

SOUTH AFRICA / JUDGMENT

Engen Petroleum Limited v Flotank Transport (Pty) Ltd (1049/2017) [2020] ZANCHC 35 (5 June 2020) [2020] ZANCHC 35

COURT

Northern Cape High Court, Kimberley

BEFORE

Makoti AJ

CASE / FILE NUMBER

1049/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

(NORTHERN

CAPE DIVISION, KIMBERLY)

Case

No: 1049/2017

Matter

Heard: 06/03/2020

Delivered: 05/06/2020

In

the appeal of:

ENGEN
PETROLEUM
LIMITED
Applicant
and
FLOTANK
TRANSPORT (PTY)
LTD
Respondent

JUDGEMENT

MAKOTI AJ

[1] The applicant is Engen Petroleum Limited and it has lodged this application which is composed of several claims against Flotank

Transport (Pty) Ltd. In all, the application comprises nine separate claims which the applicant has asked the court to direct the

respondent to pay, with a concomitant order of costs. For the sake of convenience, I will refer to the applicant as Engen and to the respondent as Flotank.

[2] Before dealing with the substance of the claims, it is apposite to address a preliminary issue pertaining to the applicant's

delayed filing of the replying affidavit. Also, I consider whether it was necessary for the applicant to have applied for condonation of the late delivery of the replying affidavit and, if indeed the application was delivered.

Late delivery of applicant's replying affidavit

[3] It is not in dispute that the Engen's replying affidavit was filed outside of the timeframes set out in the rules. Rule 6(5)(e) allows an applicant who intends to file a reply to do so within ten

(10) days of receiving an answering affidavit from the respondent. Once the period had passed, there can be no doubt that an application asking the court to condone the non-compliance with the rules became necessary.

[4] For the record, the parties have filed their respective pleadings in the following sequence:

[4.1] the Notice of Motion and the applicant's founding affidavit was filed on 16 May 2017. The application was served by the Sheriff on 22 May 2017;

[4.2] Engen supplemented its papers on 19 July 2017, the effect of which was to correct the amount stated in Claim I from the initial R234,794.85 to R34,794.85;

[4.3] on 24 July 2017 Flotank's opposing papers were served on Engen's legal representatives. The papers were filed with the Registrar on the same date; and

[4.4] four months later, on 16 November 2017 Engen filed its replying affidavit, but without asking the court to condone the late delivery thereof.

- [5] Due to the replying affidavit being late, counsel for Flotank argued that the affidavit should not see the light of day because Engen had failed to formally deliver an application for the court to condone the late filing thereof. Thus, the argument continued, the main application should only be adjudicated on the basis of averments that were made by the parties in their respective founding and answering affidavits. The controversy surrounding the condonation application shall become more clearer below.
- [6] The record reflects that, and so was Mr Zietsman's address on behalf of the Flotank, the application was previously postponed on 08 December 2017 due to Engen's belated attempt to apply for condonation of the late filing of its replying affidavit. The parties were in agreement that on that day Engen's representatives handed over the condonation application from the bar. The handing over of the condonation application in court was the reason for postponement of the matter. The postponement, according to Engen's counsel was to serve the purpose of affording Flotank an opportunity to apply its mind to the condonation application and to decide whether to oppose it or not. Engen was then ordered to pay the day's wasted costs for having caused the postponement of the matter.
- [7] When the application came before this court on 06 March 2020, the parties still presented oral arguments on whether Engen's

replying affidavit should be considered. On behalf of Flotank it was argued that because Engen had not, after postponement of the matter on 08 December 2017, formally delivered the application for condonation, that I should disregard the replying affidavit. I noted that the copy in the court file did not have the Registrar's stamp to evince the date on which it was filed. This is undoubtedly the copy that counsel for Engen handed in court on 08 December 2017.

- [8] Engen did not thereafter attend to formally filing the condonation application. It adopted an approach that it was not necessary to file the application as it was already delivered on 08 December 2017. When this situation persisted, on 16 February 2016 Flotank's

attorneys addressed a letter to Engen's representatives requesting the latter to formally file the application for condonation. The request was not responded to by Engen's representatives. There is no dispute that the letter was received and there is no explanation for Engen's failure to respond. Formalities aside, Flotank's lawyers left court on 08 December 2017 having a copy of the application for condonation. The court also had its copy of the application for condonation of the late filing of the replying affidavit. I am therefore willing to overlook Engen's failure and consider the merits of the condonation application.

