CASE NO. 142/94

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

PANGBOURNE PROPERTIES LIMITED APPELLANT

and

GILL & RAMSDEN (PTY) LIMITED RESPONDENT

CORAM: JOUBERT, F H GROSSKOPF, VAN DEN
HEEVER, HARMS et OLIVIER, JJA

HEARD: 4 SEPTEMBER 1995

DELIVERED: 21 SEPTEMBER 1995

J U D G M E N T

HARMS JA/

HARMS JA:

The appellant applied to the Witwatersrand Local Division for an order declaring that a valid and enforceable guarantee was contained in an agreement entitled "Cession" of 22 May 1989 and that, in its terms, the respondent had guaranteed the obligations of M J H Storm's Services (Pty) Ltd ("Storm") to the applicant for the remaining period of a lease concluded on 13 October 1987. The application was dismissed with costs (by Myburgh J) but leave to appeal to this Court was subsequently granted by the court a quo.

In order to understand the terms of the cession, it is necessary to set out some of the background to it. The lease referred to above, was a lease between Valjon Trust as lessor and Gill and Ramsden (Pty) Ltd, the respondent, as lessee. Valjon Trust, shortly thereafter, sold and transferred the leased premises and the appellant, as a matter of law, became the lessor. The term of the lease is to expire only on 30 May 1997. The initial monthly rental was R20 000 and was to escalate annually at the compound

rate of 10% per annum. It also provided that:

"The LESSEE shall -

10.1 not cede any of its rights nor delegate any of its obligations nor mortgage, pledge or encumber any of its rights under this Lease without the LESSOR'S prior written consent, which consent shall not be unreasonably withheld;

10.2 not sub-let nor permit anyone else to occupy nor part with possession of the leased premises or part thereof without the LESSOR'S prior written consent, which consent shall not be unreasonably withheld."

During April 1989, the appellant was approached by the respondent to release it from the lease and to accept Storm as lessee in its stead. In response, the appellant sent to the respondent a draft agreement. It provided for a substitution of Storm but, in addition, contained a provision requiring the respondent to guarantee the obligations of Storm. The respondent, in reply, requested that the guarantee be removed from the draft agreement and in support of its request provided a favourable bank report on the ability of Storm to pay R23 000 per month for 8 years. This proposal was rejected and the respondent was informed that the appellant

required it "to stand behind" Storm. As an alternative the appellant expressed its willingness to consent to a sublease. The reaction by the appellant was due to the fact that the respondent was a member of a group of companies quoted on the Johannesburg Stock Exchange whilst Storm was, as far as the appellant was concerned, an unknown entity. A sublease did not eventuate, but a delegation did. I quote it in full and, for the sake of convenience, paragraph numbers have been added.

"CESSION

[1] We, Gill and Ramsden Proprietary Limited here and after referred to as the Cedent, herein represented by NORMAN GEOFFREY LONG
being duly authorised by a resolution of the Board of Directors dated
_____ 1989 do hereby cede, assign, transfer and make over
to M J H Storms Services Proprietary Limited, here and after referred to as the Cessionary as from June 5, 1989, all our right, title, interest, claim and demand in and under the agreement of lease entered into between the Valjon Trust and Gill and Ramsden Proprietary Limited over the premises demarcated on the plan attached to the lease dated 13 October 1987 relating to Erf 270 Tulisa Park Township, Johannesburg. [2] It is recorded that the property has been sold to Erf 270 Tulisa Park Share Block Proprietary Limited subsequent to the lease being signed and that Pangbourne Properties Limited is the owner of the share block which has exclusive use of said Premises and is now the lessor in terms of the lease.

[3] The cedent warrants that it is not in breach of any of its obligations in terms of the Lease and that it will not be in breach or in default of such obligations on the effective date.

[4] This cession is granted subject to Gill and Ramsden Proprietary Limited guaranteeing the obligations of M J H Storms Services Proprietary Limited to the lessor for the remaining period of the lease.

[5] The Cession is subject to the Cedent concluding a written sublease with the Cessionary in regard to an area of the leased building situated on the premises forming the subject matter of the Lease on such terms and conditions as may be acceptable to the Cessionary in its sole discretion, within a period of thirty days of the date of signature of this Agreement. [6] A copy of the lease first mentioned together with annexures is attached and marked Annexure A.

DATED at JOHANNESBURG this 9TH day of MAY 1989.

AS WITNESS for: Gill and Ramsden Pty Limited

(Signed) (Signed)

DIRECTOR

[7] We, M J H Storms Services Proprietary Limited herein represented by MICHAEL JOHN HARRISON STORM being duly authorised by a resolution of the Board of Directors dated 8th May 1989 do hereby accept cession and transfer as from June 5. 1989 of the aforementioned Agreement of lease dated 13 October 1987 from Gill and Ramsden Proprietary Limited subject to all the terms and conditions thereof which we undertake faithfully to perform and carry out.

