IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 6105/2013

DATE: 5 AUGUST 2013

In the matter between:

COMBINED DEVELOPERS Applicant

and

ARUN HOLDINGS & 2 OTHERS Respondent

J U D G M E N T

DAVIS, J:

INTRODUCTION

In this case the applicant contends that the first respondent committed an 'event of default' as set out in a written loan agreement, the provisions of which show that the first respondent borrowed money from the applicant. Applicant contends that, in terms of an acceleration clause, all amounts owing by applicant became due and payable to first respondent owing to respondent's default. This also triggered applicant's right to execute on the security that the first respondent provided in terms of a cession *in securitatm debiti* of the firstrespondent's shares in second and third respondent. Applicant therefore seeks relief in enforcing not only the terms of the loan agreement but also its rights in terms of this cession *in securitatm debiti*. First respondent denies that any act which it might have committed constitutes an event of default and that the cession is valid and can be justifiably invoked.

EVENT OF DEFAULT

I turn to deal firstly with the question of the meaning of an 'event of default' and whether it was committed by first respondent. In terms of clause 4.1 of the loan agreement, the monthly repayment instalments were due on the last day of each calendar year. In terms of clauses 4.3.3 and 4.3.4 payment was to be made in cash, by cheque or per electronic transfer before 15h00 on the due date. As indicated in the

introduction to the judgment, applicant avers that the first respondent committed an 'event of default' as contemplated in clause 7.2 which provides thus:

"Events of default if ...

7.2 The borrower fails to pay to the lender any amount including any interest payment when due in terms of this agreement and fails to pay the amount together with *mora* interest at the floating interest rate to the lender within a period three (3) business days after receipt of deemed or deemed receipt of written demand from the lender requiring the borrower to pay the amount to the lender; or ... then in event of default shall be deemed to have occurred and the lender shall be entitled (but not obliged) in addition to and without prejudice to any other right or remedy which the lender may have in terms of this agreement or at law, forthwith and on written notice to the borrower to claim and recover from the borrower all amounts owing under this agreement (including the balance of the capital amount not repaid and all interest owing and not paid) which shall become immediately due and payable upon despatch by the lender of the aforesaid notice."

On the papers, it is common cause that an instalment of R42 133.15 was due and payable on the 31st March 2003 and, further, that the applicant submitted a statement to first respondent reflecting this amount and its calculation on the 28th March 2003. It is also common cause that the first respondent failed to pay the instalment on the due date. On the 3rd April 2013 applicant sent an email to the first respondent stating:

> "Sien asb hieronder en aangeheg ons het nog nie betaling ontvang nie. Sal julle dit asb laat regstel of indien betaling reeds gemaak is 'n bewys van betaling laat aanstuur?"

Suffice to say at this stage of the judgment that it is applicant's case that this email constituted a demand as contemplated by clause 7.2 of the agreement.

It is further common cause that the first respondent paid the amount of R42 133.15 on 3 April 2013 but *mora* interest had not been paid at the same time.

Applicant therefore contends that an event of default in terms of 7.2 has occurred which entitled the applicant on written notice:

"To claim and recover ... all amounts owing under this agreement (including the balance of the capital amount not repaid and all interest owing and not paid) which shall become immediately due and payable upon despatch ... of the aforesaid notice."

The applicant therefore despatched a notice by way of a letter of the 15th April 2013 setting out the events and claiming an amount of R7 665 040.14 together with interest.

Respondents contend that the email of the 3rd April 2013 did not constitute a demand as contemplated in clause and accordingly have resisted applicant's claim.

Mr Joubert, on behalf of the applicant, submitted that, notwithstanding the informal and polite wording of the email of the 3rd April 2013, that email constituted a valid letter of demand and it required the first respondent to pay the full amount which was due to the applicant. In support of his argument that an event of default falling within the provisions of clause 7.2 had occurred, which, in turn, justified the cause of action taken by the applicant Mr Joubert heavily on a decision of Chatrooghoon v Desai and Others 1951(4) SA 122 (N).

