

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case No. 23/076940

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

SIGNATURE

DATE: 22 August 2023

In the matter between:

DIRK VOS LOMBAARD

Applicant

and

MOOLGEM (PTY) LTD

First Respondent

PSG WEALTH FINANCIAL PLANNING (PTY) LTD.

Second Respondent

PSG INVEST (PTY) LTD T/A PSG INVEST

Third Respondent

DUROC FOODS CC

Fourth Respondent

ANDRIES FREDERIK LOMBARD

Fifth Respondent

JUDGMENT

DE VOS AJ:

- 1 The fourth respondent ("tenant") entered into a lease agreement with Moolgem. The fifth respondent stood as surety for the tenant. Moolgem, as the landlord, required security for the performance in terms of the lease agreement. The applicant provided this security in the form of a "collateral cession". The collateral cession is the applicant's R 385,596.44 investment with the second and third respondents, PSG.
- 2 In short, Moolgem's rights, as contained in the lease agreement, were secured in two ways. One, if the tenant breached the agreement, Moolgem could turn to the fifth respondent, who stood as surety for the tenant. Two, the applicant provided Moolgem with a collateral cession for R 385,596.44.
- 3 The lease agreement between Moolgem and the tenant ran into difficulties. Moolgem claims it spent almost R 3 million to prepare the premises for the tenant and is entitled to more than R 723 974.36 in outstanding rent from the tenant. The tenant disputes the validity of the lease agreement and its alleged breach.
- 4 Instead of litigating against its tenant, Moolgem has called up the collateral cession. The applicant contends that Moolgem cannot call up the cession. The applicant's case is that Moolgem's conduct is premature. Before Moolgem can call up the cession, a court has to determine the tenant's indebtedness to Moolgem. To establish the merit of the applicant's claim, the Court considers the relevant clause in the cession agreement -

"If the cessionary requests a withdrawal, PSG will sell the units and pay the cessionary the amount indicated in this form. PSG is not required to give notice of the withdrawal to the cedent."

- 5 The unambiguous wording of the clause is that Moolgem can request a withdrawal. The request can be made without notice to the applicant. The clause limits the amount that can be called up to R 385,596.44.

- 6 The applicant's interpretation of the clause, that Moolgem can only call up the cession after a court has determined the extent of the tenant's liability, is not apparent from the text of the clause. Nothing in the text supports the applicant's interpretation of the clause. Nothing in the language of the clause requires Moolgem to first litigate against the tenant before being able to call up the cession.
- 7 The express language of the clause is at odds with the applicant's interpretation. The clause's express provision that Moolgem can withdraw the money without notice to the applicant – is at odds with an interpretation that a court must first determine liability before Moolgem is entitled to rely on the clause. The applicant's position is at odds with the terms the applicant had bound itself to. The agreement's express terms provide that Moolgem need not even provide notice to the applicant, let alone prove its case against the tenant in Court.
- 8 I have also not been provided with anything in terms of context which supports the applicant's interpretation of the clause. If anything the surrounding clauses in the cession agreement supports Moolgem's interpretation. For example, the cession agreement severely restricts the applicant's ability to use the ceded investment, to the extent that the applicant cannot use the investment at all, without Moolgem's written consent.
- 9 The applicant contends that Moolgem's interpretation of the clause permits parate executie. Our courts have approved the concept of cession in securitatem debiti, which allows for the realisation of property ceded as security in case of a breach. Parate executie allows the cessionary to realise the ceded property without following a judicial procedure. Such clauses have been held to be valid, despite removing the court's oversight in relation to the realisation of the property, as long as it is not enforced in a manner against public policy.

- 10 Accepting the applicant's case, that the clause permits parate executie, the applicant has made out no case that its implementation is unfair, contra bonos mores or that Moolgem has failed/will fail in its fiduciary duties. The applicant's case is not that the clause is an improper parate executie clause. Rather, the applicant's case is that the cession agreement does not permit Moolgem to rely on the clause – without a court first determining the extent of the tenant's liability.
- 11 The Court has been provided with nothing in the text or the context which supports the applicant's interpretation of the cession agreement. The Court is not persuaded that the applicant has made out a case to prevent Moolgem from calling up the cession. The applicant has failed to make out a prima facie right in this regard. There remain, down the road, other remedies available to the applicant, albeit not in the form of an interdict based on these facts.

Order

- 12 The parties came before Court on Tuesday, 15 August 2023. PSG had indicated it would make the transfer on 21 August 2023. To permit the proper consideration of the matter and prevent PSG from paying out whilst the Court is seized with the matter, I granted an interim order on 21 August 2023 prohibiting the investment from being paid out. The order was granted, pending a further order of this court (paragraph 4(c)). The interim order ensured that PSG would only pay out the investment after a final decision could be made by this Court. Having now considered the matter and perused the papers, I grant the following final order.
- 12.1 The Court dispenses with the forms and services provided for in the Uniform Rules of Court and allows the matter to be heard as one of urgency under Uniform Rule 6(12).
- 12.2 The Court dismisses the application.
- 12.3 Each party is to pay their own costs.

12.4 This order operates as the order referred to in prayer 4(c) of the interim order of 21 August 2023. Consequently, the operation of the interim order of 21 August 2023 seizes with the handing down of this order.

I DE VOS

Acting Judge of the High Court

This judgment was prepared by Acting Judge, Irene de Vos. It is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 22 August 2023.

HEARD ON: 16 August 2023

DECIDED ON: 22 August 2023

For the Applicant: Y Coertzen
Thomas Grobler Attorneys

For the Respondent: RS Shepstone
Instructed by Richmond Attorneys