REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: A5038/2010

DATE:03/03/2011

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

BRUCE ERIC HEAFIELD	First Appellant
DUNCAN ERIC HEAFIELD	Second Appellant
WEHMEYER & DE WITT (PTY) LIMITED	Third Appellant
ZEVENFONTEIN FARM (PTY) LIMITED	Fourth Appellant

and

RODEL FINANCIAL SERVICES (PTY) LIMITED	Respondent

J U D G M E N T

WEPENER, J:

[1] This is an appeal from a decision of a judge (Bashall AJ) sitting alone in this Division with leave of that court. The case concerns the enforcement of a suretyship. The court below held that a particular clause (clause 5.1) had been inserted for the exclusive benefit of the respondent who could and did waive compliance therewith resulting in the suretyship being enforceable. Because of the finding that the condition was inserted exclusively for the benefit of the respondent the court below did not find it necessary to consider the prejudice, if any, to the sureties that resulted from the respondent's failure to ensure fulfilment with the particular condition.

[2] The second appellant was sequestrated and took no part in the proceedings and no order was issued against him.

[3] Subsequent to the court *a quo* granting judgment in favour of the respondent and subsequent to an application for leave to appeal being filed on 6 August 2009, the attorneys for the appellants wrote a letter to the respondent wherein the following is stated:

> "*We refer to the above matter and the judgment of Bashall AJ on the 30th of June 2009 against Bruce Heafield, the Principal Debtor, and his*

sureties, Wehmeyer and De Witt (Pty) Limited ('Wehmeyer') and Zevenfontein Farm (Pty) Limited ('Zevenfontein').

The judgment together with clause 2 of the Suretyships of Wehmeyer and Zevenfontein (which provides that 'All judgments against the Debtor flowing from any indebtedness covered by the Suretyship and all acknowledgments of the indebtedness and admissions by the debtor shall be binding on the surety') refer.

As you are aware the properties of Wehmeyer and Zevenfontein, in respect of which you hold Mortgage Bonds, are being sold as part of a development.

In the circumstances and in order to avoid prejudicing the sale, Wehmeyer and Zevenfontein hereby request your client's confirmation of the cancellation figures set out below. This confirmation is requested from your client as a matter of urgency in order that the Mortgage Bonds may be cancelled upon Wehmeyer and Zevenfontein's payment of the judgment debt."

Then there are set out certain figures which the third and fourth appellants contend are the correct figures for the cancellation of certain bonds. The letter also tenders payment of the sum of R150 000,00 in respect of the respondent's costs of the action between the parties. After further correspondence the cancellation figures were established and the guarantees issued therefor. As a result of an oversight the costs of the action were not included in the guarantee. The respondent's attorneys requested that this amount also be settled and it was agreed between the respondent and the third and fourth appellants that a guarantee for R150 000,00 should be issued to settle the costs of the action.

[4] It appears from the letter quoted above and the conduct of the third and fourth appellants that they intended to pay the judgment debt and the agreed costs of the action. This, in my view, was an act inconsistent with a continued intention to exercise the right to appeal. On Friday 13 November 2009 the

cancellation of the mortgage bonds was duly effected and payment in terms of the letters of guarantee duly made thereby expunging the judgment debt and costs of the action.

[5] Despite the aforegoing the appellants thereafter persued the application for leave to appeal. The court below found that, because the approach to pay the judgment debt was made by the third and fourth appellants only, that "*… (approach) … is not an unqualified acquiescence in the judgment debt*". I do not agree. In my view the actions of the third and fourth appellants are unqualified acquiescence in that the letter of 6 August 2009 offers to pay the judgment debt and costs of the action.

[6] It is an established principle of our civil law that a person who has acquiesced in a judgment cannot thereafter appeal from it – the right of appeal is said to be perempted. Once the appeal is perempted that is the end of the matter. See *Hlatshwayo v Mare and Deas* 1912 AD 242; *Samancor Group Pension Fund v Samancor Chrome and Others* 2010 (4) SA 540 (SCA) at paragraph [25] where the following was stated:

> "*<u>Doctrine of peremption</u>*
>
> *[25] In Gentiruco AG v Firestone SA (Pty) Ltd Trollip J said:*
>
> > *'The right of an unsuccessful litigant to appeal against an adverse judgment or order is said to be perempted if he, by unequivocal conduct inconsistent with an intention to appeal, shows that he acquiesces in the judgment or order.'*
>
> *See also Natal Rugby Union v Gould. In Standard Bank v Estate Van Rhyn Innes CJ said:*

