The merits of recent South African court challenges to securitisation transactions

by

Nokuthula Motloli

215031624

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TABLE OF CONTENTS

ABSTRACT

Securitisation entails a process whereby an entity, known as an originator, packages its income producing assets, for example mortgage cash flow, and sells them to a bankruptcy remote special purpose vehicle ("the SPV") by converting these assets into liquid marketable securities. To complete the process of securitisation, the securities are sold to investors. This must be distinguished from where the originator merely transfers the risks associated with the assets, which process is known as "synthetic securitization". The present discussion only considers traditional securitisation, where the assets are sold and transferred wholly to the SPV. It further only considers securitisation by banks or banking institutions.

In recent years the practice of securitisation has come under the spotlight in South African courts. The legitimacy of the process has been questioned and the courts have been called upon to establish if the securitisation transactions are valid. Securitisation will be held to be invalid in South African law if the debtor would be burdened more than he would have been had the transaction not taken place or where securitisation would deprive the debtor of defences that he would have had against the originator. This discussion considers these two instances. It further considers the merits of the mentioned court challenges against the theoretical background provided of the legal transfer of assets by cession, which is employed when the assets are transferred from the originator to the SPV.

The merit of recent South African court challenges to securitisation transactions.

1. SECURITISATION PROCESS

Securitisation entails a process whereby an entity, known as an originator, packages its income producing assets,[1] for example mortgage cash flow,[2] and sells them to a bankruptcy remote[3] special purpose vehicle ("the SPV") by converting these assets into liquid marketable securities. To complete the process of securitisation, the securities are sold to investors. Securitisation involves a true sale of assets with the effect of completely removing the assets from the estate of the originator and transferring them to the estate of the SPV.

The securitisation transaction has been found to be a "highly sophisticated commercial transaction resting on complex agreements of which requires specialist legal and financial knowledge".[4] This is perhaps one of the reasons that in recent years the practice of securitisation has come under the spotlight both in the media[5] and before the courts.[6] In this dissertation I will look at some of these court cases and the various legal issues that were raised in them. In all these cases the defendant's questioned the banks' *locus standi* to institute the legal proceedings. However, for purposes of this discussion I will not dwell on *locus standi*. This point has been

[1] Locke *Aspect of Traditional Securitisation in South African Law* (2008 thesis SA) 15.
[2] Van den Berg and Van Schalkwyk "Spotlight on the South African environment of securitisation-and-asset backed securities" 1998 *Investment Analysts Journal* 1.
[3] Moyo and Firer "Securitisation in South Africa: 2000 – 2007" 2008 *South African Journal of Business Management* 27.
[4] *ABSA Bank Ltd v Terblanche* case no 17330/12 (WCHC) (unreported) per Davis AJ para 17.
[5] Special Assignment: Bank Securitisation www.youtube.com/watch?v=SbCxTy3cnvw (21-08-2015).
[6] *Absa Bank v Hill* case no 2588/12 (WCHC) (unreported), *Nedbank Limited v Killian NO* case no 8148/12 (WCHC) (unreported), *Nedbank Limited v Coetzee* case no 6032/12 (WCHC) (unreported), *Standard Bank v Tellinger* case no 13340/2011 (SGHC) (unreported), *Tellinger v Standard Bank* case no CCT 28/12 (unreported) and *New Economic Rights Alliance (NPC) v Investec and 65 Others* case no 48102/12 (SGHC) (unreported).

fully discussed by Locke.[7] Locke also extensively discusses the possibility of securitisation being set aside as a simulated transaction.[8] I will also not discuss this point in this dissertation.

1.1 Overview of the recent court cases

In recent years a handful of bank customers have taken to the courts and to the media challenging the practice of securitisation. In 2012, in a case that was the first of its kind, the court was faced with a challenge by a non-profit organisation cited in court papers as the New Economic Rights Alliance on behalf of its members, who had their home loans financed by various major banks in South Africa.[9] The issue was brought in the South Gauteng high court as an urgent challenge to the banking institutions' right to securitise their claims to receive payment from their own debtors to third parties, the SPVs, without the debtors' consent. The issues to be adjudicated further turned on who had *locus standi* to hold the debtors liable in instances where the debtors defaulted on their obligation to make payments on the debts and whether the judgments that had already been obtained by the banking institutions were valid. The application was finally withdrawn without arguments being heard on the merits of the challenge. Unfortunately, this and other recent court challenges of similar nature have yet to be fully ventilated before the courts. Although there is no judicial precedent that has been established by the courts on these types of court challenges there are certain legal issues that lend to interesting discussion. Various aspects of the challenges have already been settled by law and for that reason I will not dwell on those issues. In this discussion I will look at the debtor's interests and position when the claim is sold to third parties without his knowledge and consent.

1.1.1 *ABSA Bank Ltd v Hill* case no 2588/12 (WCHC) (unreported)

ABSA Bank sought summary judgment against Hill for a loan secured by a mortgage bond registered over his property. Hill had failed to keep up with his repayment obligation. In his opposition Hill alleged, amongst other things, that ABSA Bank did not advance the money to him but rather that ABSA Bank was acting as an agent of an undisclosed principal. He argued

[7] Locke (n 1) 347-357.
[8] Locke (n 1) 357-367.
[9] *New Economic Rights Alliance* case (n 6).

that the claim belonged to the undisclosed principal who had the legal standing to sue him. He therefore disputed that ABSA Bank had *locus standi* to demand repayment of the claim. The matter was considered in the absence of the defendant or his legal representation in court. The court held that the defendant's papers did not show a *bona fide* defence. The court found that the defendant's denial of liability to ABSA Bank in terms of monies lent to him was contradicted by the evidence of the mortgage loan agreement in which he had undertaken to make repayments to ABSA Bank, as the bondholder. The court accordingly dismissed the defence.

1.1.2 *Nedbank Ltd v Coetzee* case no 6032/2012 (WCHC) (unreported)

Nedbank sought summary judgment against Coetzee in respect of two loans it advanced to him, which were secured by two mortgage bonds registered over his property. Coetzee's defence was that Nedbank did not have *locus standi* to hold him liable as it had ceded its rights to the mortgage bonds to an SPV prior to the institution of the legal proceedings. Coetzee argued further that it was this SPV that held the legal standing to hold him liable for defaulting on his repayments of the mortgage loans and not Nedbank. Presented with a case of an application for summary judgment, the court had to determine whether the defence raised by Coetzee was *bona fide* to the claim of summary judgment. The court referred to the judgment of Griesel J,[10] which rejected a similar defence. In that case the court made the following valid and a practical point:

> "[S]hould the defendants pay the amount presently claimed by the plaintiff and should the 'true' holder of those rights at some stage in the future emerge and claim payment of the same debt from the defendants, they [the debtors] would have a solid defence that the debt has been extinguished"[11]

In the present case the court also found the defence to be without merit and dismissed it.

