FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH-AFRICA

Case no. 508/2011

In the matter between:

SENATLA TRADING ENTERPRISE 26 CC	Applicant
and	
MADISEBO CATERING CC	1st Respondent
BLOEM WATER	2nd Respondent
THE FREE STATE DEVELOPMENT CORPORATION	3rd Respondent

HEARD ON:	21 AUGUST 2012
CORAM:	DANZFUSS, AJ
JUDGMENT BY:	DANZFUSS, AJ
DATE OF JUDGMENT:	20 DECEMBER 2012

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[1] The applicant approached this court on an urgent basis, lead *viva voce* evidence and a rule *nisi* was issued calling upon the respondents to show cause why a final order should not be made. On the return day an order was made by agreement between the parties that the full amount

owing to the third respondent (**R236 469,40**) be paid to it. (This debt owing to the third respondent was not disputed by the other parties). In addition certain identified disputes (by agreement) were referred for oral evidence in terms of rule 6(5)(g) of the Uniform Rules of Court.

[2] In summary the relevant facts are as follows:

(i) The second respondent (Bloem Water) appointed the first respondent to do construction work in terms of an agreement between those two parties.

(ii) The applicant, a civil construction contractor, entered into an agreement with the first respondent in terms of which the applicant was appointed as subcontractor for the said construction work on terms and conditions recorded in a written Memorandum of Agreement.

(iii) One of the relevant terms was that the second respondent (Bloem Water) shall pay the contract price owing by it to the first respondent directly to the applicant instead of to the first respondent.

(iv) In addition the first respondent on **5 August 2010** ceded its entire claim against the second respondent (Bloem Water) to the applicant.

(v) The applicant in terms of its agreement with first respondent and the cession of first respondent's claim against the second respondent (Bloem Water) demanded payment from second respondent (Bloem Water) who was at all relevant times notified and informed of the existence of the said cession.

(vi) After several attempts to obtain payment the applicant was informed that second respondent (Bloem Water) was going to pay the money to third respondent (the Free State Development Corporation (**"FSDC"**)). It now appeared that the third respondent (FSDC) advanced a loan to the first respondent to finance the said project and that an amount of **R236 469,40** was still owing to the third respondent. This amount is much less than the amount the second respondent (Bloem Water) owed the first respondent in terms of their agreement.

(vii) It also now appeared that on **19 November 2009** the first respondent ceded its claim against second respondent (Bloem Water) in favour of the third respondent (FSDC).

(viii) The cession by the first respondent in favour of third respondent (FSDC) therefore predates the cession in favour of the applicant.

[3] Several disputes arose between the parties in the opposing and replying papers including what the exact contents of the agreement between the applicant and the first respondent was; whether it was null and void; whether there was a proper demand for payment; etc.

[4] The main disputes were relevant to the validity and the contents of the underlying obligationary agreements between the parties and what was the affect thereof on the cession in favour of the applicant. According to the second respondent it was a so-called “double cession” resulting in

the second cession to be null and void.

Applicant received information that the second respondent (Bloem Water) was going to pay the money to the third respondent on **2 February 2011** and made application to this court on the same day for urgent relief because of the risk that third respondent may receive payment, deduct the amount owing to it and pay the balance to the first respondent which is according to the applicant a close corporation without any assets (a so-called “man of straw”).

[5] As already said the disputes were referred for oral evidence. It came before me and I ruled that the matter can be adjudicated without hearing oral evidence. I am of the opinion that:

5.1 a final decision of the real disputes between the parties is possible on the papers without hearing oral evidence;

5.2 the real disputes between the parties were not referred for oral evidence;

5.3 decision of the identified disputes would not enable the court to pass a final judgment.

[6] When a matter referred for the hearing of oral evidence comes before a court for the hearing, it is open to the court to hold that it is unnecessary to hear oral evidence and to decide the matter on the papers.

See: **WALLACH v LEW GEFFEN ESTATES CC,** 1993 (3) SA 258 (AD) at 263 H;

SHOPRITE HOLDINGS LTD v OBLOVITZ, (2006) 3 ALL SA 491 C at 500 f – 501 b;

Although a court will not lightly take such a step, it would do so where it is clear that the hearing of oral evidence will not affect the outcome of the matter and will only lead to unnecessary delay and unnecessary costs being incurred.

See: **WALLACH,** *supra*, at 262 I and 263 H;

SHOPRITE HOLDINGS, *supra*, at 500 f – 501 b.

[7] I am convinced that the hearing of oral evidence will not affect the outcome of this matter and will only delay and cause unnecessary costs.