> *'If a man has clearly and unconditionally acquiesced in and decided to abide by the judgment he cannot thereafter challenge it."*

[7] It is not necessary to show an agreement not to appeal and conduct that would estop the appellant from denying acquiescence or abandonment of the appeal would suffice. See *Hlatswayo v Mare and Deas*, supra at 254. There must be conduct leading to the clear conclusion of an intention not to assail the judgment and the *onus* of proof rests on the person alleging acquiescence. *Dabner v SAR&H* 1920 AD 583 at 594. Generally see Herbstein and Van Winsen: "*The Practice of the High Courts of South Africa*", 5th edition at pp 1216-1217. In the present case, despite the notice of application for leave to appeal having been delivered, the third and fourth appellants requested cancellation figures in respect of bonds they had furnished in order to allow them to pay the full judgment debt. The payment included capital and interest and an offer to pay an amount of R150 000,00 in respect of the respondent's legal costs. The third and fourth appellants also supplied a reason why they so acquiesced. They were desirous to sell the properties in respect of which the respondent held mortgage bonds as part of a development.

[8] The tender to pay and the payment itself were made through attorneys without protest, and the full judgment debt was extinguished by such payment.

[9] The noting of an application for leave to appeal has the effect of staying execution of the judgment. In Hlatswayo, supra, it was stated at 255 as follows:

> *'What then is the effect of paying a judgment in whole or in part? The answer to that, I think, must be that no general rule can be laid down, as so much depends upon the circumstances in which payment is made. Take the case in which execution of a judgment has been stayed; clearly any payment thereafter would be such an unequivocal act that the only reasonable inference that could be drawn from it is that there was an intention to acquiesce in the judgment.'*

[10] Although the payment was made in order to allow the sale of the properties subject to the bonds being effected and so not to prejudice those sales, the fact remains that the tender was made to pay the judgment debt and costs in full without any reservation of rights and the payment was made without protest. In this process the appellants were represented by a firm of attorneys, which would undoubtedly have known how to protect their clients' rights, had that been their intention. The only conclusion to be reached from the aforementioned facts is that the third and fourth appellants accepted and abided the judgment and indicated unequivocally that they had no intention of challenging it any further.

[11] The third and fourth appellants, being corporate entities, do not act on their own. Having regard to the affidavits it is clear that the first appellant has been the duly authorised representative and signatory on behalf of the third and fourth appellants in all matters affecting the case under consideration, including the signing of the suretyships. He is a director and shareholder of the third and fourth appellants. He associated himself fully with the third and fourth appellants. It was argued on behalf of the respondent that the first

appellant is the guiding mind of the third and fourth appellants. This was so stated in a letter dated 13 April 2010, which letter was forwarded to the attorneys of the appellants. This was never challenged. The first appellant is consequently bound by the acquiescence.

[12] In addition, the judgment granted against the first appellant and other appellants has been satisfied. There is no further dispute between the first appellant and the respondent. Pursuant to the provisions of section 21 A of the Supreme Court Act 59 of 1959 (the SC Act) any judgment or order given on appeal should have a practical effect on pain of the appeal being dismissed in the absence of having a practical effect. I have not been convinced that there is any practical effect for the first appellant should the appeal be considered on its merits, once it is found that third and fourth appellants have paid the judgment debt. Brand JA said in Port Elizabeth Municipality v Smit 2002 (4) SA 241 (SCA) at 246 G:

> *'[6] The practical result of the settlement agreement appears to be that the parties have effectively resolved all their differences. There is no longer any dispute or lis between them. Although the agreement is formulated in a way that makes the indemnity and the waiver by the parties, respectively, conditional upon the outcome of this appeal, it is clear that a businesslike approach to the terms of the settlement leads to one conclusion only, namely that, whatever the outcome of the appeal, it will have no effect whatsoever on the respondent or on the position of the parties inter se. It is in these circumstances that the question arises whether the appeal should be entertained on its merits by this Court at all. Relevant to this question are the provisions of s 21A(1) of the Supreme Court Act 59 of 1959 (s 21A). This section lays down that, when 'the issues' in an appeal are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on that ground alone.*
>
> *[7] It can be argued, I think, that s 21A is premised upon the existence of an issue subsisting between the parties to the litigation which requires to be decided. According to this argument s 21A would only afford this Court a discretion not to entertain an appeal when there is still a subsisting issue or lis between the parties the resolution of which, for some or other reason, has become academic or hypothetical. When there is no longer any issue between the parties, for instance because all issues that formerly existed*

