

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case Number: 2023/028461

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
20 June 2024	

DATE	SIGNATURE
------	-----------

In the matter between:

HYPROP INVESTMENTS LIMITED

(Registration No: 1987/005284/06)

Applicant

and

NEW AGE CONCEPTS (PTY) LIMITED t/a READS

Respondent

This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 20 June 2024.

JUDGMENT

Mudau, J

[1] The applicant, Hyprop Investments Ltd (“Hyprop”) seeks an order ejecting the respondent, New Age Concepts (Pty) Ltd t/a Reads (“New Age”) and all those occupying by, through or under the respondent from certain retail premises described as Shop No: C[...], R[...] Mall, 5[.] B[...] Avenue, R[...], Gauteng (“the premises”). In addition, the applicant also seeks an order directing the respondent to pay the costs of the application on the attorney client scale, alternatively on the party and party.

[2] The respondent opposed this application on various grounds. The only defence relied upon by the respondent at the hearing of this application was whether the applicant has the necessary *locus standi in judicio* to bring this application for the respondent's ejectment from the premises.

[3] The background facts are largely common cause. On 25 June 2021, the lease agreement between the applicant and the respondent which provides for a commencement date of 1 September 2019 was concluded but to terminate on 28 February 2023. It is the applicant's contention is that the respondent took occupation of the leased premises pursuant to the conclusion of the lease agreement.

[4] The lease agreement contains standard terms, inter alia, that the respondent would pay to the applicant the basic monthly rentals; the monthly operating costs; and all other associated charges recorded in the lease. It made provision that the respondent would pay the basic monthly rental and all other amounts provided for in the lease monthly in advance, free of exchange, without deduction, bank charges, set-off or demand from the rental commencement date and thereafter, on the first day of each and every consecutive month of the lease to the applicant.

[5] The lease agreement also provided that the applicant would be entitled in its sole and absolute discretion to appropriate any amounts received from the respondent towards the payment of any cause, debt or amount owing by the respondent to the applicant whatsoever irrespective of when the debt arose.¹

¹ In terms of clause 5 thereof.

[6] Clause 6 of the lease agreement also provided that should the respondent fail to pay the rental or any other amount payable in terms of the lease on the due date then the applicant would be entitled but not obliged, despite any previous waiver or any provision to the contrary in the lease and without prejudice to any other rights or remedies which the applicant may have against the respondent in terms of the lease or in law, to cancel or terminate the lease and require the respondent to vacate the premises and deliver the premises to the applicant.²

[7] Clause 7 made provision that any cost incurred by the applicant in enforcing the terms of the lease against the respondent will be borne by the respondent on the scale as between attorney and own client.

[8] In time the respondent defaulted. The applicant contends that during the period of lease, for the period 1 September 2019 to July 2022, the respondent repeatedly breached the provisions of the lease by failing to pay the monthly rentals and all other amounts provided for in terms of the lease when the amounts became due, owing and payable. Consequently, on 12 July 2022, the applicant (as plaintiff), in this court, instituted an action against the respondent (as defendant), under case number 22/24355, which is still pending.

[9] In the pending action the lease was cancelled in the particulars of claim³ and on the applicant's version, the lease has alternatively terminated by effluxion of time. In the pending action the applicant also sought the ejectment of the respondent from the premises. The applicant contended that to avoid any argument of *lis alibi pendens*, the ejectment relief in the pending action was upon written notice withdrawn prior to the launching of this application.

[10] The applicant also contended that the lease was never reinstated by the parties and remains cancelled. Axiomatically, the applicant alleged the respondent became to be in unlawful occupation of the premises. The applicant alleges that as owner and landlord of the premises it is entitled to and requires vacant occupation of

² In terms of clause 6 thereof.

³ See *Win Twice (Pty) Ltd v Binos and Another* 2004 (4) SA 436 (W).

the premises. The applicant emphatically points out finally that the respondent has no right or entitlement to continue to occupy the premises.

[11] The respondent's defence based on the applicant's alleged lack of *locus standi in judicio* is set out in paragraphs 4 to 9 of the answering affidavit. Essentially, the respondent contends that, in and during February 2022, a mortgage bond was caused to be registered to provide security for the loan that Nedbank Limited ("Nedbank") advanced to the applicant over the premises and in terms whereof Hyprop as mortgagor ceded, transferred and assigned to the mortgagee, Nedbank all Hyprop's right, title and interest in and to the rentals and other revenue whatsoever nature, which may accrue from the mortgaged property as additional security for the due repayment by Hyprop of all amounts owing to and claimable by Nedbank at any time in terms of the bond, with the express right in favour of Nedbank to institute proceedings against lessees for recovery of unpaid rentals and/or eviction from the premises. The bond is extant and has not been cancelled.