DOUBLE CESSION:

[8] Although both cessions were for the entire amount owing by the second respondent to the first respondent both cessions were *in securitatem debiti*. The second cession is on the face of it an out-and-out cession but it is clear from the evidence by the applicant that it was intended as security. I am of the opinion that the wording of the cession document is not decisive in this regard. Form should not be allowed to override substance if on proper analysis of the transaction as a whole the cession was made with the purpose of securing a debt owed by the cedent to the cessionary.

See: **NATIONAL BANK OF SOUTH AFRICA LTD v COHEN'S TRUSTEE,** 1911 AD 235 at 246;
BANK OF LISBON AND SOUTH AFRICA LTD v THE MASTER AND OTHERS, 1987 (1) SA 276 AD at 294 D;

GROBLER v OOSTHUIZEN, 2009 (5) SA 500 SCA at 505 E.

[9] Extrinsic evidence to show that the cession was intended to serve as security (and not to permanently transfer, dispose of or alienate the claim) is admissible.

See: **AFRICAN CONSOLIDATED AGENCIES (PTY) LTD v SIEMENS NIXDORF INFORMATION SYSTEMS (PTY) LTD**, 1992 (2) SA 739 C at 744 F;
FISHER N.O. v SCHLEMMER, 1962 (4) SA 651 (T).

[10] The second cession by the first respondent in favour of the applicant is framed in the following terms:

"……..the cedent hereby cedes to and in favour of the cessionary all its rights to payment in terms of the goods and services ……."

At that stage the first respondent had already ceded its claim against the second respondent to the third respondent (FSDC).

[11] After out-and-out cession of its claim to a cessionary, the cedent is divested of its rights to collect the claim from the debtor. A subsequent cession can confer no legal rights on the second cessionary and would therefore be ineffectual.

See: **RANDBANK BEPERK v MORRIS N.O.,** 1977 (2) SA 21 (SECL) at 26 H;

TRUST BANK OF AFRICA LTD v STANDARD BANK OF SA LTD, 1968 (3) SA 166 (A) at 175 A – D and 185 F;

BARNHOORN v DUVENHAGE, 1964 (2) SA 486 (A) at 494 H.

[12] In case of a cession *in securitatem debiti* the cedent after cession retains a reversionary interest in the claim against the debtor. I have already indicated that both cessions by first respondent and therefore also the cession in favour of third respondent (FSDC) were *in securitatem debiti*. Therefore the first respondent after cession retained a reversionary interest in the debt.

REVERSIONARY INTEREST:

[13] Cession *in securitatem debiti* is a form of pledge. When the principal debt is "pledged" to the cessionary the cedent retains the "bare dominium" or "reversionary interest" in the claim against the principal debtor.

DEVELOPMENT BANK OF SOUTHERN AFRICA LTD v VAN RENSBURG AND OTHERS NN.O., 2002 (5) SA 425 (SCA), at 447, par. 50;
LAND EN LANDBOUBANK VAN SUID-AFRIKA v DIE MEESTER EN ANDERE, 1991 (2) SA 761 (AD) at 771 C – G;
GROBLER v OOSTHUIZEN, *supra,* at 507 A.

[14] The cessionary's rights are limited to recover payment from the debtor if the cedent is in default of payment to the cessionary. The reversionary interest remains with the cedent.

[15] This reversionary interest is explained by **Nienaber JA** in the **DEVELOPMENT BANK** matter, *supra*, at 447, par. 50 namely:

"This reversionary interest, properly understood, refers to the cedent's interest in the debtor's performance (i.e. satisfaction of the principal debt by the debtor) rather than to his interest in the cessionary's performance (i.e. re-cession of the principal debt on satisfaction of the secured debt – which is a right *ex contractu* against the cessionary)."

[16] This reversionary interest is as such capable of being ceded – also *in securitatem debiti*. By ceding the "dominium" (reversionary interest) the cessionary thereof obtains the right to the balance of the proceeds of the claim upon full payment of the amount due to the first cessionary namely the entity to whom the claim was initially ceded. This right would have reverted to the first cedent (first respondent) if there was no second cession. Because of the second cession it is transferred to the second cessionary (applicant). No re-cession (to first respondent) is necessary. It happens automatically.

See: **GROBLER v OOSTHUIZEN**, *supra*, at 510 E (par. 23).

[17] *In casu* it means that as the first respondent ceded:

"…….all its rights to payment"

to the applicant after he has already ceded the claim to third respondent , all that was (and could have been) ceded was the reversionary interest. When third respondent was paid in full the claim to the balance of the amount owing automatically reverted to the first respondent but as a result of the second cession to the applicant. The applicant as cessionary became the only party entitled to the proceeds of the remaining portion of the first respondent's claim (falling due) against second respondent (Bloem Water).