1.1.3 *ABSA Bank Limited v Terblanche* case no 17330/12(WCHC) (unreported)

In a similar case to those discussed above, the Western Cape high court was faced with an additional and rather peculiar defence. In their first defence to a claim for summary judgment

[10] *Nedbank Limited v Killian NO* case (n 6).
[11] *Nedbank Limited v Killian NO* case (n 6) par 7. See par 7 below for a detailed explanation of the validity of this point.

against arrears owing on a mortgage bond on a loan that had been advanced by ABSA Bank, the defendants challenged ABSA Bank's *locus standi* based on a speculation that the debt had been securitised. The court viewed this defence as a fishing expedition and found that the defence could not have been made *bona fide* as the defendants could not produce proof to their claim. The court therefore rejected the defence.[12]

1.1.4 *Standard Bank v Tellinger* case no 13340/2011 (SGHC) (unreported) and *Tellinger v Standard Bank* case no CCT 28/12 (CC) (unreported)

In this case Tellinger also sought to argue the similar defence of a lack of *locus standi* as in the other discussed cases. Tellinger further argued that the plaintiff did not have a right to forward his contact details to a third party without his knowledge and consent. The court of first instance dismissed the defence. His petition to the constitutional court was dismissed for lack of prospects of success.

1.1.5 *New Economic Rights Alliance (NPC) v Investec* case no 48102/12 (SGHC) (unreported)

In this case the applicant New Economic Rights Alliance, cited in court papers as New Era, brought a mass challenge against various major banks in South Africa and their subsidiaries. New Era's case was simply that where the banks have parted with the claims, they could no longer collect on the debt following the true sale. In essence the application sought an order, among other things, interdicting the respondent banks from collecting any debts from members of the applicant or proceeding to execute in terms of judgments obtained by the banks against its members. The application further sought to review and set aside judgments already obtained by the banks against its members. It also sought to remove all negative credit listings from any credit bureau pursuant to such judgments and an order directing the respondent banks to

[12] As a second defence, the defendants sought to challenge ABSA Bank's *locus standi* based on the ground that the money they received from ABSA Bank was not money belonging to ABSA Bank but it was, rather, money from the Reserve Bank of South Africa. The defendants argued that because ABSA Bank requested and received the money from the Reserve Bank that it was the Reserve Bank that could sue them for the debt and not ABSA Bank. The court relying on s 13(c) of the Reserve Bank Act 90 of 1989 rejected this defence. The court observed that where a loan for consumption has been granted to a borrower, the borrower becomes the owner of the money when it is delivered. Thus any money that would have been borrowed by ABSA Bank from the Reserve Bank would be capable of being loaned to the defendant in its own name as part of the legitimate business of a bank.

surrender judgments already obtained against its members. New Era also challenged the banks' failure to disclose to the debtors that the claim had been securitised to third parties. It challenged the *locus standi* of the banks to sue when the debt had been ceded to third parties.

The application was withdrawn before arguments were presented before court.

2. TRANSFER OF RIGHTS

Rights are legally transferred by different means. Real rights are transferred by means of a real agreement and publication, which in the case of movables takes the form of delivery or registration and in the case of immovable property publication takes the form of registration.[13] A right to immaterial property, such as a right to a patent or a trademark, can be transferred as stipulated by the relevant statutory provision.[14] Copyright is regarded as incorporeal movable property capable of being transferred without delivery of the property.[15] A personal right such as a claim by a creditor to the performance of his debtor, can be transferred by means of agreement between the parties[16] and these transfers take the form of cession.[17]

3. POSSIBLE LEGAL FORMS OF TRANSFER OF PERSONAL RIGHTS

In the ensuing paragraphs I will look at the possible legal forms of transferring personal rights. The possible forms of transfer are novation and delegation and cession. In this discussion I will pay particular attention to cession. Personal rights can take the form of a creditor's right to claim payment from his debtor.[18] My discussion will mostly cover this form of personal rights.

[13] *Commissioner of Customs and Excise v Randles, Brothers & Hudson Ltd* 1941 AD 369 398 per Watermeyer JA.
[14] Burrell "Design" 8.1 *LAWSA* (2005) 227; Steyn (updated by Tanziani) "Patents" 20.1 *LAWSA* (2010) 177.
[15] Copeling (revised by Smith) "Copyright" 5.2 *LAWSA* (2004) 66.
[16] Nienaber "Cession" 2.2 *LAWSA* (2003) 3.
[17] Scott *The Law of Cession* (1991) 52.
[18] Van der Merwe, Van Huyssteen, Reinecke and Lubbe *Contract General Principles* (2012) 3; Nienaber (n 16) 3.

3.1 Novation

Novation is when an existing obligation is replaced with a new obligation having the effect of extinguishing the former obligation.[19] The fresh obligation is formed between the same parties.[20] Since the intention of the parties is not to create a new obligation, but simply to extinguish the old one to be substituted by new the obligation, it must be accepted that the prior obligation was legal, valid and enforceable.[21] The old obligation is extinguished with all its associated rights.[22] If at the time of the novation the debtor was *in mora,* the novation would purge the default.[23] Novation involves the transfer of an obligation and therefore the debtor is required to give his consent.[24]

Although both the agreement by novation and the agreement by cession can achieve the same purpose, the legal implications of the agreements are very different. The method of transfer depends on the intention of the parties when they conclude the agreement.[25] Securitisation involves the transfer of claims only, without the obligations. Securitisation does not intend to create a new contract between the debtor and the SPV. Securitisation intends to pass the original claim from the originator to the SPV in its original form. To achieve what is intended by securitisation, the originator cannot be said to have novated the claim to the SPV.

3.2 Delegation

Delegation is one form of novation.[26] It is a form of novation by intervention of a third party.[27] South African law accepts delegation as the instance of substituting the original debtor for a new

[19] Voet 46.2.2. (Gane's translation on *The Selective Voet being the Commentary on the Pandects (Paris edition of 1829) by Johannes Voet (1647–1713) and the Supplement to that Work by Johannes van der Linden (1756–1835)* (1955 - 1957)); Roberts *Wessels' Law of Contract in South Africa* (1951) 2374; Christie and Bradfield *The Law of Contract in South Africa* (2011) 466.
[20] Voet 46.2.2.
[21] Roberts (n 19) 2379; *Dalryample, Frank & Co v Schochot* 1972 2 SA 15 (W) 17G; Christie and Bradfield (n 19) 468.
[22] Roberts (n 19) 2426.
[23] Voet 46.2.10; Roberts (n 19) 2427.
[24] *Purchase v De Huizemark Alberton (Pty) Ltd* 1994 1 SA 281 (W*)* 286D.
[25] *Purchase* case (n 24) 286E.
[26] Voet 46.2.11; Kerr *The Principles of the Law of Contract* (2002) 542.
[27] Roberts (n 19) 2433.

debtor for the original claim.[28] Christie recognizes other transactions that exhibit the characteristic of delegation, which is the introduction of a third party, and states that the following transactions will not be a delegation:[29] (1) Where a debtor requests a third party to pay his debt. This will be mandate. (2) Where the debtor requests his creditor to look to a third party for payment. This will be assignation. (3) Where a third party in his own initiative undertakes to pay the debtor's debt. This will be *intercessio.* (4) Where the creditor transfers his right to claim against the debtor to a third party. This will be cession and is particularly important for the present discussion. (5) Where the debtor and the third party agree that the third party will be substituted to pay the creditor. Delegation therefore must be clear and there must be a clear intention that the parties intended to extinguish and put an end to the original obligation.[30] The debtor will also be required to give his consent to the delegation.[31]