- [9] The requirements that have to be satisfied when a party seeks condonement of its non-compliance with the rules are settled in our law. What was stated by Heher JA in *Uitenhage Transitional Local Council v South African Revenue Service*[1] regarding the requisites for condonation, is still pertinent in this matter:

“One would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite knowledge among practitioners who are entrusted with the preparation of appeals to this Court: condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.” (Emphasis added)

[10] Engen and its representatives should be aware of the requirements for this kind of application. What is needed from the court in an application of this nature is an objective consideration of all the facts. A slight delay and a good explanation may help to compensate prospects which are not strong. Alternatively, the importance of the issue and strong prospects of success may tend to compensate for a long delay.[2] The explanation in this matter is that the attorney for Engen, M D Maharaj, was responsible for the delayed filing of the replying affidavit. He indicated that he spent some time out of the country and was not able to file the application on time.[3] The explanation is unsatisfactorily patchy and does not account fully for the period of delay.

[11] Although I do not align with Flotank’s argument that there was no application for condonation, the application itself is deficient. As indicated, it does not cover the entire period of the delay, as it is required to do in terms of the authority that is found in *Grootboom v National Prosecuting Authority and Another*. [4] In that case Bosielo AJ cautioned that:

“I need to remind practitioners and litigants that the rules and courts’ directions serve a necessary purpose. Their primary aim is to ensure that the business of our courts is run effectively and efficiently. Invariably this will lead to the orderly management of our courts’ rolls, which in turn will bring about the expeditious disposal of cases in the most cost-effective manner. This is particularly important given the ever-increasing costs of litigation, which if left unchecked will make access to justice too expensive.”

[12] The above judgement in *Grootboom* followed what was said in another Constitutional Court judgement in *eThekweni Municipality v Ingonyama Trust*

[5] where the court held that:

“The conduct of litigants in failing to observe Rules of this Court is unfortunate and should be brought to a halt. This term alone, in eight of the 13 matters set down for hearing, litigants failed to comply with the time limits in the rules and directions issued by the Chief Justice. It is unacceptable that this is the position in spite of the warning issued by this Court in the past. In [Van Wyk], this Court warned litigants to stop the trend. The Court said:

...

The statistics referred to above illustrate that the caution was not heeded. The Court cannot continue issuing warnings that are

disregarded by litigants. It must find a way of bringing this unacceptable behaviour to a stop. One way that readily presents itself is for the Court to require proper compliance with the rules and refuse condonation where these requirements are not met.

Compliance must be demanded even in relation to rules regulating applications for condonation.”

[13] A careful consideration of these Constitutional Court authorities leads to a conclusion that it is no longer acceptable for an applicant to simply address one of the grounds for condonation and leave out the rest. A full explanation of the default is required, along with a full address in respect of all the other requirements.

[14] From the narrative contained in the application for condonation it cannot be said that the attorneys for Engen acted reasonably or expeditiously. The explanation leaves a lot of gaps. Even if it is accepted that Maharaj was required to attend other businesses

overseas, four months to prepare this application of 11 paragraphs is inexcusable. His explanations failed to cover most of the period of delay. Taking all these into consideration, the application to condone the late filing of Engen’s replying affidavit must be refused.

[15] The result is that I dealt with the application without considering the contents of Engen’s replying affidavit. I find it insufficient to simply suggest, as Engen’s counsel sought to do, that the other party will not be prejudiced by the non-compliance.

Issue(s) for determination

[16] This court is called upon to decide whether Engen has made out a case for payment of the monetary claims against Flotank. Engen’s

claims are derived from a contractual relationship with a third party company, Windsharp Trading (Pty) Ltd t/a Gaskells Freight Lines (‘Windsharp’). The road to determining the propriety of Engen’s claims is not as straight forward as it is inseparably intertwined with the liquidation of Windsharp. I digress to mention that Windsharp fell into liquidation on 05 November 2014. It will later become apparent that it was the liquidation that created complications in this matter.