VALIDITY AND CONTENTS OF THE AGREEMENT: THE EFFECT ON THE CESSIONS:

[18] Nevertheless, the first respondent nor the second respondent seeks the setting aside of the Deed of Cession concluded in favour of the applicant and takes no factual issue with the correctness of the cession documents, the intention of the parties as evidenced by these documents or anything of the like. No substantive relief is sought by means of a counter application launched in connection with

the validity of the cession. I am therefore of the opinion that whether the underlying agreement is null and void or binding or whatever the true contents of the agreement is, are irrelevant to the validity of the cession as long as the cession as such is valid. The invalidity of the obligationary agreement underlying the cession, the cancellation or setting aside thereof will give rise to a claim by the cedent against the cessionary for re-cession to the cedent and to disgorge whatever benefits he or she may have received from the debt. But in the absence of such re-cession or of a court order to that effect, the cession remains valid and binding.

<u>See:</u> **<u>LAWSA</u>,** 2nd edition, volume 2, part 2, p. 24, par. 32;

VAN DER MERWE, et al: <u>CONTRACT: GENERAL PRINCIPLES</u>, 2nd edition, p. 480, par. 12.6 says:

"A duty to re-cede will also arise where the obligationary agreement underlying the cession is void *ab initio*, is avoided or a valid ground for cancellation, or cancelled by agreement between the cedent and the cessionary. Re-cession is in itself a cession and requires compliance with all the usual requirements."

<u>JOHNSON v INCORPORATED GENERAL INSURANCE LTD</u>, 1983 (1) SA 318 (AD)**.**

[19] The same applies to a cession *in securitatem debiti*. **Van der Merwe et al,** *supra*, at 480 opines:

"It is clear, however, that in the case of a security transfer the duty of the cessionary to effect a re-cession of the right becomes enforceable upon the redemption of the principle obligation."

[20] As already said no one of the respondents endeavour to attack the validity of the cession to the applicant. The only attack is aimed at the validity and contents of the underlying obligationary agreement. It is not contended that as a result of the alleged invalidity of the obligationary agreement, the cessionary is obliged to re-cede to the cedent.

[21] I am accordingly of the opinion that for as long as the cession remains in place, the applicant is entitled to

payment of the proceeds of the ceded claim to the extent of the first respondent's liability to the applicant.

CONCLUSION:

[22] The amount of **R236 469,40** has been paid to the third respondent (FSDC) and its entitlement to the amount is not disputed. I am not called upon to pass judgment as far as liability towards the third respondent (FSDC) is concerned.

[23] In terms of the rule nisi (with interim effect) issued on **2 February 2011** an amount of **R937 609,41** has been paid by the second respondent into the trust account of the applicant's attorneys **Peyper Sesele Attorneys Inc**. In terms of the interim order issued on **2 June 2011** the amount of **R542 455,27** has been paid by the said attorneys to the applicant. Although these amounts were paid in terms of the interim order of **2 June 2011** pending the finalisation of the hearing of oral evidence the applicant and the second respondent submitted a draft order to be made an order of court. In this draft order it has been agreed that:

(i) the balance of the money together with the accrued interest remaining after payment to applicant has been made in terms of the order granted by this court on **2 February 2012** and as contemplated in paragraph 1.3 of the order dated **2 June 2011** is to be paid out to the applicant;

(ii) The first respondent be ordered to pay the costs of the application.

[24] The first respondent was not a party to the agreement in connection with the draft order. It in fact did not appear at the hearing at all. I am nevertheless of the opinion that the first respondent is to be burdened with the costs:

(i) First respondent opposed this application without good reason and without disclosing any acceptable defence;

(ii) First defendant was the party owing the money to applicant as well as to third respondent.

(iii) First respondent ceded its claim against the second respondent to the third respondent and then without disclosing this preceding cession signed a second deed of cession. This is the decisive fact which gave rise to this litigation.

(iv) First respondent did not advance any reasons why it should not be burdened with the costs.

<u>ORDER:</u>

[25] Wherefore I make the following order:

25.1 The balance of the money paid by second respondent into the trust account of the attorneys for the applicant **Peyper Sesele Attorneys Inc** in terms of the order of this court of **2 February 2012** and as contemplated in paragraph 1.3 of the order of this court dated **2 June 2011** together with accrued interest to be paid out to the applicant;

25.2 The first respondent is ordered to pay the costs of this application.

F. W. A. DANZFUSS, AJ

On behalf of the applicant:	Adv. S. Grobler Instructed by: Peyper Sesele Inc
On behalf of the first respondent:	No appearance
On behalf of the second respondent:	Ms N.T. Ngubane Moroka Attorneys
On behalf of the third respondent:	No appearance