The importance attached by Mr Joubert to this case necessitates a careful examination of the judgment. It appears that six plaintiffs leased a property to the defendant in 1946. The lease was in writing. The material clause of the lease, clause 18, provided:

> "In the event of the lessee failing to pay the rent hereby reserved or any part thereof on due date or failing to observe it perform any of the terms and conditions of this lease by him to be observed or performed the lessor shall be entitled by notice in writing to the lessee to call upon him to pay such rent or perform or observe such conditions and on the failure of the lessee to comply with the terms of such notice within in one calendar month of receipt thereof, the lessor shall be entitled to cancel this lease without further notice and resume possession of the lease plan by any mean subject to any claim or action they may be entitled to for arrears of rent or damages or otherwise."

The rental was payable yearly in arrears on the 1st April of each year. Defendant failed to pay the rent falling due on 1st April 1950. Consequently on 5th May 1950 plaintiffs called upon the defendant by notice in writing to pay the rent which had fallen due. This notice read thus:

"We have to draw your attention that two hundred pounds rent for the land due on 1st April 1950 is not yet reached us and also the interest of 23 pounds six s eight b please let us have this per return of post."

On behalf of a Full Bench, Broome JP analysed this notice, together with clause 18 of the agreement, as follows at 127B-C:

"First, what are the conditions which clause 18 requires to be fulfilled? The lessors must call upon the lessee by written notice to pay the arrear rent. Those being the conditions, the second question is whether the notice fulfils them. Manifestly the notice calls upon the lessee to pay the arrear rent. How then can it be said that the notice does not fulfil the conditions?"

The contention with which the Court was required to deal was that the words 'return of post' vitiate any conception of demand. To this argument the Court said at 127C:

"They do not qualify the demand? Rather they make it more peremptory. It must be remembered that the notice requires payment of an amount overdue. It reminds the

lessee that it is overdue and it calls upon him to make by return of post a payment which should have been made some time before."

Turning to the question of whether the phrase 'please let us have this per return of post' constituted a demand Broome JP said at 127E:

"The truth is of course that the use of the word "please" is merely an incident of polite business intercourse and the use of the phrase "per return of post" is no more than the normal method of emphasising a demand for payment. These polite and emphatic appendages do not alter the nature of the notice; it remains essentially a demand for payment. It is true that clause 18 entitles the lessor to cancel on the lessee's failure to comply with the terms of the notice within one calendar month ... no lessee receiving such a notice could possibly attach any importance to the phrase "per return of post". He would regard the notice as what it really was viz, a demand for payment and he would have only had to look at clause 18 to realise what would happen if he ignored the demand for a month."

To the argument, which was pressed heavily by respondent in

the present dispute, that *mora* interest was only in the amount of R86.57, Mr Joubert referred to a dictum of Herbstein J in Chomse v Lotz 1953(3) SA 738(C) at 741H:

> "However unreasonable the Court might consider the plaintiff to be in taking advantage of a situation for which the defendant was in no way responsible it cannot depart from the actual terms of the agreement itself."

Accordingly, Mr Joubert submitted that, to the extent that the respondent sought to argue that the amount of R86.57 was so insignificant that the maxim *de minimus non curat lex* applied, or that enforcement of the provisions of the loan agreement would in the circumstances be highly unfair, he submitted that the provisions of clause 7.2 could be equated to a *lex commissoria* which are:

> "Enforceable strictly according to their terms and the court has no equitable jurisdiction to relieve a debtor from the automatic forfeiture resulting from such clause." (see in this connection R H Christie The Law of Contract (6th ed) at 527)

RESPONDENT'S CASE

So much thus for the contentions of the applicant. Mr

MacWilliam, who appeared on behalf of respondent together with Mr Engela, referred to the precise wording of clauses 7.2 and 7.3. A reading thereof made it clear that there was a distinction between a written demand (as set out in clause 7.2) and a written notice as provided in clause 7.3. The contract itself gave different meanings to the words 'demand' and 'notice'. Relying on the South African Concise Oxford Dictionary's definition that a demand is 'insistent and peremptory request made as of right and that the word peremptory was defined as 'not open to appeal or challenge', Mr MacWilliam submitted that there was no basis by which the word demand as set out in clause 7.2 equated with the email of the 3rd April 2013.

In this connection he referred to Ashley v The Southern African Prudential Limited 1929 TPD 283 at 285:

> "There is no reason for construing the word "demand" in a sense other than its ordinary sense which is well understood and means "claim"; in other words an extrajudicial demand."