[17] The application is opposed on the grounds that: (a) Engen lacked the requisite legal standing to pursue the payment of any of the claims;

(b) Engen has not properly perfected its claims; and (c) Engen’s claims lie against Windsharp’s insolvent estate in terms of s 44 of the Insolvency Act. I will deal with each of these grounds of opposition at a later stage.

[18] In line with what I have stated above, I have not considered Engen’s reply to these grounds of opposition. Despite that, the parties’ respective cases are well apparent from their founding and answering affidavits.

Material

facts

[19] The factual circumstances which gave rise to Engen's claims against Flotank are largely common cause. The background is that Engen and Windsharp were involved in a commercial contractual relationship effective from January 2009. The exact terms of the contract are not germane for the proper adjudication of this application. However, it is important to note that the said

contractual relationship was affected by the eventuality of Windsharp getting wound-up in terms of an order from the Pietermaritzburg High Court dated 29 January 2015. Prior that, Windsharp was provisionally wound-up on 04 December 2014. The application that got Windsharp liquidated was issued by Engen on 05 November 2014. The dates are important for the determination of this application.

[20] The adversity of the commercial relationship between Engen and Windsharp began when the latter could no longer adequately service

its indebtedness to the former. Windsharp's inability to pay the debts gave rise to two cessions as security for the payment of its indebtedness to Engen. The evidence provided by Engen reveals that on 25 June 2014 Windsharp' debt amounted to a sum of R5,558,703.33.[6] For reasons that the relationship between the two companies was not a matter for its concern, Flotank did not dispute any averments relating to the cessions.

[21] With the first cession agreement, which was concluded on 03 April 2012, Windsharp ceded all its rights, title and interest in and to the debts over to Engen. Clause 2 of the agreement, defines the ceded debts as follows:

““Debts” shall mean all the right, title and interest in and to all and any claims of whatsoever nature and howsoever arising which the Cedent may not or hereafter have against any person whomsoever, and all and any monies and amounts of whatsoever nature which may now be or hereafter become due or owing to the Cedent from whatsoever cause and howsoever arising by any person whomsoever, including in particular, but not limited to, debts generally described as “general debts”. For the purposes of this agreement, “person” shall include not only natural persons but also corporations and other juristic persons, and, where the context so permits, shall further include any government or state or any division (including but not limited to any department or ministry) or agency thereof or authority constituted thereunder; and any association of persons

(within the foregoing meaning) even if unincorporated.” (Emphasis added)

[22] This court, likewise the parties' respective counsel, understood the above text as implying that Windsharp had ceded to Engen only the right to claim debts[7] from its debtors, as general security for the due performance and discharge of its obligations and indebtedness towards Engen. The provisions of clause 2 of the second cession agreement that was concluded on 30 June 2014 mirrors the corresponding provisions of the first cession agreement. Similar meaning can be ascribed to the second cession as in respect of the first cession. The two agreements were only to be cancelled with written communication to that

effect by Engen.

- [23] On paper, and in oral submissions, the parties were in agreement that the cession relied upon in this application was concluded in securitatem debiti to ensure that debts owed by Windsharp to Engen will be paid, either directly by Windsharp or by any of the latter's creditors, should Engen elect to claim payment from such creditors. In view of the fact that Flotank was not a party to the cession agreements, it did not dispute any of the allegations relating to Windsharp's indebtedness towards Engen. The value of such indebtedness was also not placed in dispute. Flotank simply noted all the relevant allegations.
- [24] The case for Engen was that, on 09 December 2014 it issued a written notice to Flotank informing it of the existence of the cession agreement that was concluded with Windsharp on 30 June 2014. In addition, Engen advised Flotank of its decision or election to collect all debts that were due and payable to Windsharp, directing that all the claims or payments be made to directly Engen. Also, Engen cautioned Flotank not ignore the notice as that may lead to it being indebted to Engen for an equivalent value of the claims that may be paid to Windsharp. The letter makes it clear that Flotank will not be absolved of liability should it decide to disregard the notice and make any payment(s) to Windsharp. Finally, Engen warned that it may institute legal proceedings against Flotank to recover any claims that may be paid to Windsharp in ignorance of the notice.
- [25] There is no dispute that the notice was indeed received by Flotank. In confirmation of its receipt and awareness of the notice, on 12 December 2014 Flotank responded in writing to the notice of perfection by inter alia requesting Engen to furnish it with a copy of the cession agreement referred to in the letter of 09 December 2014. The relevant paragraph of the letter reads as follows:
- "Please supply us with the memorandum of agreement containing the cession before 13:00 on 12 December 2014, otherwise we will continue with this weeks payment."*
- [26] The response makes it obvious that Flotank understood that it had been served with a written notice that Engen was perfecting the cession.[8] Flotank saw two difficulties with the notice that was issued by Engen. The first was that, because Engen had not availed a copy of the cession, perfection was improper and that it could simply ignore it and continue to make payments as before, directly to Windsharp. To this effect Flotank made it known that it was not going to accede to Engen's request notice unless it was provided with a copy of the cession agreement. It appears that the request for copy of the cession was intended to be used by Flotank in order to avoid being embroiled in the dispute as to where should the payments be made. The second difficulty that was expressed by Flotank was that the Windsharp (then already in liquidation) was opposed to the claims being paid over to Engen. It is not clear if Flotank had already become aware of Windsharp's liquidation proceedings.