> *were resolved by agreement, there is no 'appeal' that this Court has any discretion or power to deal with. This argument appears to be supported by what Viscount Simon said in Sun Life Assurance Company of Canada v Jervis [1944] AC 111 (HL) at 114, when he said, with reference to facts very similar to those under present consideration:*
> *'. . . I think it is an essential quality of an appeal fit to be disposed of by this House that there should exist between the parties a matter in actual controversy which the House undertakes to decide as a living issue.'*
>
> *Consequently, he found that in a matter where there was no existing lis between the parties the appeal should be dismissed on that ground alone (at 115). (See also Ainsbury v Millington [1987] WLR 379 (HL) at 381.) More recently, however, it was said by Lord Slynn of Hadley in R v Secretary of State for the Home Department, Ex parte Salem [1999] 2 WLR 483 (HL) at 487H ([1999] 2 All ER 42 at 47 c) that:*
> *'. . . I accept . . . that in a cause where there is an issue involving a public authority as to a question of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se.'*

For these reasons, and in the exercise of the courts discretion under section 21A of the SC Act, the appeal of the first appellant falls to be dismissed.

[13] Mr Marcus argued that the first appellant would still require the court to determine the appeal in his favour by finding that the respondent has not complied with the sixth condition. However, by virtue of the view that the sixth condition had indeed been fulfilled, as set out below this argument cannot be sustained.

[14] Mr Marcus also argued that the peremption point cannot be upheld by virtue of the fact that the court below did not grant leave to appeal against the peremption issue; that following National Union of Metalworkers South Africa v Jumbo Products CC 1996 (4) SA 735 (SCA), without such leave the question of peremption is not before the court of appeal.

[15] The court below found that there was no unqualified acquiescence in the judgment debt and it granted leave to appeal against two aspects, namely the question as to for whose benefit the conditions precedent were incorporated and the question of waiver.

[16] Does this disentitle the respondent to rely on peremption in this court? In the Jumbo Products case supra, Corbett CJ said at 740 A-D:

> *'…no appeal lies to this Court against the judgment on the merits or the judgment refusing condonation of the late filing of the application to the Court a quo for leave to appeal except either where the Court a quo has itself granted leave to appeal or where, the Court a quo having refused such leave, such leave has been granted by this Court. Thus, as is clear from the subsection, this Court's jurisdiction to grant leave itself is dependent on the Court a quo having refused such leave. The proper procedure, as imperatively laid down by s 20(4) (b), is for the would-be appellant to apply for leave first to the Court against whose judgment the appeal is to be made. If that Court grants leave, then this Court may entertain the appeal. If that Court refuses leave, then (but only then) may this Court consider an application for leave to appeal.'*

[17] By its nature, acquiescence in a judgment will only occur after the judgment is given. It may occur, as in this case, before the application for leave to appeal is heard, or thereafter. The fact that the court below was also tasked to consider the matter does not result in the appeal court not having jurisdiction to consider the question when it is placed before it.

[18] By raising the argument that leave to appeal ought not to have been granted, because the matter has been perempted, no substantive application (such as an application for condonation) was before the court. No relief was sought by the respondent. Similarly, the issue is raised on appeal to show why the appeal ought not to succeed – there is no application before us and no substantive relief is sought.

[19] Corbett CJ held in Jumbo Products, supra at 742 supra that:

> *'On the contrary, it seems to me that an application for condonation, though related to the main proceeding, is a discrete procedure falling under the general mantle of 'any civil proceedings', as these words appear in s 20(4) of Act 59 of 1959.'*

[20] I am of the view that the question whether the respondent can rely on peremption does not fall within the description of "discrete procedure" referred to by Corbett CJ.

[21] I am fortified in this view by the reference in section 20(4)(b) of the SC Act to the words "judgment" and "order".