Referring to the decision which had been relied upon so heavily by Mr Joubert and to which I have devoted analysis, namely Chatrooghoon, *supra,* Mr MacWilliam contended that

this case dealt with an agreement of lease. The agreement of lease did not make reference to a demand but provided that:

> "The lessor shall be entitled by notice in writing to the lessee to call upon him to pay such rent or perform or observe such a conditions."

In Mr MacWilliam's view, the email was no more than an informal request and could not be interpreted to have constituted a demand for the purpose of clause 7.2 or to be equated with the notice which had been provided in Chatrooghoon *supra*. In his view, at best for the applicant the email constituted an enquiry, or a request that, if payment of the amount had not been made, it should be paid as opposed to a written demand as required in terms of clause 7.2. Mr MacWilliam further contended that clause 7.2 referred to a 'failure' to pay an amount and expressly required the borrower to pay "the amount" to the lender. In his view, upon a natural construction of the words and in order to constitute a demand in terms of the clause, the precise amount demanded had to be stated which was the case in Chatrooghoon.

The reference to an amount in the present case was not a reference to any amount specified in terms of the agreement of loan. What was due at the end of April was an interest

instalment which had to be calculated each and every month in circumstances in which the second loan agreement had only been concluded the month prior thereto and provided for its own separate calculation of interest. The calculated amount which was due would differ from month to month. Not even "a base rate" referred to in the agreement of loan was defined as specific percentage but the rate had to be ascertained from the South African Reserve Bank. Furthermore Mr MacWilliam submitted that it could never have been intended by the parties that the borrower could be compelled himself to calculate the amount due, not knowing what amount the lender had calculated or that, when making the demand, the lender could expressly withhold from the borrower exactly what amount he expected the borrower to pay so that he could then invoke clause 7.2 and ensure to his benefit, the draconian consequences which would follow from a breach thereof.

Accordingly to ignore the reference to the "amount" as set out in clause 7.2 and determine that a demand in terms of clause 7.2 need not refer to any amount or merely a statement which had been sent by way of a separate email as would be unacceptable and would resulted in the situation where the lender could set out to trap the borrower and engineer the bringing into operation of the acceleration clause which would have significant, detrimental consequences for the

respondents. Finally Mr MacWilliam pointed to the wording of clause 7.2 which referred not only to "the amount" but also to "the amount together with *mora* interest at a floating interest rate". The floating rate of interest was defined in the agreement to mean "the base rate plus 25 percent per annum compounded monthly in arrears". The base rate was defined to mean "the repurchase rate quoted by the South African Reserve Bank from time to time".

In his view, it was apparent that reference to the agreement to the loan was not sufficient to ascertain base rate. That information had to be ascertained from the South African Reserve Bank, a calculation would have to be done in order to arrive at the precise amount of *mora* interest which would have to be paid. In order for a demand to serve the purpose for which it was designed, it had to make reference to all actions that the borrower should do in order to avoid the consequent default event. In the present case, in order to constitute a demand in terms of clause 7.2, the demand had to set out the amount of the instalment and the amount of the *mora* interest claimed; hence the total amount which the respondent was required to pay.

THE DEMAND

In the light of these submissions and the critical importance of

the email it now becomes necessary to examine this email in its totality. The email reads thus:

> "Menere sien asb hieronder aangeheg ons het nog nie betaling ontvang nie sal julle asb laat regstel of indien betaling reeds gemaak is bewys van betaling laat aanstuur?
> Dankie Renier Kriek"

In the same email the following earlier email is reproduced:

> "Renier ek het nog nie 'n betaling van Arun ontvang vir rente Maart 2013 nie. Tot wanneer moet ek hulle kans gee om die betaling te maak? Sewende?
> Groete Juanita De Villiers"

In the light thereof it is possible to engage in an analysis of the parties arguments.

EVALUATION

Significantly, the attached email from Ms De Villiers makes reference only to an extension to the time within which the payment should be made. Furthermore, it requires no more than that the omission should be corrected. The first words of the email state: "Sien asb hieronder en aangeheg" . It is quite

clear therefrom that Ms De Villiers' email forms part of the totality which was presented to the respondents. When Ms De Villiers asks Mr Kriek: "Tot wanneer moet ek hulle kans gee om die betaling te maak" it is a legitimate interpretation to contend that the applicant had posed the question to the first respondent that is regarding precisely when payment could be expected and whether it would be the next day or the seventh as the case might be.