Locke states that the transfer of a claim from the originator to the SPV can take the form of either delegation or of a cession.[32] She states further that the provisions of Securitisation Notice 2008[33] and its predecessors, the Securitisation Notice 2001[34] and Securitisation Notice 2004,[35] provides that the transfer divests the originator of his rights and *obligations,* which seem to imply that the transfer is by delegation. The Securitisation Notice regulates securitisation transactions where the securities of the SPV are sold to the public. Locke states that the provisions of these Securitisation Notices are contrary to what was intended by securitisation. Securitisation intends that only the claims are transferred and not the duties in terms of the obligation. In *Froman v Robertson*[36] Corbett AJA pointed out that sometimes the term "cession" is used to make reference to what is a delegation, which entails the transfer of obligations. The court stated that this was inaccurate because claims are ordinarily capable of being ceded and obligations

[28] *Brenner v Hart* 1913 TPD 607 615.
[29] Christie and Bradfield (n 19) 480. See also Voet 42.2.12.
[30] Roberts (n 19) 2436; *Brenner* case (n 28) 617.
[31] *Van Achterberg v Walters* 1950 3 SA 734 (T) 745D-E; Christie and Bradfield (n 19) 480.
[32] Locke (n 1) 319.
[33] GN 2, *GG* 30628(1 January 2008) Notice on Banks Act 94 of 1990 – Designation of an Activity not falling within the meaning of 'The Business of a Bank' (Securitisation Scheme).
[34] Schedule 3 (a) GN 1375 *GG* 229448 (13 December 2001) Notice on Banks Act 94 of 1990 – Designation of an activity not falling within the meaning of "The Business of a Bank" (Securitisation Schemes).
[35] Schedule 4 (2) (a) GN R681*GG* 26415 (4 June 2004) Notice on Banks Act 94 of 1990 – Designation of an activity not falling within the meaning of "The Business of a Bank" (Securitisation Schemes).
[36] 1971 1 SA 115 (AD) 122F-G.

cannot.[37] One wonders whether the Securitisation Notices have made similar but reverse errors in suggesting that the transfer is to be by delegation instead of cession. Since delegation involves the transfer of obligations it requires the consensus of all the parties concerned.[38]

I have objections to the argument that securitisation intended transfer to take the form of delegation. The first critical point for objection is the requirement that the parties must have clearly intended to enter into a delegation. In a securitisation transaction the originator and the SPV do not intend to transfer the claims together with the obligations. The parties also do not intend to create a new contract between the parties as envisioned by novation. Securitisation intended to fully divest the claim in its original form from the originator to the SPV without creating a new agreement between the SPV and the debtor. The question that remains is what would remain of the transfer if it is found that the parties did not intend delegation. Perhaps the court will accept the parties' true intended method of transfer, which is cession.

This is supported by the point raised by Christie that where the creditor transfers his right to claim against the debtor to a third party the transfer of the claim will be by cession and not delegation.[39]

If the position that the Securitisation Notice requires transfer of rights to be by delegation is accepted, the securitisation transaction would be illegal if another method such as cession is used. In accepting this position, the transfer would require the consent of the debtor. Since the consent of the parties is a requirement to a valid delegation, a delegation that does not obtain the parties' consent would be invalid.

It is a critical distinguishing element of a delegation that the debtor has to give his consent for delegation to be valid. The question is whether this consent can be obtained in advance, as it is commonly done in practice. In standard loan agreements, and other agreements, the debtor would be required to give the creditor consent to transfer the rights and obligations arising from that agreement. This question was considered in *Unilever South Africa Ice Cream (Pty) Ltd (Known*

[37] *Herschel v Nel* 1948 3 686 (AD) 698.
[38] *Froman* case (n 36) 122F; Christie and Bradfield (n 19) 480.
[39] Christie and Bradfield (n 19) 480.

as OLA SA (Pty) Ltd) v Jepson,[40] a case that involved a franchise agreement. The defendant agreed to a clause in the franchise agreement that allowed the franchisor to delegate his rights under the agreement to a third party. The consent, though given in advance, was found to be sufficient. It is therefore accepted that a party can consent in advance to allow his counterparty to delegate obligations in a contract to a third party.[41] The parties, however, must have intended to enter into delegation. The original party will only be released from the obligation if the parties had expressed their intentions to extinguish the original obligation.[42] From the clear intentions of securitisation that only the claims are to be transferred from the originator to the SPV it cannot be said that delegation is the method of transfer that was intended.

3.3 Cession

Cession is another method by which a claim is transferred from one person to another.[43] Where the right to be transferred is incorporeal it is incapable of physical delivery and transfer can only be by cession.[44] The party ceding the right completely divests himself of the right or benefit arising from the right after it has been transferred. An act that does not completely surrender or exclusively vest the right in the cessionary will not be cession. Likewise, an act that seeks to transfer rights and *obligations* will not be cession. Unlike novation, cession does not create new a claim to substitute the old one. Cession looks at replacing the creditor in the original contract. It has the effect of removing the claim being ceded from the estate of the cedent and vesting it in the estate of the cessionary. No separate act of delivery is required to vest the right completely in the cessionary.[45] I submit that this form of transfer is what is envisioned by securitisation.

Cession does not require the notice, co-operation or consent of the debtor,[46] but cession without the consent of the debtor will not be allowed if it will disadvantage or impair the position of the

[40] 2008 2 SA 456 (C).
[41] Van der Merwe *et al* (n 18) 458.
[42] *Brenner* case (n 28) 611.
[43] *Hippo Quarries (Tvl) (Pty) Ltd v Eardley*1992 1 SA 867 (A) 873E.
[44] Ander's translation of Sande *Cession in Actions* (1906) 2.9; *Smith v Farrelly's Trustee* 1904 TS 949 955.
[45] *Botha v Fick* 1995 2 SA 750 (A) 752H.
[46] Nienaber (n 16) 6. Scott, however, states that notice to a debtor is of paramount importance. Although she advocates notice to the debtor she accedes to the position of the South Africa law at present which states that a right can be transferred to a third party without the debtor's will or consent. Scott (n 17) 95.

debtor.[47] A cession which takes place without the debtor's consent must also not deprive him of any defences he would have had against the originator. I consider this in more detail below.

4. FORMALITIES FOR A VALID CESSION

The agreement to cede does not need to be in writing.[48] The act of cession merely concerns two separate processes. The first entails the parties entering into an obligatory agreement,[49] where the cedent sells his claim to the cessionary. The second step entails the parties entering into a transfer agreement where the actual cession of the right to the cessionary takes place.[50] Where the parties have elected to reduce the agreement into writing these agreements are often contained in one document.

4.1 Document evidencing the claim

As pointed out it is not a prerequisite that a cession agreement must be in writing. The debate whether it is necessary to deliver the document evidencing the right to be transferred, such as a share certificate, was settled by *Botha v Fick*.[51] The appellate division held that delivery of the document evidencing the personal right need not occur in order to constitute a valid cession.[52] As the law stands no separate act of delivery is required to vest the right ceded to the cessionary.