In Publication Control Board v Central News Agency Ltd 1977 (1) SA 718 (AD) at 744H-745A, the court held as follows:

> *'The sole remaining question to be determined is whether, in the absence of a cross-appeal, it is open to the respondent to raise the issue whether "Naked Yoga" falls within the provisions of the exemption contained in sec. 5 (4) (b) (iii) of the Act. The statutory provisions applicable are sec. 20 (1) (b) of the Supreme Court Act, 59 of 1959, and Rule 5 (3) of the Rules of this Court. The combined effect of these provisions is that if a respondent in an appeal wishes to achieve a variation of the judgment or order in the Court a quo he shall lodge a notice of his cross-appeal setting forth therein full particulars of the variation which he seeks. It follows that if he desires no such variation the noting of a cross-appeal is unnecessary and inappropriate.*
>
> *The terms "judgment" and "order" in the statute and Rule of Court do not embrace every decision or ruling of a court. These terms are confined to decisions granting "definite and distinct relief". (Dickinson and Another v Fisher's Executors , 1914 AD 424 at p. 427; Heyman v Yorkshire Insurance Co. Ltd .,* 1964 (1) SA 487 (AD) *at p. 490D - F.)'*

[22] In the matter under consideration the court below rejected an argument but made no "judgment" or "order" as envisaged in section 20 of the SC Act

regarding peremption. See Ngubane v South African Transport Services 1991 (1) SA 756 AD at 772 D.

[23] Having regard to the aforegoing, the argument that the respondent should have sought leave to appeal against the rejection of its argument regarding peremption cannot be upheld.

[24] The respondent cannot be prevented from arguing that the third and fourth appellants indeed acquiesced in the judgment and that the appeal had to fail in as much as the appellants would then not be entitled to challenge the judgment granted against them. F M Grosskopf JA said in Mufamadi and Others v Dorbyl Finance (Pty) Ltd 1996 (1) SA 799 (A) at 803 H – I:

> *'While the respondent, in the absence of a cross-appeal, must abide the decision of the Court a quo, it cannot be prevented from arguing that clause 14.2 is indeed valid, and that the appeal should fail inasmuch as the appellants would then at least not be entitled to challenge the amount of damages actually awarded.'*

In Administrator, Cape, and another v Ntshwaqeta and another 1990 (1) SA 705 A, the court held at 715 D "There can be an appeal only against the substantive order made by a Court, not against the reasons for judgment."

[25] In all the circumstances, the appellants are held to have acquiesced in the judgment of the court below and the right of appeal has been perempted.

Based on the aforegoing findings, the appeal falls to be dismissed.

[26] There is, however, a further reason why the appeal cannot succeed. Although there was extensive argument placed before us regarding the waiver

of a condition (the cession) pursuant to the agreement, whether the condition was inserted in the agreement for the exclusive benefit of the respondent and whether the words “on written notice to the Borrower “contained in the clause also refer to the right to waive, which is contained in the clause. I need not consider these issues or the further issue of possible prejudice to the sureties by virtue of the conclusion which I have reached.

[27] The respondent commenced its application by setting out the following allegations in its founding affidavit as summarised by the court below.

> *‘The applicant in this matter is a registered credit provider in terms of section 40 of the National Credit Act 34/2005. This was a point that arose at a preliminary stage of these proceedings but was not persisted with as a defence.*
>
> *On 22 December 2006, the applicant and the first respondent entered into a written Facility Agreement. Salient terms were, inter alia, as set out as follows in the founding affidavit.*
>
> *“10.1 The Applicant would lend and advance to the First Respondent the amount of R14 800 000,00.*
> *10.2 The amount repayable in terms of the loan agreement including interest and bond registration costs would be R18 796 000,00.*
> *10.3 The loan was conditional upon the mortgage bonds and suretship (sic) relied upon in this application being furnished and upon cession of the ticket sales by Kusasa (Pty) Limited (Kusasa) in respect of the national performance of Celine Dion to a limit of R14 800 000,00 plus costs and interest to the applicant.*
> *10.4 The monies to be lent and advanced in terms of the loan agreement would be advanced to the First Respondent on the Applicant being satisfied that its security requirements in terms of the loan agreement had been met.*
> *10.5 The loan would expire within 12 months following the date upon which the loan was advanced by the Applicant to the First Respondent in terms of the loan agreement and notwithstanding anything to the contrary contained in the loan agreement, all amounts owing by the First Respondent to the Applicant in terms of the loan agreement including all interest and other charges would be repaid to the applicant on the earlier of the first advance to Kusasa by TicketConnection in respect of ticket sales for the national performance of Celine Dion or within 12 months of the date of advance of the loan in terms of the loan agreement.*

10.6 Interest would be charged on the loan advanced in terms of the loan agreement at a rate of 0.1% per day calculated daily and capitalised monthly in arrears subject to a minimum amount of R444 000,00 being payable for the first month."