This exchange is unlike the clearly stipulated contents of the notice in Chatrooghoon *supra* to which I have made extensive reference, where the exact amounts are set out and the request is made to pay return of post.

In this case it is not unreasonable to conclude that Ms De Villiers was awaiting a response from first respondent as to when it would pay and thereafter to assess the situation accordingly. The fact is that the actual payment was made within hours of receipt of that email.

The events relating to this payment are documented fully in the answering affidavit as follows:

"What had happened was that the preceding statements which set out the actual amount payable by the first

respondent at the end of the month had been sent by the applicant to one of the first respondent's directors, Johan Loubser, as well as to the first respondent's financial manager, Koos Williams, they were thereafter forwarded it to me. However the statement for the end of March 2013 which sets out the calculation of the amount due of R42 133.15 was sent to Johan Loubser only and not to Koos Williams as well ... It was furthermore sent at approximately 13h16 on Thursday afternoon before the commencement of the Easter long weekend ... At that stage Johan Loubser was on leave and he did not see it at all and as the applicant's calculation interest had not been sent by the applicant before then it's not surprising that it was not paid. It was only after the Easter long weekend on 3 April 2013 at approximately 11h55 that I received the email ... I immediately (only 89 minutes later) informed the Renier Kriek that Johan Loubser was away on leave and that I would attend to payment as can be seen from my email ... On the very same day the interest instalment was paid. At the time neither Renier Kriek nor the applicant made any complaint about late payment nor was any request or demand for extra interest made whether in the amount of R86.57 or any other amount. What did happen is that on 12 April 2013 the dispute arose in relation to second and third

> respondent shares ... The next thing we knew was that out of the blue the loan was purportedly cancelled by the applicant it was only some time later that we were able to discover this had been attempted because the applicant alleged that the amount of R86.57 in respect of additional interest which had never been demanded nor referred to before had not been paid. According to the applicant it was this alleged failure to pay this insignificant amount of R86.57 which it concedes had never been demanded which had the effect that the full outstanding amount of the loan of R7,6 million had become immediately due and payable."

The question arises as to whether, if clause 7.2 is read in the manner contended by applicants and where the non-payment of R86.57 is common cause, can this latter failure precipitate a trigger to claim R7.6 million and as appears to be the case, perhaps even more, being R20 million? In other words, assuming that Mr Joubert's argument that there is only one reading of clause 7.2, being a strict construction which follows the line of argument of Broome JP in Chatrooghoon is correct, and that the query from Ms De Villiers should not be read in the manner suggested by applicant, would this approach to clause 7.2 be in accordance with public policy?

This question, which was never fully argued in the matter, although it was certainly raised by Mr MacWilliam sufficient for this Court to interrogate it, concerns questions of a constitutional nature.

There are three approaches in my view which follow from our constitutional dispensation and which relate to the law of contract. There are cases where it may be that there is no rule of common law which permits a vindication of a constitutional right, which is applicable in a horizontal relationship, and which would then trigger the application of section 8 of the Republic of South Africa Constitution at 1996 ('The Constitution'). This is not such a case and section 8 therefore is not thus applicable. Secondly, there are cases where the Court is required by virtue of the interpretation given to section 39(2) of the Constitution to develop the common law so that the common law, in the context of the particular case, is rendered congruent with the spirit, purport and objects of the Constitution.

Is section 39(2) applicable in this case? In my view, there is no relevant rule of common law invoked in the present dispute which is unconstitutional. Manifestly the law of contract can permit provisions such as clause 7.2 to be part of a contract. There is nothing in the contents of such a clause which

inevitably would trigger the kind of concern which may justify the application of section 39(2) of the Constitution.

But there is a third component to the enquiry in which the Constitution plays a role. I have in mind a case, such as the present, where the applicants contend for an interpretation of the clause, which if correct, may run counter to public policy. In other words, the question arises as to whether, if the interpretation of the applicants is correct, would such a clause interpreted in terms of the version contended for by applicants breach public policy?

Public policy, in the context of our constitutional democracy, must accord with the normative framework of our Constitution. It follows therefore that if public policy is in accordance with the normative framework of the Constitution, would the application of clause 7.2 which is central to applicant's case be against public policy?