4.2 Validity of a cession agreement

Like any other agreement a cession agreement is required to comply with the formalities of a valid agreement. A cession agreement must comply with the following requirements:

i. There must be a meeting of minds between the cedent, the party intending to part or transfer his right (*animus transferendi*) and the cessionary, the party intending to receive

[47] Scott (n 17) 192; *Corinth Properties (Pty) Ltd v FirstRand Bank Ltd* 2002 6 SA 540 (W) 546C; *Blaikie & Co Ltd v Lancashire NO* 1951 4 SA 571 (N) 576C.
[48] *Kessler v Krogmann* 1908 TS 290 297.
[49] The term "obligatory" is often used by courts, but authors such as Scott and Locke prefer the term "obligationary".
[50] Nienaber (n 16) 8.
[51] *Botha* case (n 45).
[52] *Botha* case (n 45) 776J – 777D.

or be the holder of the right (*animus acquirendi*). The law requires that there must be a separate and a distinct meeting of minds and therefore a person as a representative of another cannot conclude a cession with himself.[53]

ii. There must be a *justa causa,* which is the cause or purpose for the cession. It is usually formulated in the obligatory agreement, which can be in a form of a contract of sale or a contract of donation,[54] an agreement of settlement,[55] or will or statutory provision.[56] In the case of securitisation, the *justa causa* will be the sale of the right.

iii. The agreement must be legal. It must not be unlawful, immoral, *contra bonos mores*, offend against public policy or be tainted by undue influence, duress or fraud.[57]

iv. Both parties to the cession must possess contractual capacity to enter into the agreement.[58]

v. The agreement cannot be fictitious or simulated[59] or be a maneuver by the cedent to deprive the debtor of his rights, which he would have enjoyed if it were not for the cession.[60] This aspect in particular will be further explored below.

vi. The agreement cannot be prohibited by statute.[61]

vii. The agreement cannot be prohibited by common law.[62]

[53] *Samcor Manufacturers v Berger* 2000 3 SA 454 (T) 460H-I; De Wet (revised by Dendy) "Agency and representation" 1.3 *LAWSA* (2014) 131.
[54] Sande *Cession in Actions* (n 44) 2.3.
[55] *Barnhoorn NO v Duvenage* 1964 2 SA 486 (A) 492E.
[56] Sande *Cession in Actions* (n 44) 2.3; Nienaber (n 16) 28.
[57] Nienaber (n 16) 31.
[58] Sande *Cession in Actions* (n 44) 3.2.
[59] *Hippo Quarries* case (n 43) 877D.
[60] *Mannesmann Engineering & Tubes (Pty) Ltd v LTA Construction Ltd* 1972 3 SA 773 (W) 775F.
[61] For example: the Statutory Pensions Protection Act 21 of 1962 in s 2(1) provides that: "No pension or right to a pension shall be capable of being assigned or transferred or otherwise ceded or of pledged or hypothecated, nor shall the same or any contributions made by any person towards a pension be liable to be attached or subjected to any form of execution under a judgment or order of a court of law".

viii. The agreement cannot be prohibited by a subsequent agreement whether expressly or tacitly.

5. CONDITIONS THAT WOULD RENDER THE CESSION INVALID

The law of cession is founded on the principle that a cession should not prejudice the position of the debtor.[63] The rights of the debtor should not be impaired or be made more burdensome by the actions of the creditor who decides to sell his right to a third party.[64] In this regard, South African law protects the debtor in two ways: first, that the debtor must not be placed in a more burdensome position by the cession and secondly, that the debtor must not be deprived of his defences that he would have enjoyed against the cedent.[65] A change as consequence of the cession should not place a greater burden on the debtor that he would have faced if it were not for the act of cession.[66]

The law has identified instances where the consent of the debtor will be required before a valid cession can take place. These are (1) where whether the cedent or the cessionary is entitled to enforce the right makes a substantial difference to the debtor; (2) where the obligation is of a personal nature to the cedent; (3) where the matter in court has reached *litis contestatio*; and (4) where the cession would result in the splitting of the claims. The courts have also objected to cessions that would result in depriving the debtor of his defences he would have had against the cedent. These instances will be discussed in more detail in the ensuing paragraphs. Van der Merwe states that these instances are not exhaustive.[67] The courts must approach the allegation of prejudice to the debtor with an open mind.

[62] *Schierhout v Union Government (Minister of Justice)* 1926 AD 286 291; *Hodges v Coubrough NO* 1991 3 SA 58 (D) 65B - the common law prohibits the cession, assignation, delegation or otherwise alienation of the right to maintenance. Where such a right is ceded that agreement will be ineffective.
[63] Voet 18.4.13.
[64] *Guinsberg & Pencharz v Associated Press* 19161 TPD 156 159.
[65] Zimmermann *The Law of Obligations* (1990) 66.
[66] *Goodwin Stable Trust v Douhex (Pty) Ltd* 1998 4 SA 606 (C) 616G.
[67] Van der Merwe *et al* (n 18) states that *Corinth Properties (Pty) Ltd v FirstRand Bank Ltd* 2002 6 SA 540 (W) suggests that prejudice is not only limited to the recognized instances pointed out in decided cases and the court held that the cessionary was not entitled to enforce his rights to the extent that the enforcement was in conflict to the cessionary's duties towards the debtor. Van der Merwe *et al* (n 18) 411 fn215.

Courts have also accepted that payment by a debtor who was not aware of the cession must discharge the debtor's obligation.[68] The position was held in the *Katz v Katzenellenbogen* case.[69] The appellant had purchased a claim from a creditor of a company (the debtor), which company was later provisionally liquidated. This sale of the claim was done by means of a verbal cession. The verbal cession was never brought to the attention of the company or its liquidators. At a certain point in the liquidation process the creditors of the company were invited to a meeting with the liquidators to consider an offer of compromise. The appellant was not given notice to the meeting. Indeed the liquidators were not aware of the appellant's existence. The meeting proceeded and the compromise was sanctioned. The appellant challenged this in court. The court on appeal found that the cedent had ceded its claim to the appellant and therefore it was no longer a creditor of the company in liquidation. The liquidators, having no knowledge of the cession, did not have to notify the appellant. In that regards the liquidators were regarded to have discharged their obligation against the cessionary. The court found that in instances similar to the present case should it transpire that the debtor, having no knowledge of the cession, has performed to the cedent instead of the cessionary the debtor would be regarded as having discharged his obligation. The cessionary may have an action against the cedent for breach of the underlying obligatory agreement.[70]

5.1 The cession must not disadvantage the position of the debtor[71]

The law requires that the cession should not impose a greater burden on the debtor than he would have endured had the claim not been ceded.[72] Although one may say that to deprive a debtor of his right to set off or to countersue is a burdening of his right, Scott suggests that these two instances should be treated separately. She states that if the instances were treated as one the debtor's position would be protected even against a *bona fide* cession as this precludes the debtor from raising the defence of set off or to counterclaim against the cessionary after the claim has been