[8] The costs of preparation of this agreement including stamp duty shall be payable by the parties in equal shares.

DATED at DURBAN this 16 day of MAY 1989.

AS WITNESS
(Signed)

for: M J H Storms Pty Ltd
(Signed)
DIRECTOR

[9] And we, Pangbourne Properties Limited herein represented by John Ray Whiting being duly authorised by a resolution of the Board of
Directors dated _____ do hereby consent to this Cession upon the terms and conditions set out above, and undertake to advise Gill and Ramsden Pty Limited of any default on the part of the cessionary within 14 days of such default.

DATED at SANDTON this 22 day of May 1989.

AS WITNESS
(Signed)

for: Pangbourne Properties Ltd.
(Signed)
DIRECTOR"

It is common cause that a written sublease was concluded as envisaged by clause 5 and, according to the deponent on behalf of the respondent, all the parties proceeded, from June 1989, on the basis that the property had been leased by Storm. As far as clause 4 is concerned, no separate guarantee was provided. The case of the appellant is that the clause was in its own right a guarantee by the respondent of Storm's obligations in terms of the lease. According to the respondent it contained

a suspensive condition (or a condition precedent) which had not been fulfilled. The latter contention was upheld by the court below. The issue is germane because Storm, having changed its name prophetically to Cul de Sack Carriers (Pty) Ltd, was provisionally wound up on 27 January 1993. The provisional liquidator cancelled the lease and the company was subsequently finally wound up.

I have made reference to some of the background facts that had given rise to the conclusion of the cession and, more particularly, clause 4 thereof. That was done in the light of this dictum of Innes CJ in Glenn Brokers v Commercial General Agency Co Ltd 1905 TS 737 at 740-741:

> "In reading a document like this, we are justified in looking at the circumstances under which the guarantee was given, and the position of the various parties concerned. That is necessary in order to enable us rightly to understand and to place ourselves in the position of the parties at the time. But, having done that, I do not think we should gather from the circumstances what the parties meant, or what it is fair and equitable to think they meant, and then see whether we can ingeniously so read the document as to deduce that meaning from its language. The right method is first to have regard to the words of the document, and if they are definite and clear we must give effect to them. In every case where a document has to be construed so as to arrive at the intention of the

parties, if a meaning is apparent upon the face of the document, that is the meaning which should be given to it. The tendency of the older authorities, Roman-Dutch and English, was to place a strict and adverse construction upon a document of suretyship. On the other hand, later cases — in England at any rate — rather tend in the opposite direction. I think the proper rule is that without bias — without prejudice one way or the other — we should ascertain from the words of the document the intention of the parties, and if the words have a clear and definite meaning we should give effect to it."

ft appears to me that the time may be ripe for this Court to reconsider the limitations placed in this statement' on the use of "surrounding circumstances" in interpreting documents. The present instance does not, however, require it and I shall regard myself bound by the restraints set out. The parties are agreed upon two matters arising from the agreement. First, and in spite of its title, it is not a cession but rather a contract of substitution incorporating a cession of rights and delegation of obligations. The second is that the guarantee of clause 4 was, in its context, intended to be a suretyship and not a primary obligation (cf List v

'According to Caney The Law of Suretyship (4th ed) p 74 n12, what was said by Innes C J accords with what has since been said in Delmas Milling Co Ltd v Du Plessis 1955 (3) SA 447 (A) at 454 (per Schreiner JA).

Jungers 1979 (3) SA 106 (A); Norex Industrial Properties (Pty)Ltd v Monarch South Africa Insurance Co Ltd 1987 (1) SA 827 (A)). For the sake of consistency, I shall continue to refer to the agreement by its title namely "cession".

In reaching the conclusion that clause 4 of the cession contained a suspensive condition, Myburgh J reasoned in essence along these lines: The words "subject to" denote a condition precedent and thus, read in isolation, clause 4 incorporates one. Seen from a contextual point of view, clause 5 contains a suspensive condition and clause 4 is similarly worded; also, the obligations of clause 1 and 3 are in the present tense whilst that of clause 4 relates to the future.

The phrase "subject to" has no a priori meaning. Reference to any dictionary establishes that[2] In statutory contexts it is often used to establish what is dominant and what is subordinate (cf Rennie NO v

[2]Cf Alpenstow Ltd and Another v Regalian Properties plc [1985] 2 All ER 545 (Ch D) at 551d-552b in connection with "subject to contract".