This is not a radical position. In Sasfin (Pty) Ltd v Beukes 1989(1) SA 1 (A) at 9, the Appellate division, long before the Constitution was implemented, said the following:

> "No court shall therefore shrink from the duty of declaring a contract contrary to public policy when the occasion so

demands. The power to declare contracts contrary to public policy should, however, be exercised sparingly only in the clearest of cases lest uncertainty as to the validity of contracts resulted from arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of proprietary and fairness."

That a court should be careful about invoking public policy in these cases does not mean that public policy serves no useful purpose in the examination of a contract and the determination of whether the contents of the contract is against public policy and thus *contra bonos mores*. But as I shall show presently it is not a question of a contract offending an individual sense of proprietary and fairness but rather whether the values of the Constitution are breached by an interpretation. As the Constitution provides an important source of the values which inform public policy, this must guide a court in determining what the content of public policy is in this particular context.

It has been suggested that the paramount principle to be adopted is that 'the parties should know what their bargain is'. (Carole Lewis 2013 (76) THRHR 80 at 94.) But the nature of language does not always admit to one a clear answer and,

even if it did, public policy still plays a role as a default position in the evaluation of the contents of the agreement.

Before turning to the Constitutional Court's examination of this concept, it is instructive to refer to a more recent decision from the Supreme Court of Appeal of Heher JA in Jugdal v Shoprite Checkers (Pty) Ltd 2004(5) SA 248 (SCA) at 258:

> "Because the courts will conclude that contractual provisions are contrary to public policy only when that is their clear effect ... it follows that the tendency of a proposed transaction towards such a conflict ... can only be found to exist if there is a probability that unconscionable immoral or illegal conduct will result from the implementation of the provisions according to their tenor. (It may be that the cumulative effect of the implementation of provisions not individually objectionable may disclose such a tendency). If however, a contractual provision is capable of implementation in a manner that is not against public policy but the tenor of the provision is neutral then the offending tendency is absent. In such event the creditor who implements the contract in a manner which is unconscionable, illegal or immoral will find that a court refuses to give effect to his conduct but that the contract itself will stand. Much of

> the appellant's reliance before us on consideration of the public policy suffered from a failure to make the distinction between the contract and its implementation and the unjustified assumption that because its terms were open to oppressive abuse by the creditor, they must as a necessary consequence be against public policy.
>
> An attempt to identify the tendency of contractual provisions may require a consideration of the purpose of the contract, discernible from its terms and from the objective circumstances of its conclusion."

It is important within the context of this dispute to drill down into the core of this dictum. What the learned judge of appeal appears to have said is that a contractual provision may not itself run counter to public policy but that the implementation may be so objectionable that it is sufficiently oppressive, unconscionable or immoral to constitute a breach of public policy, in which case public policy can be invoked in justification of a refusal to enforce a provision.

I am conscious of the cautionary remarks of Smalberger JA in Sasfin *supra* namely that: "Ones individual sense of proprietary and fairness" is not the test. If public policy is to be invoked in this case, in the manner suggested by Heher JA in Jugdal then some objective standard must be found. As I have already

suggested, this is to be found in the normative framework of the Constitution.

The Constitutional Court provides guidance to a court in its decision in Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd 2012(3) BCLR 219(CC). At paragraph 22 Yacoob J said:

> "Good faith is a matter of considerable importance in our contract law and the extent to which our courts enforce the good faith requirement in contract law is a matter of considerable public and constitutional importance. The question whether the spirit, purport and objects of the Constitution require courts to encourage good faith in contractual dealings and whether our Constitution insists that good faith requirements are enforceable should be determined sooner rather than later. Many people enter into contracts daily and every contract has the potential not to be performed in good faith. The issue of good faith in contract touches the lives of many ordinary people in our country.
>
> The values embraced by an appropriate appreciation of ubuntu are also relevant in the process of determining the spirit, purport and objects of the Constitution. The development of our economy and contract law has thus

far predominantly been shaped by a colonial legal tradition represented by English law, Roman law and Roman Dutch law. The common law of contract regulates the environment within which trade and commerce takes place. Its development should take cognisance of the values of the vast majority of people who are now able to take part without hindrance in trade and commerce. And it may well be that the approach of the majority of people in our country place a higher value on negotiating in good faith than would otherwise have been the case. Contract law cannot confine itself to colonial legal tradition alone.