[68] Zimmermann (n 65) 66.
[69] *Katz v Katzenellenbogen* 1955 3 SA 188 (TPD).
[70] Nienaber (n 16) 48. Sharrock is of the view that the cessionary would have an enrichment claim against the cedent. Sharrock *Business Transactions Law* (2011) 254.
[71] Voet 18.4.13.
[72] Scott (n 17) 192; Nienaber (n 16) 39.

ceded.[73] A cession would be found to disadvantage the position of the debtor in the following instances:

5.1.1 Where whether the cedent or the cessionary enforces the claim makes a substantial difference to the debtor

The law states that it would be prejudicial to the debtor's position where it makes a substantially difference to the debtor whether the cedent or the cessionary is entitled to enforce the claim.[74] In *Eastern Rand Exploration Co v Nel*[75] the first four defendants had entered into a contract with Lowenstein over a certain farm. In terms of the contract, Lowenstein obtained a right to prospect the farm for a year with a right to renewal for a further year and an option to purchase the farm at any time during the subsistence of the contract. Lowenstein ceded his rights to the plaintiff. The plaintiff exercised his right to renewal. The plaintiff argued that it was unable to exercise the option to purchase the farm due to an impasse, which was caused by the hostilities of the war at the time. It relied on the provisions of Proclamation 12 of 1901, which froze the exercise of options of contracts entered into before 11 October 1899. The court held that the plaintiff's contract was protected by the proclamation and that the right to prospect subsisted until 24 December 1903. It did not make any difference to the defendants whether the option was exercised by the Lowenstein or the plaintiff. Lowenstein would have been allowed to rely on the provisions of the proclamation if the rights had not been ceded and the plaintiff should also be able to rely on them. The court found that in terms of the dead period between 11 October 1899 and 1 August 1902 the plaintiff was still able to exercise the option.

In a securitisation transaction it does not make a substantial difference to the debtor whether the originator or the SPV enforces the right. Since a claim can be ceded for purposes of collection[76] in most instances the SPV and the originator would enter into a servicing agreement where the originator would be instructed to collect on behalf of the SPV. The service agreement may also

[73] Scott (n 17) 201.
[74] Du Bois *Wille's Principles of South African Law* (2007) 844.
[75] 1903 TS 42.
[76] Locke (n 1) 353; *Hippo Quarries* case (n 43) 875G.

cede the claims back to the originator for the purpose of collection.[77] The relationship of the originator and the debtor is not of a special nature that would be affected by the securitisation transaction.

5.1.2 Where the obligation is of a personal nature to the cedent

Where the obligation to be performed under the original agreement is of a personal nature to the cedent the debtor cannot be required to render performance to someone other than the cedent, unless he or she has consented to the cession.[78] It is sometimes very difficult to determine if the right is of such a personal nature that it would render it impossible to cede.[79] The case of *Botha v Carapax Shadeports*[80] involved a restraint of trade between the employer and his two employees. The court had to consider whether the right to enforce the restraint of trade could be enforced by a cessionary after the employer ceded the right. The court held that the right to enforce the restraint of trade was not of such a personal nature to the employer that no other person could enforce it. The right was therefore enforceable by either the cedent or the cessionary. An employer, however, would not be able to cede his right or claim to receive the service from his employee in the absence of the employee's consent. This principle is based on the foundation that the employee's obligation to render services is personal to his employer. In *Eastern Rand Exploration Co Ltd v Nel*[81] Innes CJ stated the principle as follows:

> "[T]he question of whether one of two contracting parties can by cession of his interest, establish a cessionary in his place without the consent of the other contracting party depends upon whether or not the contract is so personal in its character that it can make any reasonable or substantial difference to the other party whether the cedent or the cessionary is entitled to enforce it. Subject to certain exceptions founded upon the above principle rights of action may, by our law, be freely ceded."[82]

In a securitisation transaction, the claim to receive payment from the debtor cannot be said to be of a personal nature to the originator alone. It is in instances of employment that the law states that the employer cannot cede his right to receive performance from his employee to a third party

[77] Locke (n 1) 357.
[78] *Botha v Carapax Shadeports (Pty) Ltd* 1992 1 SA 202 (A) 215I- 216B.
[79] Roberts (n 19) 1711.
[80] *Carapax Shadeports* case (n 78).
[81] *Eastern Rand Exploration* case (n 75).
[82] *Eastern Rand Exploration* case (n 75) 53.

without the consent of the employee. I submit that a debtor's position is not burdened by having to render performance to the SPV instead of the originator in terms of this exception.

5.1.3 Where the matter in court has reached *litis contestatio*

Cession of rights when a matter has reached *litis contestatio* can only proceed with the consent of the court.[83] In *Waikiwi Shipping Co Ltd v Thomas Barlow & Sons (Natal) Ltd*, Waikiwi Shipping sought to cede to Marine Enterprise a right that was the subject matter of a counterclaim, after the proceedings against the respondent had reached *litis contestatio*. Cession under these circumstances will only be allowed at the discretion of the court and the court will disallow a cession that will prejudice the debtor. A transfer of a claim under these circumstances cannot be by mere agreement between the cedent and the cessionary. The court therefore stated that the act of cession will be "perfected when the court gives its seal of approval by granting the substitution" where such cession takes place after *litis contestatio*, but before judgment has been given.[84] The court would have to determine whether the position of the debtor would not be affected by the cession.

In a securitisation transaction where the parties wish to transfer claims after the matters in court has reached *litis contestatio*, the court would have to give the necessary approval. I submit that the court would not approve the cession if the position of the debtor would be prejudiced.

5.1.4 Where the cession would result in the splitting of the claim

The consent of the debtor is required where the cession will cause the claim to be split or be apportioned amongst multiple cessionaries.[85] In *Spies v Hansford and Hansford Ltd*[86] the court was called to determine the validity of a cession where the cedent purported to cede a part of the

[83] *Waikiwi Shipping Co Ltd v Thomas Barlow & Sons (Natal) Ltd* 1978 1 SA 761 (A).
[84] *Waikiwi Shipping* case (n 83) 678G.
[85] *Spies v Hansford and Hansford Ltd* 1940 TPD 1 9.
[86] *Spies* case (n 85).

claim. The court agreed with earlier cases[87] that a claim arising from a single cause of action could not be ceded in part, unless the debtor had consented to the partial cession. The court in *Anglo–African Shipping Co (Rhod) (Pvt) Ltd v Baddeley*[88] took a different view. There it was held that a cedent was free to manage his financial affairs in a manner that would cede a single right to multiple cessionaries jointly and severally without consulting the debtor for his consent. The court qualified its position by stating that such a cession would still be subject to the fundamental rule that the cession should not leave the debtor in a disadvantageous position. The law allows a partitioning of a claim in such a manner that there are a number of joint owners of a single claim on the condition that it can only be enforced in a single action.[89] The claim would be ceded to multiple cessionaries jointly and severally, or *in solidum*, and the claim would be regarded as a single obligation owed to multiple cessionaries. In this instance, the position of the debtor would not have been burdened as he would not face multiple litigants.