- [27] Based on the above stipulated grounds, Flotank disregarded the notice and continued to pay the week's claim that afternoon[9] and the several claims in the subsequent weeks to Windsharp. This appears to have been motivated, at least to an extent, by the fact that Engen had not heeded Flotank's request to be provided with a copy of the cession agreement. It is common cause that in the afternoon on 12 December 2014 Flotank made payment to Windsharp in the amount of R432,389.38 (Four Hundred and Thirty-Two Thousand, Three Hundred and Eighty-Nine Rand and Thirty-Eight Cents).
- [28] Additionally, Flotank made the following further payments: on 19 December 2014 an amount of R344,239.14 (Three Hundred and Forty-Four Thousand, Two Hundred and Thirty-Nine Rand and Fourteen Cents); on 22 December 2014 an amount of R152,817.80 (One Hundred and Fifty-Two Thousand, Eight Hundred and Seventeen Rand and Eighty Cents); on 24 December 2014 an amount of R313,137.14 (Three Hundred and Thirteen Thousand, One Hundred and Thirty-Seven Rand and Fourteen Cents); on 02 January 2015 an amount of R339,052.39 (Three Hundred and Thirty-Nine Thousand, Fifty-Two Rand and Thirty-Nine Cents); on 09 January 2015 an amount of R198,613.68 (One Hundred and Ninety-Eight Thousand, Six Hundred and Thirteen Rand and Sixty-Eight Cents); on 16 January 2015 an amount of R230,571.36 (Two Hundred and Thirty Thousand, Five Hundred and Seventy-One Rand and Thirty-Six Cents); on 23 January 2015 an amount of R276,046.04 (Two Hundred and Seventy-Six Thousand, Forty-Six Rand and Four Cents; and on 30 January 2015 an amount of R34,794.85[10] (Two Hundred and Thirty-Four Thousand, Seven Hundred and Ninety-Four Rand and Eighty-Five Cents).
- [29] Engen's claims against Flotank constitute the cumulative value of the amounts reflected in the preceding paragraph. In their respective affidavits and in court, the parties were ad idem that the amounts truly reflected what Flotank has paid to Windsharp in the period between 12 December 2014 and 31 January 2015. Thus, if I find that the payments were wrongly made by Flotank, Engen will be entitled to payment of the cumulative value of all the claims mentioned in the preceding paragraph.
- [30] A summarised explanation of Flotank's grounds of opposition, which is discernible from its answering affidavit, is that:
- [30.1] since the date on which Windsharp was placed under liquidation, all the debts and claims in its favour fell to be pursued by the liquidators of its insolvent estate and that, as a result, Engen did not have the necessary locus standi to claim the payments;[11]
- [30.2] there was no proper 'perfection' or notice of the cession by Engen to Flotank on the basis that Engen had failed to provide a copy of the cession after it was requested in the letter of 12 December
2014. This point was raised on the basis that Engen had failed to attach a copy of the memorandum of cession to the notice of 09 December 2014, and after Flotank had requested that it be provided; and

[30.3] Engen has a claim against the liquidators or the insolvent estate of Windsharp. The point that was made was that, since the liquidation of Windsharp, the claims had to be dealt with as provided for in s 44 of the Insolvency Act, 1936.[12] It was contended that s 44 of the Insolvency Act, taking into consideration the existence of the cession agreement, elevated Engen's standing to that of a secured creditor of the liquidated estate of Windsharp.