That is as stated above set out in the founding affidavit. Clause 2.6 provided:

"2. SECURITY
The facility is conditional upon the following security being furnished to Rodel:
2.5 Cession of the ticket sales by Kusasa (Pty) Ltd, collected on its behalf by Ticketconnection(sic) in respect of the national performance by Celine Dion, limited to an amount of R14 800,00 plus costs and interest."

Clause 4 of the facility agreement provided:

"4. STANDARD TERMS AND CONDITIONS
The facility is subject to Rodel's STANDARD TERMS AND CONDITIONS annexed hereto. In the event of any conflict between the STANDARD TERMS AND CONDITIONS in this facility agreement, the terms of this agreement will prevail."

This must be read with clause 5.1 of the applicant's standard terms and conditions."

See Minister of Community Development v SA Mutual Fire & General Insurance Co Ltd 1978 (1) SA 1020 (W) where Colman J noted with reference to Halsbury, *Laws of England* , 3rd ed, vol. 18, para. 922:

'When a person becomes surety for another in a specific transaction or obligation, the terms and conditions of the principal obligation are also the terms and conditions of the suretyship contract.'

"5. Security.
5.1 The facility shall be conditional in all respects upon the provision and registration, if applicable, of the security, if any, listed in clause 2 of the facility agreement and Rodel shall have no obligation under the facility pending the provision and registration of the same. The condition, if any, that security be furnished is for the benefit of Rodel. Rodel shall be entitled, unilaterally and at its discretion to waive fulfilment of any of the security requirements listed in clause 2 of the facility agreement or to accept partial fulfilment of any security requirements or to release any security that it hold for the obligation of the Borrower on written notice to the Borrower."

The second respondent executed a deed of suretyship in respect of the above loan facility. He has subsequently been sequestrated and his trustees have played no further part in these proceedings.

Also on 22 December 2006 the third and fourth respondents executed written deeds of suretyship to secure the obligations of the first respondent to the applicant. The third and fourth respondents are property owning companies. Their liability was limited to a maximum of R6 600 000,00 and R12 200 000,00 respectively. A salient term was:

> *"8. This surityship shall be in addition to any other security held by Rodel against the Surety and this suretyship shall not be affected by any other suretyship or security held by Rodel against the Surety."*

Two mortgage bonds were registered against the immoveable property of the third and fourth respondents respectively. It is recorded that:

> *"The Mortgagor binds itself jointly and severally in solidum for, and as co-principal debtor with the principal debtor unto and in favour of the mortgagee in the amount herein mentioned for the repayment on demand of all sum (sic) or sums of money which may now be or from time to time hereafter be or become owing and payable by the Principal Debtor to the said mortgagee in respect of the indebtedness mentioned herein."*

The limits of the indebtedness were respectively R6 600 000,00 and an additional amount of R660 000,00 as against the third respondent and R12 200 000,00 an additional amount of R1 220 000,00 as against the fourth respondent.

In the founding affidavit the applicant avers:

> *"21. All conditions precedent to the loan agreement were duly fulfilled and the loan due in terms thereof was duly advanced by the Applicant to the First Respondent on 27 December 2006. The Applicant complied with all of its obligations in terms of the loan agreement.*
> *22. An event occurred to render the repayment of the loan, interest and other amounts due by the First Respondent to the Applicant due prior to the aforesaid twelve month period of the loan and accordingly, the loan became due, owing and payable on the expiry of such twelve month period and was thus payable in full together with all interest and other charges due in terms thereof on or before 26 December 2007.*
> *23. On 23 November 2007, the Applicant addressed a letter per e-mail (to the e-mail address provided to the Applicant by the First Respondent for the purposes of notification of the First Respondent by the Applicant in terms of the transaction) and so faxed to the First Respondent's fax number (likewise provided to the Applicant for such purpose) a letter in terms of which the First Respondent was given notification that the loan facility expired on the 26th of December 2007 and that an amount of R20 592 106, 40 would be due, owing and payable*

on such date in terms of the provisions of the loan agreement. A copy of such letter is annexed hereto marked 'FA7'.