This view has been accepted on the strength that the debtor can elect to whom he wishes to render his performance.[90] The payment to the elected cessionary would discharge his obligation to the remaining co-cessionaries. By the same token, any one of the co-cessionaries may demand the debtor to render payment to him of the entire amount.[91] Where one of the co-cessionaries has elected to enforce payment, the debtor would be required to render performance to that co-cessionary.[92] Where each co-cessionary wishes to sue for a pro rata share of the debt, thus creating a multiplicity of actions, this would amount to splitting of a single claim, which places the debtor in an unfavourable position of defending multiple claims instead of one.[93]

The emphasis of the law is not necessarily against the splitting of a single claim amongst multiple co-cessionaries but rather, as pointed out by Scott,[94] the crucial point is that the cession

[87] *Guinsberg* case (n 64); *Verkouteren v Rubesa* 1917 TPD 274.
[88] 1977 3 SA 236 (R) 239. Scott (n 17) at 194 concurs and states that a creditor is free to dispose his right provided it does not burden the debtor's position.
[89] Kerr (n 26) 500-501.
[90] Voet 45.2.4.
[91] Voet 45.2.4*; Kotsopoulos v Bilardi* 1970 2 SA 391 (C) 397E.
[92] *Anglo-Africa Shipping* case (n 88) 239A.
[93] Scott (n 17) 194.
[94] Scott (n 17) 192.

should not disadvantage the debtor's position. I would also argue that the law seeks to protect against an apportioning of a debt that has the *potential* to burden the position of the debtor.[95]

Duke v Allen[96] considered the question whether a cedent was free to cede only a cost order and retain the judgment claim. In that case the applicant was formerly married to the first respondent. They divorced in July 1946 with an order that the applicant forfeited the benefits of their ante nuptial contract, which had subsisted during the duration of their marriage. In August 1946 the first respondent instituted action for the transfer to him of a certain immovable property. In that application the first respondent was successful: a judgment was granted in his favour together with costs. The judgment was subject to a condition that first respondent had to pay a certain amount to the applicant. The applicant appealed the judgment but the attempt failed. In May 1951 the first respondent ceded both costs of the court of first instance and the appeal court to the second and third respondents, leading to the present case. In the present case the court stated that the orders for costs were associated with the judgment and therefore could not be separated. The cession of the costs alone did not only amount to an apportionment of the debt, therefore exposing the debtor to two enforcement actions, but it also deprived the applicant to apply set-off to the amount that she was entitled to receive from the first respondent. The court reaffirmed the common law position and found the cession to be invalid for making the position of the applicant more burdensome.[97]

On the same point of apportionment of costs from the judgment they relate to, in an earlier case *Verkouteren v Rubesa,*[98] a creditor had obtained judgment with costs and thereafter attempted to cede the judgment whilst he retained the claim to costs. The court had found that the order for costs could not be divorced from the judgment and therefore it could not be enforced separately. However, the court did not nullify the cession. The court was satisfied that the cedent had intended to part with a portion of the claim and vindicated the innocent cessionary who was not

[95] *Liquidator of Tirzah (Pvt) Ltd, Belmont Leather (Pvt) Ltd, G &D Shoes (Pvt) Ltd P B Shoes (Pvt) Ltd (all in liquidation) v Merchant Bank of Central Africa Ltd* 2003 ZWSC 60 (Zimbabwe).
[96] 1953 3 SA 702 (N).
[97] *Duke* case (n 96) 704G.
[98] *Verkouteren* case (n 87).

aware that the claim was being ceded in part. Scott disagrees with both these cases. She views costs and a judgment as two separate causes of action capable of being ceded separately.[99]

In *Guinsberg & Pencharz v Associated Press* the court stated that the law prohibited the cession of an undivided cause of action to give rise to two rights of action.[100] In *Lief NO v Dettmann*[101] the court rejected the fragmentation of a right under mortgage bond without the debtor's consent.[102]

In the *Anglo Shipping* case the court stated that even where a holder of an entire claim elected to recover a portion of the claim he would be prohibited from recovering the other portion in different proceedings as this would amount to an apportionment of a single claim.[103] In my opinion, it would be a different case where the holder abandoned a part of the claim and elected to collect on a portion of it. It must also be noted that a debtor that has consented to the apportionment of the claim will not be protected by the restriction against the apportionment of a claim.[104]

Where a document records more than one right, Nienaber is of the view that, in such circumstances, each right is capable of being ceded separately.[105]

It is established that the law requires the debtor to give consent to cession that would burden his position or that deprives him of his defences. What remains is whether a debtor can give his consent in advance to a splitting of the claim or taking away of the right to set off. In recent years banks have amended their standard loan agreement forms to anticipate the debtor's consent to allow for these instances. The following clauses appeared on a covering mortgage bond:

> "2.1. The Mortgagor hereby consents and agrees to the cession of the Lender's rights and/or to the delegation of the Lender's obligations in terms in terms of this Bond and the Mortgage Loan Agreement and hereby appoints a director of the Lender to be its true and lawful agent with full power and authority to

[99] Scott (n 17) 185.
[100] *Guinsberg & Pencharz* case (n 64) 158.
[101] 1964 2 SA 252 (A).
[102] *Lief NO* case (n 101).
[103] *Anglo-Africa Shipping* case (n 88) 240A.
[104] *Blaikie & Co* case (n 47) 576D.
[105] Nienaber (n 16) 40.

enter into and execute a novation or any other form of agreement on its behalf in order to give effect to and confirm such cession and/or delegation to one or more other persons or entities.

2.2. The Lender (or any person or entity to whom its rights and/or obligations are ceded, delegated and/or assigned) shall at any time, without notice to the Mortgagor, be entitled to cede, delegate and/or assign all or any of its rights and /or obligations under this Bond or the Mortgage Loan Agreement, and /or the indebtedness secured by this Bond, either absolutely or as collateral security to one or more other persons or entities (*notwithstanding that a cession, delegation and/or assignment to more than one person or entity may result in the splitting of claims against the Mortgagor*) and on any such cession, delegation and/or assignation taking place (without limiting the effect thereof), the Mortgagor shall make all payments (the right to receive which have been ceded to such cessionary) direct to such cessionary without any set off, deduction or withholding of nature whatsoever."[106]

The nature of these clauses is to obtain the requisite consent to the cession in advance.

In my opinion, in a securitisation transaction claims are generally sold to a single SPV. However, even if the claims are sold to multiple SPVs, I must agree with the position taken in *Anglo Shipping* case that a cedent is free to manage his financial affairs in a manner that would cede a single claim to multiple cessionaries jointly and severally without consulting the debtor for his consent. The critical issue is not to disallow a cession to multiple cessionaries, but to protect the debtor from a multiplicity of litigants. In the event that the claim has been ceded to multiple cessionaries jointly and severally, the debtor's position would not be prejudiced or burdened since only one creditor would be entitled to sue him. In any event, as seen from the extract from a loan agreement, debtors are now required to give consent to the splitting of the claim when signing the loan agreement forms.