Locus standi in judicio

[31] An important consideration when determining whether a party has the necessary legal standing to institute legal action is whether, or not, that party has direct and substantial interest in the outcome of the claim.[13] It is well written in our authorities that what is required to be shown is a legal interest in the subject matter of the litigation, an interest which may be adversely affected by the judgement of the court.[14] The undisputed facts in this matter reveal that Engen is claiming payment for debts owed to it by Windsharp, ostensibly based on the right to take legal action to claim for its own benefit over debts owed by third parties to Flotank. That right to sue is derived from the fact that in a cession in securitatem debiti the Cedent is divested to the right to sue for payment of the ceded book debts in favour of the Cessionary.[15]

[32] Engen has not attempted to act as an agent or on behalf of Windsharp or the insolvent estate. Its claim is entirely for its benefit, regardless of where the payment who is to make the payment. Its cause of action is based on Flotank's ignorance of the notice issued on 09 December 2014 when it continued to pay the weekly claims to Windsharp. It has an independent claim against Windsharp's debtors, after perfecting its claim and having its notice ignored by any debtor who has been served with such notice of perfection.

[33] There is and can be no dispute to the fact that Windsharp was seriously indebted to Engen, and that, as from 30 June 2014 Engen was entitled (at its sole election) to demand direct payment from Windsharp's debtors. It was entitled to do so in accordance

with the undisputed memorandum of cession of that same date.[16] The claims in this application constitute Engen's attempted exercise of its rights in terms of the memorandum of cession. Engen has always been entitled to the payment of its indebtedness from Windsharp or by the latter's debtors. It has the right to call for payment in accordance with the cession agreement. It established its causa on the basis that Flotank ignored its notice of perfection of the cession. I do not agree that the liquidation of Windsharp affected

Engen's right to be paid. What may have changed is whether Engen was post concursus still entitled to rely on the cession in securitatem debiti to claim payment directly from Flotank as one of the debtors of Windsharp, or if its claim fell exclusively against the liquidators

of the insolvent estate. The answer to this question shall be provided at a later stage.

[34] For the reasons canvassed above, the technical defence or ground of opposition that Engen lacked the necessary locus standi in judicio cannot succeed.

Perfection of cession

[35] The point raised in this regard was that in Engen failing to provide a copy of the relevant memorandum of cession, there was no proper perfection of the cession. It was specifically contended on behalf of Flotank that the mere sending out of the letter of 09 December 2014 to the debtors of Windsharp, without attaching the actual memorandum of cession, Engen had failed to properly perfect the cession.[17] I was not directed to any authority for the proposition that perfecting a cession requires that the relevant memorandum of cession should be attached to the notice.

[36] That Engen and Windsharp were parties to an agreement of cession is undeniable, the result being that the right to claim payment of debts owed to the latter was transferred to the former immediately upon the conclusion of the agreement. That much is in line with the above legal authority and a plethora of others. At its election, a cessionary may serve a notice to debtors of the cedent calling upon them to make payment of any debts over to it (cessionary). A debtor who ignores without justification such notice of cession and pays the cedent is in law not absolved from liability of paying the cessionary what is due to be paid to the cedent.[18]

[37] As indicated, Flotank contends that the notice did not amount to proper perfection. I disagree with such sentiment. In my view the notice carried sufficient information upon which Flotank could have relied to make payments directly to Engen. In the alternative,

Flotank could have withheld payments to Windsharp in order to first ascertain the veracity of the existence of the cession. It must be taken into account that the validity of the cession was not placed in dispute.

[38] The legal principles applicable in this present matter have been articulately stated by P M Nienaber as follows:[19]

“Although notice to the debtor of the cession is not a pre-requisite for cession, it is thus incumbent on the cessionary, in whose interest it is to do so, to inform the debtor of the cession to him or her at the risk, if this is not done, that his or her claim may be pre-empted by the unsuspecting debtor’s performance to the cedent . . . whom he or she genuinely and reasonably identifies as his or her true creditor.” (Emphasis added)

[39] The excerpt above points to the conclusion that a notice to debtors about the cession constitutes proper perfection, nothing more. There is no set formality for perfection, even though it may help to deal away with any confusion by attaching a copy of the cession to the notice. I am not in agreement with counsel for Flotank when he says that the failure to attach the memorandum affected the perfection. There is no fault with Engen’s perfection and, as a result, this ground of opposition must also fail.