[12] The respondent also relies on clause 8.2 as read with clause 8.3 of the bond, which stipulate the conditions in terms whereof the applicant would be reinvested with all its right, title and interest in and to the agreements of lease concluded with tenants, and which conditions have allegedly not been satisfied by Hyprop to bring this application. Basically, the respondent contends that Nedbank, amongst others, has the sole right to collect the arrear rentals and to evict the respondent and that Hyprop is therefore precluded from obtaining payment of the arrear rentals (and utility charges) and an eviction order.

[13] Clause 8 of the mortgage bond relied upon reads as follows:

"8. CESSION OF RENTALS AND REVENUES

8.1 The Mortgagor hereby cedes, transfers and assigns to the Mortgagee all the Mortgagor's rights, title and interest in and to all rentals and other revenues of whatsoever nature which may accrue from the mortgaged property as additional security for the due repayment by the Mortgagor of all amounts owing to or claimable by the Mortgagee at any time in terms of this

bond, with the express right in favour of the Mortgagee irrevocably and *in rem suam*—

8.1.1 to institute proceedings against lessees for the recovery of unpaid rentals and/or eviction from the mortgaged property;

8.1.2 to let the mortgaged property or any part thereof, to cancel or renew and enter into leases in such manner as the Mortgagee decides, to evict any trespasser or other person from the mortgaged property;

8.1.3 to collect on behalf of the Mortgagor any monies payable in respect of the alienation by the Mortgagor of the mortgaged property or any portion thereof,

provided, however, that the cession, transfer, assignment and authorities and powers specified above shall not be acted upon by the Mortgagee without the consent of the Mortgagor unless the Mortgagor has failed to comply with any term or condition of this bond or any loan, facility or other indebtedness secured hereby, or has otherwise committed a breach thereof. The Mortgagee is further entitled to charge commission of 3% (three percent) of the gross amount of all rentals and other revenues collected (to the extent not prohibited by the Act) and to recover such commission from the Mortgagor under this bond.

8.2 The parties acknowledge that, in order for the Mortgagor to commence, institute conduct and conclude proceedings against any tenant to enforce any rights under or pursuant to any relevant lease agreements, the Mortgagee may be required to re-cede the rights and interest under the relevant lease agreements to the Mortgagor. Accordingly, subject to the provisions of clause 8.3, upon the earlier of—

8.2.1 the Mortgagor (or any person managing the relevant lease agreements on its behalf) signing a letter of demand in relation to a relevant lease agreement; or

8.2.2 the Mortgagor providing an instruction to a practising attorney to either issue a letter of demand or institute any legal proceedings against any tenant in relation to a relevant lease agreement,

the Mortgagee hereby, without the need for any further action and with effect from 09:00 on the day on which such signature is appended as contemplated in clause 8.2.1, or such instructions are given to such attorney contemplated in clause 8.2.2 (as the case may be) re-cedes to the Mortgagor the rights and interests in the relevant lease agreement, subject to the provisions of clause 8.3.

8.3 If, in the circumstances set out in clause 8.2 above, an event of default has occurred and is continuing in respect of the obligations secured under this bond, the re-cession contemplated in clause 8.2 of the rights and interests in any relevant lease agreement shall occur only if the written consent of the Mortgagee to such re-cession has been granted prior to the occurrence of an event contemplated in clause 8.2.1 or clause 8.2.2, as applicable.”

[14] The parties are *ad idem* that the provisions of clause 8 of the bond must be properly constructed and interpreted for the determination of the issue before me. Reference was made to the decision of the Supreme Court of Appeal in the *Picardi Hotels* case.⁴ There, the SCA had to deal with the construction and interpretation of a clause in a mortgage bond which was identical to clause 8 in the bond. As it will become apparent from the following paragraphs, this case is distinguishable from that of *Picardi Hotels*.

