11] 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.[12] "

[9] I have carefully considered the submissions and relevant clauses and find myself in agreement with the contentions by the applicants. Ostensibly the same view was taken by my learned sister Van Rhyn,J on granting the provisional order. Measured against the principles enunciated in ***Engen supra*** I am of the view that the whole tenure of the cession agreement points towards a cession *in securitatem debiti.* In my view clause 6 makes it abundantly clear that the cession is not an out-and-out cession. I therefore find that the applicants have the necessary *locus standi* in respect of the cession point that was taken.[13]

[10] In proving the respondents' indebtedness in the amount of R 2 717 854,90 the applicants relied on five loan agreements and a certificate of balance. The terms of the agreements may be summarised as follows:

10.1 The first agreement was a summer production credit agreement and term loan agreement entered into between the parties on or about 14 November 2013.

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[9] *Grobler* para 17.
[10] 3 *Lawsa* 3 ed para 180.
[11] 2 *Lawsa* 2 ed para 53; Van der Merwe *Kontraktereg* 4th ed (2012) at 427.
[12] *Grobler* paras 11-14; *Worman v Hughes and Others* 1948 (3) SA 495 (A) at 505; *Byron v Duke Inc* [2002] ZASCA 58; 2002 (5) SA 483 (SCA). This was also applied by this Court in *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* [2011] ZASCA 22; 2011 (4) SA 276 (SCA) para 15.
[13] See *Van Zyl NO v Good Clothing CC* [1997] JOL 18 SE for the liquidators' entitlement to administer and claim same.

A quotation was incorporated into the said agreement in terms of which the calculation of the amount of the loan advanced and financing costs incurred over the term of the agreement were set. The agreement was for a credit facility made available to the first respondent totaling R815 987.25 fully repayable on or before 31 August 2014. The parties agreed that any outstanding amount due under the agreement would form part of the principal debt owed to the third applicant and the security required was a general and special notariaI bond to the amount of R750 000.00.

10.2 The second agreement was a summer production credit agreement and term loan agreement entered into between the parties on or about 11 November 2014. It caused the reconciliation of previous credit agreements and facilities and extended further credit facilities to the amount of R1 464 571.34. A quotation was incorporated into the said agreement in terms of which the calculation of the amount of the loan advanced and the financing costs incurred over the term of the agreement was set out and forms the written part of the agreement which was accepted by the first respondent. The credit facility was made available to the first respondent totaling R1 464 571.34 and which was fully repayable on or before 31 August 2015. The previous securities already provided was a general and special notarial bond in the amount of R750 000.00 and additional security of a general and special notarial bond in the amount of R1 000 000.00.

10.3 The third agreement was a credit agreement advanced to the first respondent for liming and entered into between the parties on 11 March 2016. It caused additional credit facilities to be added to the already extended credit facilities by an additional amount of R370 567.55. For as long as the summer production facility remained outstanding, the third agreement were repayable within 3 years in equal instalments. The previous security already provided being a general and notarial bond in the amount of R750 000.00 and a general and special notarial bond in amount of R1 000 000.00, were required.

10.4 The fourth agreement was a summer production credit agreement and term loan agreement entered into between the parties on or about 10 October 2016. It caused the reconciliation of previous credit agreements and facilities and extended further credit facilities to the amount of R3 255 591.00. The agreement was for a credit facility made available to the first respondent totaling R3 255 591.00 fully repayable on or before 31 August 2017. Security entailed the previous securities already provided and the additional security of a notarial bond in the amount of R580 000.00 over a MC Cormick 135 (2012) tractor, and a notarial bond in the amount of R550 000.00 over a JD1750 planter. The general and special notarial bond for an amount of R1 130 000.00 and an additional amount of R226 000.00 was duly registered.

10.5 The fifth agreement (annexed to the founding affidavit as annexure “DB20”) was a summer production credit agreement and term loan agreement entered into between the parties on 15 February 2018. The fifth agreement caused the reconciliation of previous credit agreements and facilities and extended further credit facilities to the amount of R2 084 188.34. A quotation was incorporated into the said agreement in terms of which the calculation of the amount of the loan advanced and financing costs occurred over the term of the agreement were set. The agreement was for a credit facility made available to the first respondent totaling the amount of R2 084 188.34, fully repayable on or before 31 August 2018. As security the previous securities already provided and the additional security of a notarial bond.

10.6 It is common cause that the second respondent bound himself as surety and co-principal debtor, jointly and severally with the first respondent, *in solidum* for the due performance by the first respondent of its obligations under the agreement, to the third applicant.

