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# CORPORATE & COMMERCIAL ALERT

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*A discussion of **University of Johannesburg v Auckland Park Theological Seminary and Another** (CCT 70/20) [2021] ZACC 13*

On 11 June 2021, the Constitutional Court of South Africa (Court) upheld an appeal from the Supreme Court of Appeal (SCA) brought by a property owner and lessor, the University of Johannesburg (UJ), that the rights under a registered long term lease entered into by UJ and its lessee, Auckland Park Theological Seminary (ATS), were of such a personal nature (i.e. *delectus personae*) that these rights were not freely cedable by ATS to Wamjay Holdings Investments (Pty) Ltd (W), notwithstanding that the lease was silent regarding cession by the lessee.



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## Beware of lease cessions!

### A discussion of *University of Johannesburg v Auckland Park Theological Seminary and Another* (CCT 70/20) [2021] ZACC 13

In general, rights (but not duties or obligations) arising out of a contract may be freely ceded to a third party without the knowledge or consent of the counterparty (i.e. the debtor) who owes the corresponding duty.

On 11 June 2021, the Constitutional Court of South Africa (Court) upheld an appeal from the Supreme Court of Appeal (SCA) brought by a property owner and lessor, the University of Johannesburg (UJ), that the rights under a registered long term lease entered into by UJ and its lessee, Auckland Park Theological Seminary (ATS), were of such a personal nature (i.e. *delectus personae*) that these rights were not freely cedable by ATS to Wamjay Holdings Investments (Pty) Ltd (W), notwithstanding that the lease was silent regarding cession by the lessee.

In general, rights (but not duties or obligations) arising out of a contract may be freely ceded to a third party without the knowledge or consent of the counterparty (i.e. the debtor) who owes the corresponding duty. For example, creditor X who has a claim against debtor Y, may freely cede this claim to another creditor Z, without the consent of debtor Y.

There are, however, exceptions to this rule. For example, a prohibition on cession without consent in the written contract in which the right was created – for convenience referred to as a “no cession clause”.

Another exception is known as *delectus personae*: the identity of the creditor is so important that the right may not be ceded without the consent of the debtor. In this matter the Court stated that where parties to a juristic act “intend to negotiate personally with each other to the exclusion of others, the general principle that a person may dispose of his rights freely, is restricted”. An example would be where a person has chosen a specific surgeon to perform his or her heart transplant. The right to perform the surgery cannot be ceded without the patient’s consent, although the right to payment might be capable of cession.

UJ and ATS concluded a 30-year lease (without a no cession clause), which was registered in 1996, for a single upfront rental of R700,000 which was paid. In 2011, ATS ceded its rights under the lease to W (which was in the business of schools and not tertiary education), for a once-off payment of R6,500,000, without the knowledge or consent of UJ. Upon discovering this cession in 2012, UJ as lessor cancelled the lease on the grounds that ATS’ rights under the lease were *delectus personae* and thus incapable of cession and ATS had by the purported cession repudiated the lease entitling UJ to cancel.

The Court held that the nature of the right cannot be determined only from the ordinary grammatical meaning of the words of the contract. It stated at paragraph 75 that “it cannot be that the rights created by the lease in this case are not *delectus personae* merely because the general right (and correlative obligation) flowing from a lease is that of beneficial occupation, which is generally not personal”. The Court therefore emphasised the importance of contextual evidence (which evidence it allowed, contrary to the SCA) and of the circumstances leading to the conclusion of the contract. The test is an objective one, and should include a consideration of the text, context, and purpose of the contract.

UJ required the prior approval of the Minister of Education before this property could be let, which application for approval specifically named ATS in order to assist UJ in its project of providing tertiary education by building a theological college. Another important contextual factor was the statutory framework within which the lease was concluded, specifically the Universities Act 61 of 1955, and section 4(2) of the Rand Afrikaans University Act 51 of 1966

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### A discussion of *University of Johannesburg v Auckland Park Theological Seminary and Another* (CCT 70/20) [2021] ZACC 13...continued

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which empowered UJ to contract with ATS. Cumulatively, the above factors satisfied the Court that the rights under the lease were personal to ATS and could not be ceded without UJ's consent. This cession amounted to a breach of contract by ATS and a repudiation, entitling UJ to cancel the lease agreement.

The Court further clarified Greenberg JP's judgment in *Boshoff v Theron* 1940 TPD in which an obiter (i.e. not binding precedent) statement was made that a long-term lease is seldom *delectus personae*. The Court emphasised that the above obiter simply means that long-term leases are ordinarily not *delectus personae*, particularly leases to natural persons as the longer the lease period, the less likely a lessor would intend for the same person to occupy the property for the whole period. However, this does not mean that long-term leases can never be *delectus personae*.

In determining whether rights under a lease are *delectus personae* and therefore incapable of cession, the key inquiry is: "*whether the rights flowing from the contract in question are so personal in nature that it makes a reasonable or substantial difference to the debtor whether the cedent or the intended cessionary is entitled to enforce them.*" This applies to all contracts, including lease agreements. The Court held that, "*whether or not rights under a particular lease agreement are delectus personae will always depend on the specific agreement between the parties; its factual matrix and purpose; the circumstances leading up to its conclusion; and the knowledge at the time of those who negotiated and produced the agreement.*"

Therefore, even if a contract is silent on whether or not the rights thereunder may be transferred to another party, it is advisable to have regard to the above factors as they may indicate that the rights are *delectus personae* and therefore may not be transferred without the prior consent of the other party.

In summary, as lessor always ensure that your lease has a no cession clause, which is standard in most leases. In the rare unfortunate scenario where such a clause has not been included, a lessor may be able to rely on *delectus personae*, but the scope of that defence is frankly unclear from this case, where a full bench of the SCA (on appeal from two lower courts) sided with ATS and W in rejecting *delectus personae*, only to be overturned by this Court on further appeal. Certainly, *delectus personae* does not usually apply to lessee rights under leases, based upon this Court judgment.

Depending on the facts, a lessor argument (not made in this matter based upon the SCA and Court published judgments) should be that it makes a substantial difference to the lessor (such as UJ) which is materially disadvantaged if it must enforce lessee obligations against a cedent (such as ATS) which no longer occupies or has an interest in the leased premises, while defending an enforcement of occupation rights by a cessionary (such as W). In particular, this is the case under a contract such as a lease where numerous obligations are ongoing and where some obligations are arguably reciprocal obligations of the lessee to the lessor's obligation to give beneficial occupation.

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*David Thompson, Clara Hofmeyr and Fatena Ali*

# RISK ASSESSMENT DATE LOOMING – 2 JULY 2021

**THE OSHA DIRECTIVE REQUIRES EMPLOYERS TO UNDERTAKE A RISK ASSESSMENT BY 2 JULY 2021.**

The risk assessment requires employers to indicate whether they intend adopting a mandatory vaccination program and if so, the categories of employees who will be required to be mandatorily vaccinated.

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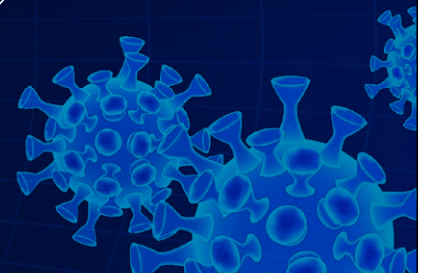
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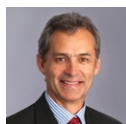


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### BBBEE STATUS: LEVEL TWO CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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