Legal effect of liquidation

[40] The parties were in agreement that the cession had transferred the right to take action to claim debts to Engen. The erstwhile Appellate Division in the case of *Johnson v Incorporated General Insurances Ltd*[20] described the nature of a cession agreement in the following terms:

“It is accomplished by means of an agreement of transfer (“oordragsooreenkoms”) between the cedent and the cessionary arising out of a justa causa from which the intention of the cedent to transfer the right to claim to the cessionary (animus transferendi) and the intention of the cessionary to become the holder of the right to claim (animus acquirendi) appears or can be inferred.” (Emphasis added)

[41] Through the relevant memorandum of cession Windsharp transferred the right to claim payment of debts owed to it over to Engen. That much cannot conceivably be gainsaid.

[42] Mr Dayal for Engen relying on common cause facts asserted that Flotank should be found liable and be ordered to pay all the claims or debts that were paid to Windsharp after it had received the notice of perfection of the cession on the basis that:

[42.1] it was common cause that it had received notice of the cession, accompanied by a request [or demand] to pay all of Windsharp’s claims to Engen;

[42.2] despite the fact that it had received the written notice on 09 December 2014, Flotank ignored it and continued to make the several payments directly to Windsharp; and

[42.3] the payments that were made to Windsharp did not absolve Flotank and that it remained legally liable to Engen for all those payments.

[43] Furthermore, according to Mr Dayal, by making the payments to Windsharp after it had received the written notice, Flotank failed to act reasonably and that it should therefore be made to bear the consequences for its failure to take heed of the notice. He bolstered his contention by making reference to the case of *Sasfin (Pty) Ltd v Beukes*[21] in which it was held that:

“A debtor who pays the cedent after a notice of cession is not relieved of paying the cessionary again. Christie (op cit at 459). Thus a debtor may be placed in a position of uncertainty if the existence of a cession is disputed.”

[44] It is appropriate to remember that Windsharp fell into liquidation with the date of reckoning being 05 November 2014. The *Sasfin* decision does not assist Engen as that decision did not take place in the context of liquidation. Reliance on *Sasfin* therefore fails to take into consideration that the situation took a dramatic change when Windsharp was placed under liquidation.

Nienaber[22] adds the following voice to the discourse:

“Performance by the debtor, more particularly payment, to the cessionary, the new creditor, discharges the debt. It should follow as a corollary that payment to the cedent ought not to release the debtor. Yet it is a well-established rule, based on the palpable need to protect a blameless debtor who rendered performance to the party he or she genuinely believed to be the true creditor, that payment to the cedent

absolves or at least releases the debtor, provided that he or she was unaware of the earlier cession or, if aware thereof, that he or she nonetheless acted in good faith in effecting the payment. The debtor's prior knowledge of the cession, however gained, would normally exclude good faith and defeat the payment. But it has been said that the debtor will be released from liability if such debtor can show that, notwithstanding his or her prior knowledge of the claim by the cessionary, he or she nevertheless paid the cedent in good faith." (Emphasis added)

- [45] It cannot be gainsaid the above is true in the ordinary course of events. This is not a normal case. The liquidation of Windsharp was an intervening factor. As I have mentioned above, Windsharp was finally liquidated in January 2015 approximately two months after the initial application was lodged by Engen on 05 November 2014. The parties were in agreement that the date on which Windsharp went into concursus creditorum was by application of law 05 November 2014.[23]
- [46] The success or failure of this application is centred on the question as to what effect did the liquidation of Windsharp have on Engen's claims. According to Mr Dayal the liquidation of Windsharp should have no effect to any of Engen's claims arising out of the cession agreement. This, according to him, was because Windsharp was already divested of the right to sue in respect of any of the ceded claims long before liquidation. He submitted that the liquidators could not have acquired any rights that are greater than those that the cedent held prior to its liquidation. He pointed to no authority to back-up this contention.
- [47] On behalf of Flotank Mr Zietsman contended that because the cession on which Engen was relying was in securitatem debiti, the liquidation of Windsharp has changed everything. The essence of his argument was that, from the date on which Windsharp went into concursus creditorum, on 05 November 2014, the dominium of the ceded claims or book debts resorted in the liquidators of Windsharp. Furthermore, he submitted that after liquidation the position of Engen as cessionary became that of a preferred creditor of Windsharp's insolvent

estate.[24]