24. *Notwithstanding the aforesaid demand and the expiry of the loan period as aforesaid, the First Respondent failed to make payment of the aforesaid outstanding amount or any amount whatsoever."*

There followed notices by registered letter to the first and second respondents referred to below.

On 5 May 2008 letters demanding payment of the third and fourth respondents were despatched to them by registered post.

Before the respondents filed their answering affidavit a notice was served in terms of Rule 35(12) referring to the allegations in the founding affidavit as follows:

"1. In paragraph 21 the Deponent states that 'All conditions precedent to the loan agreement were duly fulfilled' and 'The Applicant further complied with all of its obligations in terms of the loan agreement.'

2. *In clause 10.3 (sic) the Deponent states that 'The loan was conditional upon the mortgage bonds and suretyship relied upon being furnished and upon cession of the ticket sales by Kusasa (Pty) Limited in respect of the national performance of Celine Dion…'*

3. *Clause 2 of Annexure 'FA1' to the Founding Affidavit, and clause 2.6 of the Annexure 'FA1' to the Founding Affidavit state that the facility is conditional upon the following security being furnished to Rodel: 'Cession of the ticket sales by Kusasa (Pty) Limited, collected on its behalf by Ticketconnection, in respect of the national performance of Celine Dion, limited to an amount of R14 800 000,00 plus costs and interest'."*

This resulted in the production of a document which I set out as follows. It is headed Cession of Funds (Limited) and commences:

> *"Re: Cession of future funds due to Kusasa (Pty) Limited in respect of the Celine Dion concert to be held in South Africa in 2008 in favour of Rodal Financial Services (Pty) Ltd.*
> *We have been advised by our client in respect of the above event as the official ticketing agent for this event, to initiate the following cession of funds in your favour.*
>
> *Due to the nature of the artist, the respective venues and to date, the number of requests for information on these events, we are confident that the below funds will be realised shortly after the events are open for public sale.*
>
> *The cession has the following limitations:*
>
> *1) the cession is limited to the amount of twenty million rand (R20 000 000.00) pending the availability of such funds after ticketing agents, fees and deductions.*

2) *the cession is in favour of Rodel Financial Services (Pty) Ltd 1998/024425/07.*
3) *the cession is in respect of funds to be realised by the Celine Dion concert held at the following venues in South Africa in February 2008:*
   a) *Loftus Stadium – Pretoria*
   b) *Absa Stadium – Durban*
   c) *EPRFU Stadium – Port Elizabeth*
   d) *Newlands Stadium – Cape Town*
4) *Funds will be advanced on a weekly basis. The Ticketconnection trading week commences Sunday and ends the following Saturday. Funds will be payable the Monday preceding the tracking week.*
5) *Funds will be advanced into the following bank account:*
   Rodel Financial Services:
   Standard Bank
   Overport city
   Account: 052615499.
6) *Ticketconnection is an agent to Kusasa (Pty) Limited and as such incurs no liability whatsoever in regards (sic) to Kusasa Pty (Ltd) the public and/or the beneficiary of the ceded funds."*

It is ended with the name Darren Ebbs, who I was advised acted for Ticketconnection and it was addressed Attention: Melinda Terblanche, Rodel financial Services."

[28] After considering the question of cession, Bashall AJ found that the "unsigned document which predates the Facility Agreement produced under Rule 35 (12) does not in my view, constitute a cession as contemplated in clause 2.6. It is no more than an undertaking to cede". I do not agree.

[29] In Luttig v Jacobs 1951 (4) SA 539 (o) at 568 B Brink J set out the law regarding suretyship and affirms that no particular form of cession is required. What is necessary is that the person entitled to rights must intend to cede them and he must do everything necessary to give effect to his intention. The cessionary becomes the exclusive holder of the rights ceded.

[30] The facility agreement, which forms part of the suretyship provides that it is conditional upon six securities being furnished: the registration of two

mortgage bonds, the issue of three suretyships and sixthly, a cession of the ticket sales by Kusasa (Pty) Ltd, collected on its behalf by Ticketconnection in respect of the national performance of Celine Dion, limited to an amount of R14 800 000,00 plus costs and interest.