Gordon and Another NNO 1988 (1) SA 1 (A) at 21D-22D). In contractual settings, especially insurance contracts, it is usually used to create a suspensive condition, but also (always depending on the context) a resolutive condition (SA Eagle Versekeringsmaatskappy Bpk v Steyn 1991 (4) SA 841 (A) at 848 B-D). Frumer v Maitland 1954 (3) SA 840 (A) is an example of an instance where, in a contract, it simply introduced a condition of the contract, i e a material term (in contradistinction to a suspensive or resolutive condition)/

The cession states explicitly what its effective date was to be: in clause 1 it is said that the making over of the lease would take place as from June 5, 1989; and that is repeated in clause 7. Clause 5, on the other hand, made the cession "subject to" the respondent concluding a written sublease with Storm within 30 days of the date of signature (22 May 1989). In other words, the cession was to come into operation before the final date for the conclusion of the sublease. This, in my judgment,

[3]To my mind Colman J erred in his interpretation of this case in Vizirgianakis v Karp 1965 (2) SA 145 (W) at 146 G-H.

shows conclusively that clause 5 did not contain a suspensive but rather a resolutive condition. One cannot, therefore, argue that the use of the phrase "subject to" in clause 5 leads to the conclusion that the same phrase created a suspensive condition in clause 4. On the contrary, clause 5 provides a clear indicium that the parties did not necessarily use the phrase in clause 4 in its conventional contractual meaning of creating a suspensive condition.

I am of the view that the phrase was used in clause 4 to denote that the cession was to be subservient to the guarantee, in other words, and to use an Afrikaans equivalent, the cession was "onderworpe aan" the guarantee. It does not mean that the guarantee had to follow upon, and suspend, the cession. This view is consistent with the grammatical usage of the present participle "guaranteeing". A present participle expresses an action now going on (cf Concise Oxford Dictionary s v "present"). It has, generally, an active meaning. (For a full discussion of the subject see T Mc Arthur (ed) The Oxford Companion to the English Language (1992) s v

"participle".) Swan, Practical English Usage, p 454, gives as an example of the use of a present participle the sentence "(c)an you see the girl dancing with your brother?" He then formulates the rule that an adjectival present participle clause can only be used to describe actions that happen around the same time as the main verb. It will be recalled that the main verb ("is granted") in clause 4 was in the present tense. It follows from this, and having regard to the linguistic approach (much favoured by Mr Levin on behalf of the respondent), that clause 4, on its own, was an unconditional guarantee.

This conclusion is confirmed by reference to another comparison between clauses 4 and 5. The latter set a time limit of 30 days for the conclusion of the sublease. Clause 4, which was of the essence to the appellant and respondent, contained no time limit. To suggest that it was the intention of the parties to have allowed a reasonable time for the provision of a guarantee does not, in the context of this agreement make commercial sense. It also does not make commercial sense for an offeror

(the respondent in this case) to make his offer subject to his own volition (the provision of a guarantee). In the light of the fact that the agreement was a tripartite agreement, there was no conceivable reason why an honest businessman would have made the rights and obligations of the third party subject to his own whim. The respondent had an urgent desire to have it substituted as lessee. That could only be done with the appellant's consent. The appellant had insisted upon a guarantee. The effective date had been agreed upon. There was no reason to postpone it or to make it uncertain. It was also argued on behalf of the respondent that it is inconceivable that the terms of a valuable guarantee would be left as vague and uncertain as the guarantee of clause 4. It is true that the appellant may have required a stricter deed of suretyship containing, e g, a waiver of the exceptiones, a liability in solidum and so forth. On the other hand, the appellant had received the offer as formulated in clause 4. The appellant may have placed a measure of trust in the bona fides of the respondent. In any event, deeds of suretyship in this simple form have stood the test of

time (cf Norex case supra).

I am thus satisfied that the appellant was entitled to the declaratory order sought.

In the result the appeal is upheld with costs, including the costs of two counsel. The order of the court a quo is set aside and for it is substituted an order:

(1) declaring that a valid and enforceable guarantee exists in the "Cession" of 22 May 1989 (Annexure "A6" to the founding affidavit) in terms whereof the respondent, as surety, guaranteed the obligations of Cul de Sack (Pty) Ltd (formerly M J H Storm's Services (Ply) Ltd) to the applicant for the remaining period of the lease (Annexure "A3" to the founding affidavit); and

(2) for costs, including the costs of two counsel.

L T C HARMS
JUDGE OF APPEAL

JOUBERT, JA)
F H GROSSKOPF, JA) Agree
VAN DEN HEEVER, JA)
OLIVIER, JA)