

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

- (1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES:
NO
(3) REVISED:

Signature: _____ Date:

14/12/2021

CASE NO: 33476/2019

In the matter between:

EXTRA DIMENSIONS 44 (PTY) LTD

Plaintiff

And

DEVCOR INVESTMENTS (PTY) LTD

First Defendant

RODNEY CARL GOLDEN

Second Defendant

JUDGMENT

NICHOLS AJ

Introduction

[1] This is an action in which the plaintiff, Extra Dimensions 44 (Pty) Ltd, seeks payment of the sum of R441 137.51, together with interest and costs, from Devcor Investments (Pty) Ltd and Mr. Rodney Carl Golden as the first and second defendants, jointly and severally. For ease of reference, I will refer to the parties as the plaintiff and the first and second defendants respectively.

[2] The plaintiff's claim arises from a written lease agreement concluded between the plaintiff and the first defendant. The second defendant is cited in his capacity as surety and co-principal debtor with the first defendant. The amount claimed represents holding over damages for the period April to September 2019 following on from the cancellation of the written lease agreement by the plaintiff.

[3] At a special pre-trial hearing convened on 7 July 2021, the parties agreed to approach this court in order to seek a separation of issues in terms Rule 33 (4) and to request that the defendants' pleaded defence that the plaintiff lacked *locus standi* in these proceedings be heard separately from the merits of the action and be argued as a point of law before me. I granted the application in terms of Rule 33(4).

[4] The parties further agreed that for the purpose of the argument before me, the facts as pleaded in the defendants' amended plea and the plaintiff's replication may be considered as common cause insofar as they relate to the issue of the plaintiff's *locus standi*.

The Issue

[5] The issue for determination is the legal conclusions that flow from the common cause facts, namely whether the re-cession by Nedbank Ltd (Nedbank) re-vested the plaintiff with *locus standi* in this action retrospectively.

The common cause facts as pleaded

[6] It is common cause that the plaintiff instituted action against the first defendant on 30 September 2019 and the second defendant on 5 October 2019 by service of summons. The plaintiff ceded its rights to the written lease agreement to Nedbank in terms of a covering Mortgage Bond which was registered on 13 November 2015.

[7] The defendants delivered an amended plea on 21 July 2020 in which they disputed the plaintiff's *locus standi* to institute this action, averring that the plaintiff had become divested of its rights in consequence of its cession *in securitatem debiti* to Nedbank.

[8] In response, the plaintiff delivered a replication to the amended plea on 6 August 2020. It denied that it lacked the necessary *locus standi* to institute and continue the action. The plaintiff pleaded, inter alia, the conclusion of a written re-cession agreement with Nedbank on 28 July 2020. In terms of the re-cession agreement, Nedbank re-ceded to the plaintiff all rights in respect of the written lease agreement with effect from the date

on which the claim giving rise to the action against the first defendant arose. The plaintiff accepted the cession of the ceded claims on and subject to the terms and conditions of the re-cession agreement. A copy of the re-cession agreement was annexed to the replication.

Application of law

[9] It is settled law that a cession *in securitatem debiti*, such as the cession contained in the bond concluded between the plaintiff and Nedbank, deprives the cedent of the right to recover the ceded debt, with the cedent retaining only the bare dominion or a reversionary interest in the ceded debt.¹

[10] In circumstances where a cedent incorrectly institutes proceedings in its name, those proceedings would not necessarily be a nullity. This defect in procedure may be remedied by substituting the correct person as plaintiff.² It is now also well established that a plaintiff, in such circumstances, may also remedy this defect by taking re-cession of the claims in question from the cessionary.³

[11] The view expressed by Boruchowitz AJA in *Picardi Hotels Ltd v Thekwini Properties (Pty) Ltd*,⁴ is apposite in the circumstances of this matter and bears repetition:

'I am of the view therefore that an effective and unconditional transfer of rights occurred when the cession in securitatem debiti was executed. The consequence is that the respondent was divested of the power to sue the appellant in respect of the unpaid rentals. In order to sue for the recovery of the ceded debts the respondent should have taken re-cession of them from the bank'⁵ (my emphasis)

[12] It is now trite that a plaintiff is allowed to depart from the general rule that requires a cause of action to exist at the time of the institution of the action in suitable cases, where

¹ *Picardi Hotels Ltd v Thekwini Properties (Pty) Ltd* (680/07) [2008] ZASCA 128; 2009 (1) SA 493 (SCA) para 3.

² *Sentrakook Hanhelaars Bpk v* 544 I-J, 542 B-C.

