

# SUMMARY OF THE JUDGMENT

## BONDED PREMISES: DOES THE BONDHOLDER OR OWNER SUE FOR EVICTION?

### Pacific Paramount Properties (Pty) Ltd v Burchell t/a Top Wash and Another (8418/2018) [2018] ZAWCHC 124 (19 September 2018)

*It happens frequently that when a bank grants a mortgage to a lender, it stipulates in the agreement that the right to sue for rental received from the property and the right to apply for eviction of unlawful occupiers, rights usually exercised by the landowner, are made over to the bank. In the present matter the tenant invoked this arrangement in defence against the landowner's application for eviction. The landowner was successful and the judgment provides an important call for attention to the interpretation of such provisions in mortgage bond agreements.*

The Judgment can be viewed [here](#).

### FACTS

Pacific Paramount Properties (Pty) Ltd (Pacific) applied to the Cape Town High Court for an order evicting its tenant, Top Wash, from commercial premises it owned in Camps Bay. When Pacific took transfer of the property, a mortgage bond was registered in favour of Nedbank Ltd. Clause 8 of the bond provided for additional security for Pacific's indebtedness to the bank and read as follows:

'8. 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 ... with the express right in favour of the Mortgagee irrevocably and *\*in rem suam* –

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

8.2 to let the mortgaged property or any part thereof ... ;

8.3...

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 terms or condition of this bond or any loan, facility or other indebtedness secured hereby, or has otherwise committed a breach thereof...'. (The latter portion of this clause is hereafter referred to as "the proviso".)

(\**In rem suam*, in the above means that the bank could institute proceedings in its own name to evict, collect rental, and the like.)

The argument in the present matter related to:

- i. whether, by virtue of the cession contained in the mortgage bond, Pacific lacked *locus standi* (standing) to sue for eviction;
- ii. if it retained standing, whether the lease agreement had terminated by the effluxion of time.

**HELD:**

- The language of clause 8 of the mortgage bond is very similar to the cession considered in *Picardi Hotels Ltd v Thekwini Properties (Pty) Ltd*. In that case it was held that the proviso did not suspend the operation of the cession.
- In *Picardi*, however, the question related to the right of the cedent to institute proceedings to recover rent. The cession of the personal right to claim rent meant that the cedent lacked *locus standi*. The court there was not concerned with that part of the clause which authorised the cessionary to evict unlawful occupants.
- There may be a distinction between the right to evict and the right to sue for rent. The latter is a personal right which may be ceded. The former, when it is based (as here) on ownership rather than on the assertion of a contractual right to redelivery, is an incident of ownership.
- In the present case, the cessionary (the bank) had the irrevocable right in its own name (*in rem suam*) to evict unlawful occupants. This points to the granting of an irrevocable mandate, rather than an out-and-out cession of the right. The proviso strengthens this distinction by mentioning not only 'cession, transfer [and] assignment' but also 'authorities and powers'. If the right to seek eviction is an irrevocable authority/mandate rather than a right acquired by cession, the mandatee (the bank) would arguably not be entitled to institute eviction proceedings in its own name; instead, the mandatee (the bank) would act on the authority by causing such proceedings to be instituted in the name of the mandator.
- On this basis, it may be that the eviction proceedings were rightly instituted in Pacific's name. In any event, Pacific had in its replying papers attached a re-cession agreement.
- Even then, assuming that Pacific lacked *locus standi* prior to the re-cession, it

regularised this position by way of the re-cession.

- Top Wash's challenge to Pacific's locus standi was therefore rejected. Top Wash failed on the second issue too, as it could not prove that the lease had not expired by the time the proceedings were instituted.

Judgment was granted in favour of Pacific.

#### CONTACT US

- |                                  |                                      |                                     |                                    |
|----------------------------------|--------------------------------------|-------------------------------------|------------------------------------|
| ■ CAPE TOWN<br>Tel: 021 406 9100 | ■ SOMERSET MALL<br>Tel: 021 850 6400 | ■ TYGER VALLEY<br>Tel: 021 943 3800 | ■ FOURWAYS<br>Tel: 010 001 2632    |
| ■ CLAREMONT<br>Tel: 021 673 4700 | ■ STELLENBOSCH<br>Tel: 021 001 1170  | ■ MENLYN<br>Tel: 012 348 1682       | ■ CENTURION<br>Tel: 012 001 1546   |
| ■ FISH HOEK<br>Tel: 021 784 1580 | ■ BLOUBERG<br>Tel: 021 521 4000      | ■ ILLOVO<br>Tel: 011 219 6200       | ■ BEDFORDVIEW<br>Tel: 011 453 0577 |