

**University of Johannesburg v Auckland Park Theological Seminary and Another (CCT 70/20) [2021]  
ZACC 13 – Cession of a Lessee’s Rights and Obligations**

As a general rule, rights arising out of an agreement or specifically a lease agreement, may be freely ceded to a third party without the knowledge or consent of the counterparty. However, it is not unusual for an agreement to contain a provision providing that a lessee who seeks to cede and assign all their rights and obligations in terms of the lease agreement to a third party may only do so after obtaining the prior written consent of the lessor, which consent may not be unreasonably withheld. Furthermore, another exception to the general rule is when the identity of a party is so important that the right may not be ceded without the consent of the counterparty (*delectus personae*).

In terms of the *University of Johannesburg v Auckland Park Theological Seminary and Another*, the central issue before the Constitutional Court was whether the cession of rights in a long-term lease agreement between the University of Johannesburg (UJ) and Auckland Park Theological Seminary (ATS) was permissible, and central to the determination of this issue was whether the rights of the lease agreement are personal to ATS and therefore incapable of cession.

UJ and ATS entered into negotiations regarding ATS’s acquisition of property for a theological college and the negotiations culminated in UJ obtaining permission from the Minister of Education, which was required in terms of the statutory framework. In seeking permission, UJ specifically mentioned ATS and outlined the purposes for which ATS required the property. UJ and ATS subsequently entered into a thirty-year lease agreement, which was registered in 1996.

The lease agreement did not contain a provision specifically prohibiting cession. ATS paid UJ a once off rental of R700 000.00. ATS did not establish a theological college premises, as previously negotiated with UJ, and instead ceded its rights under the lease agreement to Wamjay Holdings Investments Pty Ltd (Wamjay) by way of a notarial deed of cession, without the knowledge and consent of UJ. Wamjay paid ATS R6 500 000.00 for the rights.

Upon discovering this cession, UJ, as the lessor, cancelled the lease agreement on the grounds that ATS’ rights under the lease agreement were *delectus personae* and thus incapable of cession and ATS has, by the purported cession, repudiated the lease which entitled UJ to cancel the lease agreement after accepting the repudiation. UJ approached the High Court for an order evicting ATS and Wamjay from the premises.

The High Court found in favour of UJ on the basis that the evidence was consistent and uncontroverted in relation to the personal nature of the relationship between UJ and ATS, however the Supreme Court of Appeal disagreed and held that all contractual rights can be transmitted unless they are either of such a personal nature that the identity of the contracting party matters and is instrumental to the agreement (*delectus personae*) or it can be shown that the contract conveys an intention that the rights not be transferred. The SCA briefly held that the existing jurisprudence indicates that in a long lease agreement, the lessor does not expect that the obligations of the lease agreement will be carried out personally throughout the whole term and there was no evidence in the lease agreement which indicated the rights were *delectus personae*.

The Constitutional Court (CC) decision:

The CC held that the nature of the right cannot be determined only from the ordinary grammatical meaning of the words of the agreement. The CC stated 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 the lease agreement is that of beneficial occupation, which is generally not personal.”* The CC emphasized the importance of contextual evidence and the circumstances leading to the conclusion of the agreement and that determination of delectus personae is an object test and should include a consideration of the text, context and purpose of the agreement.

As stated above, UJ required the approval of the Minister of Education before the property could be let, which application for approval specifically named ATS to assist UJ in its project of providing tertiary education by building a theological college. Furthermore, the statutory framework that empowered UJ to conclude a lease agreement with ATS provided further contextual evidence that the rights under the lease agreement were personal to ATS and thus could not be ceded without UJ’s written consent. Therefore, the cession amounted to a repudiation of the lease agreement by ATS, which entitled UJ to cancel the lease agreement.

In determining whether rights under a lease agreement are *delectus personae* and therefore incapable of cession, the key determination is:

1. *Whether the rights flowing from the agreement in question so personal in nature that it makes a reasonable or substantial difference to the party whether the cedent or the intended cessionary is entitled to enforce them; and*
2. *What the specific agreement between the parties, its factual matrix and purpose are; the circumstances leading up to the conclusion and the knowledge at the time of those who negotiated and produced the agreement.*

It is essential that as a lessor, you ensure that your lease agreement has a provision specifically prohibiting the cession of rights, unless written consent is obtained. However, if no provision is included in the lease agreement, a party may rely on delectus personae as a defence, but the scope of the defence will depend on the circumstances surrounding the conclusion of the agreement.