[11] Relying ostensibly on clause 16.4 of the fifth agreement a certificate of balance was issued by the liquidators on 8 November 2022. In terms thereof

they say that they have personal knowledge of the amount of debt and the outstanding balance on 27 October 2021 to be R 2 717 854.90.

[12] The respondents served a notice in terms of Uniform Rule 35(12) on the liquidators. It is the same liquidators who attested to the certificate of balance on 8 November 2022. In the Rule 35(12) notice, served on 29 March 2023, the respondents requested copies of all statements of account held with Agri-Com for the duration of the contractual relationship between Lego Boerdery and Agri-Com. In response applicants did not provide any such statements of account. The respondents in filing their opposing affidavit attached six statements of account (OA 1-6) indicating balances owed by the respondents to the applicants as at 28 February 2018. The respondents aver that from February 2018 the then Agri-Com failed to supply any monthly account statements to first respondents. Respondents aver that during or about May and June 2018 first respondent delivered to Agri-Com the yield of first respondents' sugar bean harvest and that Agri-Com were to sell same at the market related price and allocate the proceeds of such sale against first respondent's outstanding indebtedness. The total value of the sugar beans so delivered amounted to R 2 389 904.00. It is further averred that first respondent also delivered soya beans and maize to Agri-Com's silos in Harrismith and that payment thereof was made by the purchasers (Nu-Pro) directly to Agri-Com in the amount of R 379 838.38. First respondent avers that these amounts were not reflected in accounts and aver that first respondent's indebtedness to Agri-Com was extinguished. It is common cause that first respondent did not incur further indebtedness towards Agr-Com after 28 February 2018.

[13] In their replying affidavit the applicants contend that as a result of the answering affidavit the liquidators had to inspect "further records" of third applicant pertaining to its dealings with the respondents – such documents comprising in excess of three lever arch files. The liquidators aver that a detailed analysis of the documentation by the respondents should lead to the conclusion that these statements cannot refer to the debt owed in respect of

the summer production loan as that loan was only entered into between the parties on 15 February 2018 and that the respondents couldn't have performed by 28 February 2018. They state, amongst others, that the sugar beans allegedly delivered "can never be said to be delivered in payment" of the debt owed on the summer production loan "as it has already been delivered in May 2018." Belatedly in its replying affidavit the applicants annexed a statement (annexed as "RA2") indicating merely the Nu-Pro amount to have ostensibly been deducted from the respondents' indebtedness.

[14] What the applicants move for is final relief in the form of a judgment in the claimed amount. They appear to have been appointed as liquidators only after 27 October 2021. As such they personally did not have any personal dealings with the respondents in 2018. The certificate issued by them was therefore based on the documentation that they ostensibly have acquired as liquidators and the certificate therefore is an aid to prima facie prove the respondents' indebtedness. Should I find that the respondents' version unsettles the certificate or has the effect that the amount as stated in the certificate becomes uncertain, the applicants cannot succeed in their quest for final relief.

[15] It is now settled law that when in motion proceedings a dispute of fact arises on the affidavits, a final order can be granted only if the facts averred by the applicant, which have been admitted by the respondent, together with the facts alleged by the latter justify such an order (known as the ***Plascon-Evans*** rule[14]). In ***National Director of Public Prosecutions v Zuma***[15] these principles were restated by the Supreme Court of Appeal, with the addition that the position may be different in the event where the respondent's version consist of bald or unworthy denials, raises fictitious disputes of facts, is palpably implausible, farfetched or clearly untenable that the court can reject such version merely on the papers.

[14] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty)Ltd* 1984(3)SA 623 (A)
[15] 2009 (2) SA 277(SCA).

[16] I have come to the conclusion that I cannot reject the respondents' version as to the alleged payments made by first respondent as being so far-fetched or untenable that I can reject it outright as being false. On the contrary, it would seem in all the circumstances whether there might be good merit in those allegations. In this respect I find the answers by the applicants in response to the Rule 35(12) notices, to be significant. One gets the impression from the allegations that the applicants simply do not have the full statements of accounts and supporting papers available. I am in any event of the view that the disputes raised cannot be resolved on the papers and that the application cannot succeed on that score as well.

[16] I therefore make the following order.

16.1 The extended *rule nisi* dated 9 February 2023 is uplifted.

16.2 The application is dismissed with costs.

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C REINDERS, J

On behalf of the applicants: Adv A van der Merwe

Instructed by:

Leahy Attorneys Inc.

c/o McIntyre Van der Post Inc.

BLOEMFONTEIN

On behalf of the respondents:	Adv JMC Johnson
	Instructed by:
	EG Cooper Majiedt Inc.
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