³ *Picardi Hotels* at para 3; *Pangbourne Properties Ltd and Another v Your Life (Pty) Ltd and Another* (2010/17427) [2013] ZAGPJHC 230; [2013] 4 ALL SA 719 (GSJ) (3 September 2013) para 35; *Bedford Square Properties (Pty) Ltd v Pakon Restuarants (Pty) Ltd t/a Ciao Baby Cucina and another* [2014] JOL 32409 (GJ) para 23; *Zeta Property Holdings (Pty) Ltd v Lefatshe Technologies (Pty) Ltd* 2013 (6) SA 630 (GSJ) para 14.

⁴ (680/07) [2008] ZASCA 128; 2009 (1) SA 493 (SCA).

⁵ *Picardi Hotels* at para 14.

exceptional circumstances and common sense permit of such departure.⁶ As stated by Lamont J in *Pangbourne Properties Ltd and Another v Your Life (Pty) Ltd and Another* ⁷:

*'All the authorities support a decision in exceptional and unusual circumstances to allow the amendment to permit a plaintiff who at the time of instituting action did not have a cause of action to proceed to judgment if the rights vest in him prior to judgment. It is suggested that there be a re-consideration of the approach to avoid formalism and prejudice to a plaintiff subject to none being suffered by the defendant.'*⁸

[13] In *Pangbourne*, the court considered the fact that the claims had been re-ceded to the second plaintiff with effect from a date prior to the institution of action to be a special and unusual circumstance and as such, the only prejudice to the second defendant was that a claim which always vested in someone was being allowed to proceed.⁹ The court reasoned that this approach did not detract from the general approach, which requires a cause of action to subsist at the time of the issue of the summons. In the absence of special circumstances the plaintiff will not be allowed to establish a cause of action which arose later.¹⁰

[14] The court exercised its discretion in favour of allowing the second plaintiff to proceed to seek judgment against the second defendant, notwithstanding the fact that at the time of the institution of the action the retrospective re-cession did not exist.¹¹ Additional factors, which the court found to be persuasive in arriving at its decision, were the following:¹²

- (a) The second defendant suffered no prejudice.
- (b) The second defendant was indebted to someone at the time of the institution of the action although it was not the second plaintiff. The existence of the cession was not disclosed to the defendants and they must have believed that the creditor was the second plaintiff not the banker.

⁶ *Barclays Bank International Ltd v African Diamond Exporters (Pty) Ltd* 1976(1) SA 93 (W) 96G- 97H; *Philotex (Pty) Ltd and Others v Snyman and Others* 1994 (2) SA 710 (T) at 715; *Marigold Ice Cream Co (Pty) Ltd v National Co-Operative Dairies Ltd* 1997 (2) SA 671 (W) 677 H-J;

⁷ *Pangbourne Properties Ltd and Another v Your Life (Pty) Ltd and Another* (2010/17427) [2013] ZAGPJHC 230; [2013] 4 ALL SA 719 (GSJ) (3 September 2013) para 34.

⁸ *Pangbourne* at para 34.

⁹ *Pangbourne* at para 36.

¹⁰ *Pangbourne* at para 35.

¹¹ *Pangbourne* at para 37.

¹² *Pangbourne* at para 37.

(c) The retrospective recession by a fiction vests the claim in the hands of the second plaintiff from a time prior to the second plaintiff joining the action.

(d) It is counterproductive, highly technical and a waste of costs to non-suit the second plaintiff at the present time in these circumstances.

[15] The submission was advanced on behalf of the defendants that the re-cession agreement is not an outright re-cession because of the provisions of clause 5, which provides that:

‘5.1 This agreement shall remain in force until the earliest of:

5.1.1 the Lessor receiving payment in full of all amounts owed to the Lessor by the Defaulting Tenant, whether pursuant to a judgment or not;

5.1.2 the Lessor’s legal proceedings instituted against the Defaulting Tenant in respect of the Ceded Claims being dismissed by a judgment in favour of the Defaulting Tenant against the Lessor;

5.1.3 the Defaulting Tenant no longer being in breach of its contractual obligations to the Lessor in terms of its lease with the Lessor; or

5.1.4 the occurrence of an event of default under the Loan Agreement.

5.2 The right, title and interest in and to the Ceded Claims shall automatically be deemed to have been re-ceded and to revert to Nedbank on the occurrence of the first of the events stipulated in 5.1 above and Nedbank hereby accepts such cession.’

[16] It was argued that once any of the events referred to in clause 5 occur, the plaintiff would automatically lose the rights afforded to it in terms of the re-cession agreement and therefore the re-cession is not an outright re-cession.