5.2 Where the cession results in depriving the debtor of his defences against the cedent

Cession means that the cedent is substituted by the cessionary and the cessionary steps completely in the cedent's shoes. As the cessionary would enjoy the benefits of the cession, the law requires that he be subjected to the disadvantages occasioned by his newly acquired position. This means that the cessionary, in certain instances, would be subjected to the same defences and exceptions that would have been used against his predecessor, the cedent.[107] The debtor therefore may raise defences he would have raised against the cedent such as set off, fraud, illegality or prescription. The debtor cannot be deprived of these defences by virtue of the cession and to

[106] Emphasis added. This is an extract from a covering mortgage bond by FirstRand Bank Limited, which was going to be executed in September 2015.
[107] Voet 18.4.13; *Cape Town Municipality v Fletcher & Cartwrights Ltd* 1936 CPD 347 352.

deny him these defences would gravely disadvantage his position to defend his position as against the new creditor.[108] In the case of *Goodwin Stable Trust v Douhex (Pty) Ltd*[109] the debtor alleged that the cedent was indebted to him and that as the result of the cession he was deprived from the ability to countersue. All defences that would have been available to the debtor to be used against the cedent should likewise be available to be used against the cessionary.[110] The courts have also refused to acknowledge a cession where it believed that the cession had deprived the debtor of his right to a claim in reconvention or where the cession was a simulation as a maneuver to deprive the debtor his procedural right to a claim in reconvention against the cedent.[111]

Where the debtor could raise the defence of set-off against the cedent prior to the ceding of the rights, the debtor should likewise not be deprived of this right after the cession has taken place. The debtor should still be able to raise it against the cessionary.[112] The debtor would only be precluded from raising the defences if they are connected to the personal capacity of the cedent.[113] The cessionary is further debarred from invoking a privileged status, which the cedent did not enjoy, and which privileged status would disadvantage the debtor from fully defending his case, unless the privilege is clearly personal to the cessionary.[114] For instance, in my opinion a cessionary would not be permitted to invoke the privileged status conferred upon him in terms of section 4 and section 5 of the Diplomatic Immunities and Privileges Act[115] which immunes a head of state, special envoy and certain representatives from civil proceedings of the courts of the Republic, if that privilege status did not apply to the cedent.

As a general rule, the courts will not allow the debtor to rely on set off against the cessionary on an amount that the debtor believes is owed to him by the cedent if the amount was not quantified at the time of the cession. The courts would only allow the staying of the enforcement

[108] *National Bank v Marks and Aaronson* 1923 TPD 69 71.
[109] *Goodwin Stable Trust* case (n 66) 616.
[110] *Biggs v Molefe* 1910 CPD 242 (mistake); *Walker v Syfret* 1911 AD 141 (set off); *Opperman v De Beer* 1915 TPD 92 97 (fraud, duress, prescription, payment, set off); *Findlay and Sulivan v Brown & Co* 1926 AD 272 274-275 (illegality); Christie and Bradfield (n 19) 488.
[111] *Mannesmann Engineering* case (n 60).
[112] Voet 16.2.4.
[113] *Walker* case (n 110) 162.
[114] Voet 18.4.13.
[115] Act 37 of 2001.

proceedings in order to quantify the debtor's amount where it believes that cedent and the cessionary acted in bad faith or the cession was a simulated maneuver to circumvent the debtor's right to countersue.[116] In the *Mannesmann Engineering* case the court pointed out that if the cedent had instituted the action the debtor would have been entitled to raise the defence to stay the proceedings until its counterclaim had been adjudicated upon.[117] This would enable the debtor to apply set off the amounts that were owed to him by the cedent. Where the debtor has proved bad faith or simulation of the cession to deprive him of his defences, the debtor should also be allowed to raise the defence to stay the proceedings to enable him to apply set off against the cessionary.

The SPV becomes the new creditor in a securitisation transaction. The SPV must therefore bear the defences that the debtor would have raised against the originator at the time of cession. That means that the debtor can raise the defence of set off against the SPV if the amounts were quantified at the time of the cession. If, however, the debtor has consented in advance, as is seen from the extract covering bond, he would not be able to exercise his defence of set off against the SPV.

6. THE DEBTOR CANNOT RELY ON CESSION TO IMPROVE HIS POSITION

Whilst it is critical to protect the position of the debtor from being burdened by the cession it can equally be said that that the cession cannot be relied upon by the debtor to improve his position.[118] In *Frank v Premier Hangers CC* the defendant, a wholesaler and manufacturer, had been a customer of a company, DS Frank and Associates (Pty) Ltd. The plaintiff was the company's director and 50 per cent shareholder. The company went into liquidation and plaintiff bought some of the current and future claims owed by debtors to the company, including claims against the defendant. The defendant raised that the company in liquidation was indebted to it for a certain amount, although the amount were unliquidated at the time of the cession. The defendant sought to stay the present proceedings in order to counterclaim against the company.

[116] *LTA Engineering Co Ltd v Seacat Investments (Pty)* Ltd 1974 1 SA 747 (A) 771A.
[117] *Mannesmann Engineering* case (n 60) 774F.
[118] *Frank v Premier Hangers CC* 2008 3 SA 594 (C) 607A.

The court, relying on Nienaber, confirmed the position in South African law that a debtor who is being sued can rely on set off of his claim if the claim was already liquidated or qualified for set off against the ceded right at the time of the cession, or where the counterclaim was ripe for the debtor to sue. If the claim were unliquidated at the time of the cession, then the debtor would not be able to apply set off. The cessionary would only be obliged to defend the debtor's counterclaim or application to set off where it was shown that the cession was simulated to deprive him of his right to countersue or apply set off. The court accepted that the defendant's claim was unliquidated. It therefore accepted that had the proceedings to sue the defendant been instituted by the liquidators before the claim was ceded, the defendant would not have been able to raise set off. At best the court would have stayed the proceedings to allow the determination of the claim to enable set off. In the same breath, the defendant cannot be granted leave to countersue on an unliquidated claim without having proved that the cession was in bad faith. In doing so the cession would improve the defendant's position.

In *Standard Bank of South Africa Ltd v Renico Construction (Pty) Ltd*[119] the court applied the principle in *Frank v Premier Hangers CC* and confirmed that the court must first pronounce on a figure before it is payable.[120] A debtor, therefore, cannot seek to apply set off to an amount that had not been liquidated at the time of the cession. This is for the reason that the debtor would not have been able to raise set off against the cedent at the time of the cession if his claim was unliquidated.[121] The aforegoing is subject to the exception that the debtor is entitled to raise set off in order to stay the enforcement proceedings pending his proceedings to quantify his claim, if it is shown that the cession was a deliberate maneuver to circumvent him from enforcing his rights.[122] The court in *Corinth Properties (Pty) Ltd v FirstRand Bank Ltd* held that cession cannot be used as an expedient to deprive debtors of their rights.[123]

In the recent court challenges to securitisation under discussion the debtors argue or allude to the argument that by virtue of the cession their obligation to repay the debts have been extinguished. The argument being that because the debt is no longer due to the originator, as the originator has

[119] 2015 2 SA 89 (GJ).
[120] *Renico Construction* case (n 119) 95C.
[121] Nienaber (n 16) 51.
[122] *LTA Engineering* case (n 116) 771A; *Corinth Properties* case (n 47) 547D.
[123] *Corinth Properties* case (n 47) 547D.

sold it, they no longer have to repay the debt. This line of argument is absurd as it is clear that the debtors remain indebted on the loans. The only detail that changes is the identity of the new creditor. When the claim is ceded it gets transferred to the SPV in its original form. A debtor therefore cannot rely on the cession between the originator and the SPV to evade his obligations. This would be contrary to the rule that a debtor cannot rely on the cession to improve his position.

