

SOUTH AFRICA / JUDGMENT

Nedcor Bank Limited v Boulbigh

224 CC (15078/98) [1998]

ZAGPHC 4 (19 August 1998)

[1998] ZAGPHC 4

COURT

High Courts - Gauteng

BEFORE

Willis

CASE / FILE NUMBER

15078/98

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IN

THE HIGH COURT OF SOUTH AFRICA (TRANSVAAL PROVINCIAL
DIVISION) JOHANNESBURG

CASE

NUMBER: 15078/98

DATE:

1998-08-19

In

the matter between

NEDCOR

BANK

LIMITED.....

Plaintiff

and

BOULEIGH

224

CC.....

Respondent

JUDGMENT

WILLIS, AJ; This is an application in which the applicant seeks to compel the respondent to comply with its obligations in terms of a deed of cession signed by it in favour of the applicant. The cession agreement was signed on 28 January 1998. This document provided in paragraph 3 thereof "The cedent does hereby cede, transfer and make over to the cessionary the cedent's rights, title and interest in and to the aforesaid cedent and to all rentals and other revenues of whatsoever nature which may accrue to the cedent by virtue of the deed (indistinct) sectional title deed, for the express right in favour of the cessionary irrevocably" and the word is emphasised by myself "and in (indistinct) 3.1 to institute proceedings against tenants for the recovery of unpaid rentals and/or evictions of the premises.

3.2 If any unit owned by the cedent to cancel or(renew and enter into leases in such a manner as the cessionary decides and to evict any trespasser or other persons from the unit." If I understood the argument of Mr De Klerk who appears for the respondent correctly raised essentially two defences. The first was that the cession was a reality -a. cession in securitatem debiti and the second was that in terms of a bond agreement which was entered into on 24 July 1997 the applicants had undertaken in terms of clause 8.3 thereof not to act upon the cession referred to in the bond agreement, without the consent of the mortgagor unless the mortgagor has failed to comply with any term or condition of this bond or any loan secured thereby or otherwise committed a breach thereof.

I should record that there is a separate agreement of loan which was entered into on 18 July 1997 which makeB no pertinent reference to the circumstances upon which the bank may act upon any cession. I just want to emphasise that the restrictions that appear in clause 18 of the agreement of loan do not limit the applicant in the way that clause 8.3 of the mortgage agreement do.

I wish, to further record that all three of these documents, namely the cession agreement, the loan agreement and the mortgage agreement

contain the standard clause relating to non-variation save where this had been recorded in writing.

The document of cession, in other words the document which was entered into on 23 January 1998 is in my view clear, succinct, uncomplicated

and ambiguous. And evidence to alter the clear and unambiguous meaning of this cession is in my view precluded. I refer to the

following cases RAND RIETFontein Estates limited v COHN 1937 ad 317 at 326. DE WET v hollow(10) 1914 ad 157 and of course DELMAS MILLING COMPANY LIMITED V DU PLESSIS 1935 (SA) 447 (A) 454-455.

In my view it is absolutely clear that the document of cession is, in its terms, an out-and-out cession and this would therefore defeat the respondent's defence that the agreement was in fact a cession in securitatem debiti. Even if I am wrong with regard to whether the cession is an out and out cession or a cession in securitatem debiti, I believe that it is helpful to refer to the case of *incorporated general insurance ltd v GUSH AND another* 1990 (4) SA 573W which was a (20) decision given by PREISS. J. This judgment in my very respectful view summarises very succinctly the law with regard

to cession out and out and cession in securitatem debiti.

As is pointed out in that judgment the only difference of any importance between a cession out-and-out and a cession in securitatem debiti, is that in the case of cession in securitatem debiti on payment of the secured debt the cessionary shall be obliged to recede the ceded right of action. In my view, the cession if it was a cession in securitatem debiti, would not assist the respondent to defeat (30) the claim of the applicant, and it would need to proceed by way of a separate action or application in order to claim a recession. It would not constitute in itself a defence.