[17] It was also argued that the defendants should be afforded an opportunity to properly plead to this re-cession and they can only do so if the re-cession is pleaded in the particulars of claim. The defendants’ contended that the plaintiff is not entitled to raise the fact of a re-cession of the claims in a replication as opposed to an amendment of its particulars of claim. They contended that a defect in *locus standi* could only be cured by amendment to the particulars of claim and not by way of replication.

[18] In support of the argument that the plaintiff is not entitled to introduce a re-cession in a replication, the defendants rely on *Sambit Holdings (Pty) Ltd v Marais and Others*.¹³ This matter is distinguishable in a number of respects and reliance upon it is misplaced. Most notably the court in *Sambit Holdings* was called upon to exercise a discretion whether to allow an amendment in terms of Rule 28 that would have the effect of vesting the plaintiff with *locus standi* in the action retrospectively. The plaintiff in that matter also did not attach a copy of the re-cession agreement to the replication.

[19] In this case the plaintiff's replication was delivered in response to the defendants' amended plea that contested its *locus standi* because of the cession. A copy of the re-cession agreement was attached to the replication as an annexure. The defendants did not object to the delivery of the replication, nor did they reserve their rights to challenge any aspect of the delivery of the replication.

[20] In the matter of *Bedford Square Properties (Pty) Limited v Pakon Restuarants (Pty) Ltd t/a Ciao Baby Cucina and Another*¹⁴, the re-cession agreement which was considered by the court contained an identically worded clause 5. These application proceedings related to a claim for damages consisting of arrear rental and holding over damages. After close of pleadings, and on the eve of the hearing of the matter, the respondents filed a supplementary affidavit in which they contended that the applicant had divested itself of the right to sue because of a cession in favour of the bank that was recorded in the mortgage bond registered over the leased premises. In response to this supplementary affidavit, the applicant filed an affidavit to which it attached a re-cession agreement concluded between it and the bank.

[21] The court noted that the re-cession agreement had been concluded after the application had been launched¹⁵. Relying on the judgment of *Pangbourne*, Opperman AJ found that the applicants were allowed to deviate from the general approach that a cause of action should exist at the time of the institution of the action in exceptional and unusual circumstances.¹⁶ The court held that the re-cession had the effect of curing the absence of a cause of action from prior to the launching of the application.¹⁷ The fact of the re-cession was raised in the affidavit filed in response to the respondent's supplementary affidavit,

¹³ (90194/15) [2019] ZAGPPHC 1086 (9 December 2019).

¹⁴ (2013/27964) [2014] ZAGP JHC 180 (15 July 2014).

¹⁵ *Bedford Square* at para 19.

¹⁶ *Bedford Square* at para 21.

¹⁷ *Bedford Square* para 23.

which was filed out of time. The court had no issue with the manner in which the re-cession had been raised, the overriding consideration appears to be that the fact of the re-cession was raised in direct response to the challenge raised to the applicant's *locus standi*. The court did take issue with the manner in which the respondent's challenge to the applicant's *locus standi* was raised but for practical and pragmatic considerations, it allowed the respondent's supplementary affidavit.

[22] In relation to the identically worded clause 5, the respondents in the *Bedford Square* matter argued that what was 'receded was simply a temporary right and that the recession was thus ineffective.'¹⁸ In rejecting this argument, Opperman AJ held that what was ceded was contained in clause 2 of the re-cession agreement, which provides in addition that it will remain in force until the earliest of one of the events stipulated in clause 5.1.¹⁹ Similarly, I likewise have no hesitation in rejecting the defendants argument that the re-cession agreement is not an outright cession and that it is subject to clause 5. Likewise, clause 2 of the re-cession agreement in this matter sets out what is ceded, which will remain in force until the earliest of one of the events stipulated in clause 5.1.

[23] In the SCA judgment of *Aussenkehr Farms (Pty) Ltd v Trio Transport CC*,²⁰ the dispute regarding the plaintiff's *locus standi* was raised in a special plea which was delivered after the plaintiff's evidence had been led at trial. The defence raised in the special plea contested the plaintiff's *locus standi* at the time of the issue of the summons on the basis that it had ceded its rights against its debtors *in securitatem debiti* to the bank. The plaintiff responded to the defendant's special plea by delivering a replication in which it, inter alia, admitted the fact of the cession and a divesting of its rights to sue in consequence of such cession; averring that the bank had cancelled the cession and as a result all its former rights, including its claims against the defendant, had re-vested in it; and in the alternative, a re-cession agreement was pleaded.