7. CONCLUSION

In a legal context securitisation is a transfer of rights by way of cession. From the recent court challenges discussed it is clear that there is a sense of uncertainty of the securitisation transaction from the general public. Indeed the process of securitisation, as pointed out in *ABSA Bank Ltd v Terblanche,*[124] rests on complex agreements and requires specialist legal and financial knowledge. Securitisation is a legitimate business tool, providing advantages such as improved liquidity, diversifying of funds, achieving better interest rates, better risk management and tax or accountancy advantages.[125] To a layman the process can be daunting. However, in the legal context securitisation takes the form of transfer of rights by way of the well-established legal method of cession.

The court in *Nedbank Limited v Killian NO*[126] pointed out that the question is not whether the debtor is liable or not after the claim has been ceded. The emphasis is on the fact that the debtor *is* required to perform in terms of his initial agreement with his creditor, be it to the initial creditor, the cedent, or to the new creditor, the cessionary. He is required to render performance to the party that he was under the impression he ought to render performance to. Should it transpire, after the debtor has performed, that the debt has been sold and the new owner claims performance, the courts are clear that the debtor's performance to the initial creditor extinguishes the debt. In other words, the debtor is in no danger of having to perform twice on the same debt. This was the principle in the *Katz v Katzenellenbogen*[127] case. This judgment therefore contradicts the argument in the recent court challenges that where the claim has been transferred

[124] *Terblanche* case (n 4) para 17.
[125] Locke (n 1) 30.
[126] *Nedbank Limited v Killian NO* case (n 6)
[127] *Katz* case (n 69).

by securitisation without the debtors' knowledge and/or consent that they are no longer required to make payment of the debt to the SPV. This does not reflect the current legal position.

From the discussion we have gathered that a securitisation transaction entails a true transfer of a right to an individual who was not a party to the original agreement. Having looked at the different legal forms of transfer we established that the transfer of the right during a securitisation transaction could be by cession or delegation. If it is accepted that the transfer is by delegation then the debtor would need to give his consent to the delegation. Cession presents the same principles that are found in a securitisation transaction. The Securitisation Notice, however, suggests that transfer must be by delegation. Locke suggests that the Securitisation Notice implies cession and delegation. Having established that securitisation is or can be by transfer of rights by cession, we can conclude that the agreement to sell a claim does not need to be in writing, the debtor does not need to be informed or to give his consent to the transfer and that the transfer completely removes the right from the transferor's estate and vests it in the estate of the transferee. South African law protects a debtor who has not given his consent to a cession in two ways: by not placing the debtor in a more burdensome and onerous position and by not depriving the debtor of his defences that he would have enjoyed against the cedent. Should the court find that the debtor has not given his consent to the cession and one or more of the prohibited instances that burden the position of the debtor or deprive the debtor of his defences exist, that cession would be rendered invalid and unenforceable.[128]

The securitisation process likewise has to be tested against the established provisions of South African law. The originator and the SPV need to ensure that the securitisation transaction does not weaken the position of the debtor or deprive him of his defences or countersuits that he would have had against the originator. Should the securitisation process be found to be contrary to these two protections offered to the debtor, the court would not give effect to the securitisation.

[128] *Anglo Shipping* case (n 88) 240A-B.

Cessions have been widely used as a proper tool of commercial transactions. As held in the *Goodwin Stable Trust v Douhex (Pty) Ltd* case,[129] cessions remain a means by which businesspeople and private individuals transfer their personal rights as part of business or commercial transactions.[130] This has been adopted into the securitisation process. The debtor is still required to perform to the SPV. The SPV becomes the new holder of the right and in turn becomes the only one that can sue on the claim.[131] In most instances the parties to the securitisation enter into various agreements allowing the originator to remain in the picture as a representative or an agent of the cessionary to collect payment on behalf of the SPV.[132] These agreements are legal. In practice the SPV, which is an entity created solely for the purpose of holding the claim acquired from the originator, would generally instruct the originator to collect payments on its behalf. The originator may also be authorised by the SPV to institute legal proceedings against a defaulting debtor. The originator would have to show that it is acting in a representative capacity.

To my mind, a debtor would have to plead that the securitisation transaction has weakened his position. He would need to show that the securitisation has taken away a defence or privilege that he enjoyed before the claim was ceded. If there has not been any situation taking his defences away, the debtor cannot refuse to honour his obligation in terms of his contract with the originator. Alternatively, the debtor would need to show that owing to the cession his new creditor, the cessionary, has certain privileges which protect him from defences or counterclaims that can be raised by the debtor against him. These would have to be considered on a case-by-case basis.

In a normal securitisation transaction, I cannot see in what manner the position of the debtor can be said to have been prejudiced. The business of the debtor is not interrupted by the securitisation. The debtor would not be required to do anything to effect the transfer. In those securitisation transactions where the cedent continues to act in a representative capacity or as a collecting agent for the originator, the debtor would be required to continue with his payment

[129] *Goodwin Stable Trust* case (n 66).
[130] *Goodwin Stable Trust* case (n 66) 617E.
[131] *Katz* case (n 69) 190G-H*; Rothchild v Lowdens*1908 TS 493 499; *Barclays Bank (D.C & O) v Riverside Dried Fruit Co* 1949 1 SA 937 (C) 946.
[132] Locke (n 1) 346-357.

arrangements with his bank. These would remain unaffected as the originator would continue to act for the SPV. The cession would not affect the terms of the debtor's agreement with the originator. The SPV cannot implement a new interest rate or introduce new terms that would disadvantage the debtor that are different to the original terms with the originator.

Further, a debtor who has rendered performance to an originator prior to receiving notification of the cession has a legally recognised defense that he has performed in good faith to the person he was under the impression that he must pay.[133] The law states that such a debtor would be relieved from his obligation against the SPV. He cannot be prosecuted for rendering performance to the wrong party. Voet states that a cessionary who delayed, failed or neglected to notify the debtor of the cedent of his newly acquired right has only himself to blame when the debtor performed directly to the cedent.[134] In such instances the SPV would not have recourse against the debtor but he would have a breach of contract claim against the originator.[135]

With respect to the attack on the validity of a cession for lack of notice to the debtor, I submit that the law today is that: "No rule is more clearly established in our law than that rights of action may be ceded to third parties without the consent of the party liable."[136] South African law also maintains the position that a debtor who has not consented to the cession cannot be rendered weaker by it. He must remain protected with the defences that would have been available to him as against the cedent. Whilst the aforegoing has been long accepted, in *Frank v Premier Hangers CC*[137] the court held that it can equally be said that a cession cannot be relied on by the debtor to improve his position.[138]

[133] Voet 18.4.15.
[134] Voet 18.4.15.
[135] Nienaber (n 16) 48. Sharrock is of the view that an enrichment claim is available to the cedent in these circumstances. Sharrock (n 70) 254.
[136] *Executors of Paterson v Webster, Steele & Co* 1881 1 SC 350 355.
[137] *Frank* case (n 118).
[138] *Frank* case (n 118) 607A.

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