[15] In determining the issue as to whether rights had been ceded or not, the SCA stated:

“It is incumbent upon the courts to ascertain the intention of the parties which, in the first instance, must be gathered from the language of the clause itself. The words of the cession must be given their plain, ordinary, popular and grammatical meaning, unless it clearly appears from the context that the parties intended them to have a different meaning. Absent ambiguity, the meaning conveyed by the words themselves must be given effect to unless

⁴ *Picardi Hotels Ltd v Thekwini Properties (Pty) Ltd* [2008] ZASCA 128; 2009 (1) SA 493 (SCA) (“*Picardi Hotels*”).

this would give rise to absurdity, repugnancy or inconsistency with the rest of the bond. In order to ascertain what the parties intended by the language used the court is required to consider the bond as a whole rather than isolated expressions and is to have regard to its object. The relevant provision must also be construed in accordance with sound commercial principles and good business sense so that it receives a fair and sensible application.”⁵

[16] The SCA concluded that,⁶ “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 recession of them from the bank.”

[17] It is trite that unless otherwise agreed, a cession *in securitatem debiti* results in the cedent being deprived of the right to recover the ceded debt, retaining only the bare dominium or a reversionary interest therein.⁷ In this case, provision was made as per clause 8.1 that the cession, transfer, assignment and power shall not be acted upon by Nedbank without the consent of Hyprop unless Hyprop breached the terms of the mortgage bond.

[18] In this case, just as the SCA concluded in *Picardi Hotels*, there is no dispute that the phrase “cedes, transfers and assigns” incorporates all of the constituent elements of a cession and is sufficient to constitute an effective transfer of rights by Hyprop to Nedbank in interpreting clause 8.1. However, that is where the similarities end. In this case, clause 8.2 and 8.3 are differently phrased. Put differently, the SCA did not, as counsel for the respondent was constrained to concede, deal with 8.2 and 8.3 as they read in this matter.

[19] Properly construed, for Hyprop to commence, institute and conclude proceedings against the respondent to enforce its rights in terms of the lease,

⁵ Id at para 5.

⁶ Id at para 14.

⁷ Id at para 3. See also *Bank of Lisbon and South Africa Ltd v The Master and Others* 1987 (1) SA 276 (A) at 294C.

Nedbank may be required to recede the rights under the lease to Hyprop, subject to clause 8.3 that deals with default. Nevertheless, if there was no default, no further action is necessary on the part of Nedbank. With effect from 09h00 on the date the letter of demand was signed by Hyprop's representative (i.e. attorney) or legal proceedings are instituted as they were against the respondent (from the earlier date thereof), Nedbank automatically receded to Hyprop its rights in terms of the lease as per clause 8.2. In this instance, no default as envisaged in clause 8.3 on the part of Hyprop in terms of the mortgage bond relied upon by the respondent was alleged, so no consent by Nedbank was necessary for the applicant, Hyprop, to launch this application.

[20] Clearly, as the applicant also contended, the terms of clause 8 do not deprive Hyprop as applicant of its right to possession of the property and, concomitantly, its right to evict an unlawful occupier thereof. It appears to me that Hyprop as owner of the property, which is the subject of the eviction application, by agreeing to clause 8 in the bond, did not divest itself in favour of Nedbank, of its right to claim an eviction order against the respondent. Had the bank chosen to institute action against respondent, it would have had to have done so in the name of the applicant, Hyprop.

[21] It follows, accordingly, that the respondent's contention that Nedbank, has the sole right to collect the arrear rentals and to evict the respondent is without basis. I conclude that, the applicant is therefore not precluded from obtaining payment of the arrear rentals (and utility charges) and an eviction order. There is no reason why costs should not follow the result as provided for in the lease agreement.

Order

1. An order forthwith ejecting the respondent, New Age Concepts (Pty) Ltd t/a Reads and all those occupying by, through or under the respondent from the premises described as Shop No.: C221, Rosebank Mall, 50 Bath Avenue, Rosebank, Gauteng ("the premises") is hereby granted.
2. In the event of the respondent failing to comply with the order in paragraph 1 above, the Sheriff of the Court, alternatively his Deputy, is hereby

authorised and directed to eject the respondent and all those occupying by, through or under the respondent from the premises.

3. The respondent is ordered to pay the cost of this application on the attorney client scale (scale C).

TP MUDAU
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Date of Hearing:	08 May 2024 June2024
Date of Judgment:	20 June 2024

APPEARANCES

Counsel for the Applicant:	Adv. W F Wannenburg
Instructed by:	Brits Muller Attorneys

Counsel for the Respondent:	Adv. SP Pincus SC
Instructed by:	Mouyis Cohen Inc