[31] When launching the application, the respondent, in its founding affidavit, supplied the full particulars of the bonds and suretyships as it claimed relief pursuant thereto. Regarding the sixth condition, it only alleged that "All conditions precedent to the loan were duly fulfilled and the loan due in terms thereof was duly advanced by the Applicant to the First Respondent on 27 December 2006."

[32] Prior to delivering its answering affidavits, the appellants served a notice in terms of rule 35(12) which, as it was understood, required production of the cession of the ticket sales. In a reply to this notice, the document headed Cession of Funds (Limited) was produced. The terms of the document are set out in the passage quoted from the judgment of the court below.

[33] The cession document, in my view, proves a fulfilment of the sixth condition. It is headed" Cession of Funds (Limited)". The subject matter of the document reads that it is a "cession of future funds due to Kusasa (Pty) Ltd in respect of the Celine Dion concert"… in favour of the respondent. The first paragraph of the document, which is in the form of a letter, indicates that the purpose of the document is "to initiate the following cession of funds in your favour". I am in agreement with Mr A Gautschi who appeared on behalf of the

respondent that the wording of the document is such that a cession of funds was intended. The last paragraph of the letter refers to the "ceded funds". Having regard to the cession document as a whole, it is a valid commercial document. Mr Gautshi also referred to the dictum of Colman J in Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd 1964 (1) SA 669 (W) at 670G-H where it was said:

> *"It is my task therefore to examine exh. 'A' in order to see whether or not it fixes a price, or provides for the fixing of a price with the requisite degree of certainty. In so doing I must, I think, have regard to the fact that exh. 'A' is a commercial document executed by the parties with a clear intention that it should have commercial operation. I must therefore not lightly hold the document to be ineffective. I need not require of it such precision of language as one might expect in a more formal instrument, such as a pleading drafted by counsel. Inelegance, clumsy draftmanship or the loose use of language in a commercial document purporting to be a contract, will not impair its validity as long as one can find therein, with reasonable certainty, the terms necessary to constitute a valid contract."*

I am consequently satisfied that a cession of the ticket sales took place and that the sixth precondition was indeed met.

[34] Mr Marcus argued that the respondent disavowed any reliance on the cession and could not do so in reply as a case must be made in the founding affidavit and not in a replying affidavit. This is not an inflexible rule. The respondent disavowed reliance upon the cession in circumstances where no relief was claimed based upon it but the allegation that all conditions had been complied with contained in the founding affidavit, was unambiguous.

[35] Only when the appellants took the defence that there was no compliance with the sixth condition, did the respondent react in the replying affidavit as follows: "No detailed allegations were made with reference to the

cession for the single reason that the cession is not relied upon in these proceedings ". It clearly did not rely on the cession as it was an ancillary matter for purposes of the appllication. The respondent then stated in the replying affidavit that a written confirmation of the cession was indeed obtained and referred to the cession document referred to herein.

[36] The cession has consequently been shown to exist. In this regard, I refer to the case of Nedbank Ltd v Hoare1988 (4) SA 541 at 543, where Mullins J said:

> *'I do not read this Rule as implying that a deponent to an affidavit can in no way depart from the terms thereof. If this were so, a party could not, in a supplementary affidavit, vary or explain the terms of a founding affidavit. This is a matter of frequent occurrence, more particularly where it is not sought to withdraw or vary factual allegations, but only to amplify or amend legal conclusions or submissions, which are frequently incorporated in an affidavit, in order to clarify a cause of action.*
>
> *Even if it is intended to vary or amend facts, I can see no objection thereto. A witness giving evidence on oath in Court frequently retracts a statement, or qualifies or changes his evidence. Whatever effect it may have on his credibility, he can not be precluded from giving such evidence. Why should the deponent of an affidavit be in a different position?*
>
> *Insofar as Rule 28(1) is concerned, I read this Rule as meaning nothing more than that the provisions of the Rule may not be used to amend an affidavit. It does not, for example, preclude a deponent from filing a supplementary or replying affidavit explaining, varying or even retracting statements made in his original affidavit.'*

There can be no objection that regard be had to the cession document and the fact that the deponent states that a cession was effected wherein cession of the ticket sales was indeed intended.

In the circumstances, the appeal cannot succeed and falls to be dismissed with costs, such costs to include the costs of two counsel.

_____

Judge W L Wepener
Judge of the High Court

I agree _____

Judge J P Horn
Judge of the High Court

I agree _____

Judge M Victor
Judge of the High Court