With regard to the clause 8.1 in the mortgage agreement, it seems to me that by reason of the parole evidence rule to which I have already referred, that it is not permissible for it to have regard to that document in addition to the clear agreement of cession. But even if I am wrong in this regard and if it is a matter of law I could have regard to the mortgage agreement, then it would seem to me that an onus would rest upon the respondent to set out clearly in its answering affidavit that the applicant could not act upon the cession by reason of the fact the mortgagor had failed to comply with any term or condition of the bond or any loan secured thereby, and had otherwise pertinently committed a breach thereof, and would need pertinently in its answering affidavit to allege that it has not failed to comply with any term or condition of this bond or any loans secured thereby or had otherwise committed a breach thereof.

It seems to me having gone through the respondent's (answering affidavit that no where has this defence been pertinently raised in such terms. Accordingly it must fail along this basis. Even if I am wrong in this regard it is important to note that the agreement upon which the applicant relies, namely the cession of rentals and revenue was entered into on 28 January 1998 - by reason of the fact that both the loan agreement and the mortgage agreement pertinently contain the standard clause relating to variation being required in writing, ..-

END OF TAPE 1 - RESUMING ON TAPE 2

1998 must take precedence. This seems to me to be obvious. For these reasons, I am satisfied that the applicant should SUCCEED in the application.

I turn now to deal with the question of costs. Mr Suttner who appeared for applicant asked that I make an order for costs to include two counsel. It should be noted that there is a large amount of money at stake. I refer pertinently to the fact that on 28 April 1998 the applicant's attorneys sent a letter to the respondent in which it was said that "on or about 15 July 1997 our client concluded an agreement of loan with you in terms whereof inter alia our client would lend and advance subject

to the further conditions contained in the agreement the sum of R9 million upon security of the first mortgage bond." It goes on to say "Pursuant thereto and in terms of the conditions contained in the mortgage bond registered over the immovable property you ceded rentals and other revenues in partial disclosure of your financial obligations. For your records we enclose herewith a copy of the aforementioned cession signed by Messrs Duggan and French on 27 January 1998." The letter goes on to make a pertinent demand for relief which in all material terms conforms with the relief sought in the notice of motion. I may pause here en passant; because I omitted to deal with the issue in my reasoning on whether the applicant should succeed or not. It is interesting that in the respondent's response to this letter of demand none of the defences that were subsequently raised were raised in that letter despite that it was drawn by a very eminent firm of attorneys acting on behalf of the respondent. And that provides a further reason why the respondent must fail.

I return to the question of costs. Clearly when sums of this money of this magnitude are involved it is reasonable to contemplate the engagement of two counsel. Furthermore the questions of law relating to cession out and out and cession in securitatem debiti are not particularly straight forward. A further point to be borne in mind is that in the respondent's answering affidavit it made serious and (unfortunate) allegations relating to the integrity of a bank, and in my view a bank, in particular, has a duty to maintain a reputation of integrity. Accordingly, it seems to me that no criticism can be levelled at the applicant for engaging the services of two counsel.

In the result I make the following order which has been prepared in conformity with a draft prepared by the applicant.

It is ordered that the respondent deliver to the applicant at the offices of the applicant attorneys of record, within five days of the date of this order;

1.1 A list of all tenants and occupiers who have or who are presently occupying a sectional title unit owned by the respondent in the development known as Portion 138 (portion of portion 64) of the farm Rietfontein No. 32, registration division IR, Province of Gauteng ("the premises");

1.2 Each and every written lease and sale agreement concluded between the respondent and tenants/occupiers whose names appear on the list referred to in paragraph 1.1 above;

1.3 All the respondent's books of account, receipts and other books, statements and correspondence relating to the tenants/occupiers whose names appear on the list referred to in paragraph 1.1 above;

1.4 Give full account of all the monies received by the respondent from the tenants/occupiers whose names appear in the list referred to in paragraph 1.1 above;

2. The respondent debate the account referred to in paragraph 1.4 above with the applicant within five days of written request by the applicant to the respondent to do so and, within twenty four hours thereof, to pay the (indistinct) to such debate;

3. The respondent pay the costs of this application, including the costs consequent upon the employment of two counsel.
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Prepared on 14 October 2026 · Esheria