It may be said that a contract of lease between two business entities with limited liability does not implicate questions of ubuntu. This is, in my view, too narrow an approach. It is evident that contractual terms to negotiate are not entered into only between companies with limited liability. They are often entered into between individuals and often between poor, vulnerable people on one hand and powerful, well-resourced companies on the other. The idea that people or entities can undertake to negotiate and then not do so because this attitude becomes convenient for some or other commercial reason, certainly implicates ubuntu."

This theme is further developed by Moseneke DCJ in a

separate judgment at para 71:

> "Indeed it is highly desirable, in fact necessary, to infuse the law of contract with constitutional values including values of *ubuntu* which aspire much of our constitutional compact. On a number of occasions in the past this Court has had regard to the meaning and content of the concept of *ubuntu* it emphasises the cardinal nature of society and "carries in it the ideas of humanness, social justice and fairness" and envelopes "the key values of group solidarity compassion, respect, human dignity, conformity to basic values and collective unity". Were a court to entertain Everfresh's argument the underlying notion of good faith in contract law, the maxim of contractual doctrine that agreements seriously entered into should be enforced, and the value of *Ubuntu* which inspires much of our constitutional compact may tilt the argument in its favour. Contracting parties certainly need to relate to each other in good faith. Where there as a contractual obligation to negotiate, it would be hardly imaginable that our constitutional values would not require that the negotiation must be done reasonably with a view to reaching an agreement and in good faith."

Lewis op cit at 92 complains that this approach holds potential

harm for the 'fabric of law in contract', in that there will be uncertainty about testing all contractual arrangements going forward. To claim that the development of public policy along the lines set out in Everfresh is a disincentive to 'development and investment' is to step into a very contested economic debate which judges should seek to refrain from entering without clear evidence.

As I indicated it may well be that the applicant in this case is not part of the sadly very large constituency of poor and vulnerable of which Yacoob J spoke eloquently in his judgment in Everfresh. But the same principle must apply that in some measure public policy embraces the concept of good faith and reasonableness expressed more in the words of Heher JA in Jugdal *supra.*

The implementation of clause 7.2 as sought by applicants is so startlingly draconian and unfair that this particular construction of the clause must be in breach of public policy. Some form of communication to pay a measly sum of R86.57 immediately following payment of the large principal sum should surely have been required. In other words, it cannot be congruent with public policy that a demand, in an ambiguous form as I have indicated in terms of my interpretation of the email of the 3rd April 2013, can first be met with silence because R86.57

has not been paid and then a week later the full weight of clause 7.2 be applied by the applicant to gain massive commercial advantage to the significant disadvantage of respondent.

To sum up: there are at least two basis upon which I have found that the applicant's case must fail. In the first place the email of the 3rd April 2013 is not on 'all fours' with the approach which was adopted in Chatrooghoon. Ms De Villiers' qualification must be read, at least, to have placed in the mind of respondent the idea that respondent may have come back to say 'I will pay in two days' time' so that negotiation may have followed. Clause 7.2 has draconian implications and hence it is the least that could be expected for a proper demand to be made which would inform respondent of the entire amount, as was the case in Chatrooghoon where both the principal and interest was set out in the letter of demand.

The fact that the sum of R86.57 was not paid due to some miscalculation (it would be highly unusual for the respondents to have refused to have paid this small amount when they were already prepared to pay forthwith the total outstanding sum) should surely have been met by some communication to remind the respondent that it remained in arrears, albeit by so small a sum.

Assuming however, that the interpretation that I have given to the contract and to the conduct of the parties is incorrect, a further question arises as to whether, in such a case, the interpretation placed upon clause 7.2 by the applicants would not be in breach of public policy.

I have found for the reasons that I have articulated that this interpretation would breach public policy as it must now be constituted.

In the light of this analysis there is no necessity for me to deal with any of the interesting and thoughtful arguments developed by Mr Joubert and by Mr MacWilliam concerning the validity of the cession. It is clear that if the first leg of the argument failed, applicant's case must also fail.

Mr MacWilliam passionately argued that I should impose an adverse costs order, that is a punitive costs order, given the conduct which has been adopted by the applicant. I have thought carefully about this submission but, in the light of the range of arguments that have been raised, the nature of the clause and the manner in which Mr Joubert argued on the basis of very strict construction, it appears to me that it would be inappropriate to make such an order.

Accordingly, the application is dismissed with costs including the cost of two counsel.

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DAVIS, J