- [48] For different reasons, both counsel referred to the case of Millman NO. v Twiggs And Another[25] in which the court held inter alia thus:

"When a right is ceded with the avowed object of securing a debt the cession is regarded as a pledge of the right in question: dominium of the right remains vested with the cedent and vests upon his insolvency in his trustee, who is under the common law entitled to administer it in the interests of all the creditors, with due regard to the special position of the pledgee." (Emphasis added)

- [49] The above case is by no means the authority for the proposition that Engen's right become that of preferent creditor. This is because, as noted by the court, the parties in that case had readily agreed about that position.[26] On careful reading of the dictum above, it is the dominium of the right which remains vested with the cedent and, upon liquidation, on the trustees. In practical terms the effect of a cession in securitatem debiti has been held in all

respects to be the same as that of an ordinary cession but coupled with an agreement that on payment of the secured debt the cessionary shall be obliged to recede to the cedent the ceded right of action.[27]

[50] Mr Zietsman further submitted that it was well known and undisputed that the payments were made to the cedent, being Windsharp. In that case, his submissions continued, Engen as cessionary should lodge its claim with the liquidators of Windsharp. The ceded right becomes part of the cedent's estate on insolvency, meaning that the trustee of the cedent's estate may claim the money and pay the secured claim of the cessionary.[28] It should be recalled that the liquidators of Windsharp objected to the claims being paid to Engen.[29] The right that was ceded to Engen in law constitutes 'movable property' within the definition contained in s 2 of the Insolvency Act[30] and Engen has a preferent right thereto in *securitatem debiti*.

[51] Counsel for Engen referred the court to certain paragraphs from the case of *Nedband Ltd v Cooper NO and Others*[31] and contended that what Windsharp had retained was only the book debts but not the right to claim payment from its creditors as that right had been pledged to Engen. This implied, according to him, that the liquidators of Windsharp's estate could not lay claim to the payments. If that be correct, it would mean that Flotank did not discharge its obligations by making payments to Windsharp. I have great difficulty in accepting this submission because in a later paragraph the same judgement also reads as follows:

"[23] The liquidator is entitled to claim and administer claims of an insolvent company which have been ceded in securitatem debiti. This right flows from the fact that the dominium in the policy remains vested in the cedent and the proceeds recovered form an asset in the estate of the company in liquidation." (Emphasis added)

[52] In view of the above authority, Engen's claims crumble because that case makes it plain that the liquidators of Windsharp have the right to claim that which was ceded in *securitatem debiti* to Engen. This in my view obliterates the case that Engen sought to make against Flotank. Of course I accept without reservation that in the normal course, where liquidation is not an issue, Engen would have been fully entitled to claim payment of the debts owed to Windsharp. Liquidation, however, changed the all of that.

[53] Applying the principles as derived from the authority in *Bank of Lisbon, supra*, Mars eloquently puts the position thus:

"If the cession of, for example book debts, is given as a pledge, the pledgee will be considered to be a secured creditor of the insolvent estate of the pledgor and will have to proceed in terms of the Insolvency Act. Where the cession has taken place though a pledge, the pledged ('ceded') right remains part of the estate of the pledgor ('cedent'). Therefore, if such a pledgor is later sequestrated the personal right (pledged right) will fall in his insolvent estate and his trustees will deal with it accordingly, and the pledgee ('cessionary') will be a secured creditor of the insolvent estate. In this instance, the right of pledge ('cession') merely lapses when the secured debt is settled. Therefore, there is no reverse cession

that takes place in order again to render the pledgor fully entitled to the pledged

personal right.”

[54] In my view Engen’s claims fly against the essence of the authorities that have been discussed above. To further demonstrate

essence of the above authorities, it is important to reflect what the court had stated in the case of Incorporated General Insurances Limited v Gush and Another[32] where it held that:

“It will be appreciated that the trustee’s right to administer the proceeds of the policy flowed from the conclusion that the so-called dominium in the policy remained with the cedent.

....