[24] The *Aussenkehr* case is authority for the proposition that a right to claim from the defendant becomes re-vested in the plaintiff when a cession *in securitatem debiti* is terminated.²¹ In *Zeta Property Holdings (Pty) Ltd v Lefatshe Technologies (Pty) Ltd*,²² the court was of the view that there is no difference in principle between an automatic re-

¹⁸ *Bedford Square* para 26.

¹⁹ *Bedford Square* para 27.

²⁰ (499/2000) [2002] ZASCA 28; [2002] 3 ALL SA 309 (A) (28 March 2002).

²¹ *Aussenkehr* at para 28.

²² 2013 (6) SA 630 (GSJ).

cession after the institution of action and an express agreement of re-cession. In both cases, the plaintiff is re-vested with the right to sue and any defects in the plaintiff's cause of action, which may have existed at the time of the service of the summons, have been cured. If a defendant fails to object to a plaintiff's replication, in which a subsequent re-cession agreement is pleaded purporting to re-vest the plaintiff with the rights necessary to secure its *locus standi*, that defendant surrenders its right to contend that, at the time of the institution of the claim, the cause of action had been imperfect.²³

[25] There is no merit in the respondent's argument that the plaintiff is not entitled to raise the fact of a re-cession agreement by way of a replication and further that the plaintiff is obliged to do so by an amendment of the particulars of claim. The authorities cited in this judgment reflect the various stages during the proceedings when a defendant or respondent may elect to raise the defence that a plaintiff or applicant lacks *locus standi* because of a cession *in securitatem debiti*. It is at that stage, that the plaintiff or applicant must then squarely and directly address this challenge and in action proceedings, it may do so by either amending its particulars of claim or filing a replication. Neither election, in action proceedings, is expressly prohibited and the defendants contentions to this effect are rejected. When considering the prescriptive period, in *Aussenkehr* Lewis AJA held:

'In the circumstances I consider that the right to claim payment from the defendant became vested again in the plaintiff when the cession was terminated on 4 June 1997. And when the replication to the new plea (in effect embodying the plaintiff's amended claim) was filed by the plaintiff in June 1999, the prescriptive period had not yet run its course...'²⁴ (my emphasis)

Conclusion and Order

[26] In the premises, I align myself with the view that common sense and the practical administration of justice require me to reject the defendants' defence regarding the plaintiff's *locus standi*.²⁵ I am also of the view that the re-cession with effect from a date prior to the institution of action constitutes a special and unusual circumstance justifying a deviation from the general rule that a cause of action should exist at the time of the institution of the action. Issues of prejudice like prescription do not arise and have not been contended for by the defendants'.

²³ *Zeta Property* at paras 15 – 16.

²⁴ *Aussenkehr* para 28.

²⁵ *Marigold* at 676 G-H.

[27] In line with the established principles, I am of the view that the effect of the recession agreement was to re-vest the plaintiff with *locus standi* in the action retrospectively. It is relevant that the defendants did not object to or oppose the replication and applying the *Zeta Property* ruling, the defendants' likewise cannot be allowed to complain that the plaintiff's cause of action was imperfect at the time of institution of the action.

[28] The practical effect of the defendants' defence being successful is that the plaintiff will simply institute action afresh. This would unnecessarily increase the cost of litigation for the parties, particularly in the circumstances of this matter where the plaintiff is armed with a valid recession agreement. As in *Pangbourne*, it would likewise be counterproductive, highly technical and a waste of costs to non-suit the plaintiff on the facts of this matter.

[29] In so far as I am also obliged to exercise a discretion in deciding whether or not to allow the plaintiff to proceed as plaintiff in the action, I exercise same in favour of the plaintiff.²⁶ The plaintiff is entitled to proceed further with the litigation in this matter, notwithstanding the fact that the retrospective re-cession did not exist at the time of the institution of this action.

[30] The question of law which I have been asked to determine is not novel. This issue has been traversed by various courts including this division. The facts of this matter do not require a deviation from the established principles for the reasons that have been provided. In relation to costs, there is no reason for me to deviate from the usual order that would follow when an application is dismissed.

[31] In the circumstances I make the following order:

- (a) The defendants' defence of lack of *locus standi* is dismissed.
- (b) The defendants are ordered to pay the costs of the opposed argument.

²⁶ *Du Toit v Vermeulen* 1972 (3) SA 848 (A) at 857A.

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T NICHOLSACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' representatives via email, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 14 December 2021.

HEARD ON: 19 July 2021

JUDGMENT DATE: 14 December 2021

FOR THE PLAINTIFF: Advocate E Fraser

INSTRUCTED BY: Wright Rose Innes Inc.

FOR THE DEFENDANTS': Advocate E Coleman

INSTRUCTED BY: J.J. Badenhorst & Associates Attorneys Inc.