Accordingly, on the authority of the Appellate Division cases, by which I am of course bound, I conclude that the issue in the special case before me is indistinguishable from the facts in the National Bank case supra. The latter is authority for the proposition that the proceeds of the collection of the book debts properly fell into the estate of the company in liquidation as being an asset of such company. It follows that the first defendant was empowered and indeed obliged to collect them. Accordingly he is entitled to 10% of the proceeds in terms of para 1 of tariff B.” (Emphasis added)

[55] In view of these authorities, it became completely unquestionable that Engen’s claim lay, post concursus,[33] that is, from 05 November 2014 onwards, against the insolvent estate of Windsharp in accordance with the provisions of s 44 of the Insolvency Act, as a secured or preferred creditor. If that be the case, Engen was not entitled to, post concursus, issue the notice of perfection against any of the debtors of the liquidated Windsharp. In my view, therefore, the application stands to fail.

[60] I accordingly make the following order:

“[1] The application is dismissed; and

[2] The applicant is to pay the costs of this application, including the costs that were previously reserved on 23 March 2018.”

MAKOTI, MZ

ACTING JUDGE

NORTHERN CAPE HIGH COURT

KIMBERLEY

Representation:

For Applicant: Adv K Dayal SC

For Respondent: Adv Zietsman SC

- [1] Uitenhage Transitional Local Council v South African Revenue Service 2004 (1) SA 292 (SCA) para 6.
- [2] United Plant Hire (Pty) Ltd v Hills and Others 1976 (1) SA 717 (A) at 720E-F; also, Darries v Sheriff, Magistrate's Court, Wynberg and Another 1998 (3) SA 34 (SCA) at 40H-41E.
- [3] Supporting Affidavit p 70 paras 5 and 6.
- [4] Grootboom v National Prosecuting Authority and Another 2014 (2) SA 68 (CC).
- [5] eThekweni Municipality v Ingonyama Trust 2013
- (5) BCLR 497 (CC) at paras 26-27.
- [6] FA3: Acknowledgement of Debt and Undertaking to Pay dated 30 June 2014.
- [7] Novartis v Maphil 2016 (1) SA 518 (SCA); [2015] 4 All SA 417 (SCA) (3 September 2015).
- [8] FA8.1: Letter from Flotank to Engen dated 12 December 2017.
- [9] 12 December 2017.
- [10] As amended in the Supplementary Affidavit at p 194 par 5.
- [11] At p 125 par 3.6.
- [12] Act No. 24 of 1936.
- [13] PE Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd 1980 (4) SA 801 at 804B.
- [14] United Watch and Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another 1972 (4) SA 409 (C) at 415H.
- [15] Picardi Hotels Ltd v Thekwini Properties (Pty) Ltd [2008] ZASCA 128; 2009 (1) SA 493 (SCA) para 3.
- [16] FA2 p 36-46.
- [17] AA p 126 par 4.3.
- [18] Sasfin (Pty) Ltd v Beukes 1988
- (1) SA 626 (WLD) at 637I.
- [19] Joubert (ed) The Law of South Africa 2ed, vol 2 Part 2 (2003).
- [20] 1983
- (1) SA 318 AD at par 319G.
- [21] 1988 (1) SA 626 (WLD) at 637I.

[22] Note 19 supra.

[23] Item 9 of Schedule 5 of the Companies Act No. 71 of 2008; read with s 348 of the Companies Act No. 61 of 1973.

[24] National Bank of SA Ltd v Cohen's Trustee 1911 AD 235.

[25] Millman No v Twiggs and Another [1995] ZASCA 62; 1995 (3) SA 674 (A) at 676G-H.

[26] Ibid, at p 677.

[27] Bank of Lisbon and South Africa Ltd v The Master and Others 1987 (1) SA 276 (A); also, Trust Bank of Africa Ltd v Standard Bank of South Africa Ltd 1968 (3) SA at 189A – B.

[28] Ibid.

[29] Letter dated 12 December 2014.

[30] Insolvency Act 24 of 1936.

[31] Nedbank Ltd v Cooper NO and Others 2013 (4) SA 353 (FB).

[32] 1990

(4) SA 573 (WLD) at 577 A and at 580 B – C.

[33] Nel and Others NNO v The Master and Others 2002 (3) SA 354 (SCA) at 361H-I to 362A-B.

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