



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 876/2020

In the matter between:

ENGEN PETROLEUM LIMITED

APPLICANT

and

FLOTANK TRANSPORT (PTY) LTD

RESPONDENT

Neutral citation: *Engen Petroleum Ltd v Flotank Transport (Pty) Ltd* (876/20)
[2022] ZASCA 98 (21 June 2022)

Coram: MAYA P, ZONDI, MAKGOKA JJA, MEYER AND SAVAGE AJJA

Heard: 23 May 2022

Delivered: 21 June 2022

Summary: Interpretation of cession – whether a pledge or out-and-out cession incorporating a *pactum fiduciae* – effect of out-and-out cession on ceded debts upon liquidation of cedent – appeal upheld with costs.

ORDER

Application for leave to appeal from: Northern Cape Division of the High Court, Kimberley (Makoti AJ sitting as court of first instance):

- 1 Leave to appeal is granted.
- 2 The appeal is upheld with costs.
- 3 The order of the high court is set aside and replaced as follows:
 - ‘1. The respondent is to pay to the applicant the following amounts:
 - 1.1 R342 389.38 with interest thereon at the legal rate from 12 December 2014 to date of payment, both days inclusive;
 - 1.2 R344 239.14 with interest thereon at the legal rate from 19 December 2014 to date of payment, both days inclusive;
 - 1.3 R152 817.80 with interest thereon at the legal rate from 22 December 2014 to date of payment, both days inclusive;
 - 1.4 R313 137.14 with interest thereon at the legal rate from 24 December 2014 to date of payment, both days inclusive;
 - 1.5 R339 052.39 with interest thereon at the legal rate from 2 January 2015 to date of payment, both days inclusive;
 - 1.6 R198 613.68 with interest thereon at the legal rate from 9 January 2015 to date of payment, both days inclusive;

- 1.7 R230 571.36 with interest thereon at the legal rate from 16 January 2015 to date of payment, both days inclusive;
 - 1.8 R276 046.04 with interest thereon at the legal rate from 23 January 2015 to date of payment, both days inclusive;
 - 1.9 R34 794.85 with interest thereon at the legal rate from 30 January 2015 to date of payment, both days inclusive.
2. The respondent is to pay the applicant's costs.'

JUDGMENT

Savage AJA (Maya P, Zondi, Makgoka JJA and Meyer AJA concurring)

Introduction

[1] The applicant, Engen Petroleum Limited (Engen), seeks leave to appeal to this Court against the judgment and order of the Northern Cape Division of the High Court, Kimberley (the high court), dated 29 March 2020. This was after the high court dismissed with costs Engen's application to enforce against the respondent, Flotank Transport (Pty) Ltd (Flotank), the terms of a cession agreement concluded between Engen and Windsharp Trading (Pty) Limited (Windsharp). Engen applied for leave to appeal. This was refused.

[2] Following the refusal by the high court of Engen's application for leave to appeal, Engen petitioned this Court for leave to appeal. The application was referred for oral argument in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013. The parties were advised to be prepared, if called upon to do so, to address this Court on the merits. Having regard to the prospects of success, apparent from the reasons which follow, leave to appeal to this Court is granted.

Relevant factual background

[3] In January 2009 Engen and Windsharp entered into an Engen Diesel Club (EDC) agreement. Under the terms of the EDC agreement, Windsharp became indebted to Engen in an amount which, by June 2014, exceeded R5.5 million. As security for the debt, Engen and Windsharp concluded two deeds of cession, in April 2012 and June 2014. Clause 1 of the first cession, entered into on 3 April 2012 (the 2012 cession), recorded that:

'1. CESSION AND PLEDGE

The Cedent hereby cedes, transfers and makes over to the Cessionary all the Cedent's right, title and interest in and to the Debts (as defined in clause 2) as a continuing general covering security for the due performance and discharge of every obligation and indebtedness from whatsoever cause and howsoever arising which the Cedent may now or at any time hereafter have toward the Cessionary; and without limiting the generality of the foregoing, whether such indebtedness be a direct, indirect or contingent liability; whether it be matured or not; whether it may be or may have been incurred by the Cedent individually or jointly with others or by any firm in which the Cedent has or holds or may hereafter have or hold any interest; and whether it arises through any acts of suretyship, guarantee, warranty, indemnity or other undertaking signed by the Cedent solely or jointly with others or otherwise.'

[4] Clause 1 of the second cession entered into on 30 June 2014 (the 2014 cession), which replaced the first cession, was similar to clause 1 of the first cession, but with the insertion in italics at the end of that clause of the following: '*...The Cession hereby granted by the Cedent to the Cessionary includes any and all reversionary rights the Cedent might otherwise have had in and to the claim hereby ceded.*'

[5] Clause 14.2 of the 2014 cession provided that:

'14.2 Execution of this memorandum has discharged –

(a) every prior agreement between the parties to the extent within the scope of the subject matter of this agreement, whether or not inconsistent with the provisions of this memorandum; . . .’

[6] On 5 November 2014, at Engen’s instance, a provisional order of liquidation was obtained against Windsharp. That order was made final in January 2015. On 9 December 2014, Engen notified Flotank in writing of the existence of the June 2014 cession and of Engen’s intention to claim the debt ceded to it by Windsharp. Engen called upon Flotank, pursuant to the terms of the 2014 cession, to make payments directly to it. Flotank was cautioned that should it fail to do so it would not be absolved of liability towards Engen for any amounts paid to Windsharp.

[7] In response to Engen’s notice, on 12 December 2014 Flotank sought that, by 13h00 the same day, Engen provide it with a copy of the relevant cession. Engen failed to do so. Thereafter, Flotank, in disregard of Engen’s notice, made nine payments to Windsharp, from 12 December 2014 to 30 January 2015, in respect of debts due by it to Windsharp. In May 2017, on the basis that Windsharp had ‘ceded its book debts in *securitatem debiti*’ to it, Engen applied to the high court for an order that Flotank pay Engen the nine amounts it had paid to Windsharp.

[8] Flotank opposed the application inter alia on the basis that, on liquidation, Windsharp’s ceded book debts resorted with its liquidators, with Engen becoming a secured creditor of Windsharp from the date of liquidation; and that Engen held a claim against Windsharp’s liquidators. In addition, Flotank contended that since Engen had failed to provide it with the cession relied upon, no proper perfection of the cession had occurred.

[9] The high court found that the *concurso creditorum* was created by operation of law on 5 November 2014 when Windsharp was placed into provisional liquidation. The court rejected Flotank’s contention that Engen had failed to ‘perfect’ the cession by not having provided a copy of the cession to Flotank and

that notice to Flotank by Engen of the cession had been sufficient. The court found, however, that it was Windsharp's liquidators and not Engen that were entitled to claim that which had been ceded *in securitatem debiti* to Engen. This, reasoned the court, was so in that the cession entered into had amounted to a pledge, which was the basis on which the case had been conducted before the court.

[10] For the first time in its application for leave to appeal to this Court, Engen argued that, properly construed and as a matter of law, the 2014 cession was not a pledge and that the high court had erred in treating it as such. Since the reversionary rights of the cedent were vested in Engen as the cessionary, it was contended that an out-and-out cession to Engen existed and that it was entitled to the relief sought against Flotank.

[11] The matter was opposed by Flotank on the basis that the cession relied upon by Engen was not an outright cession and should be construed as a pledge. This, it was submitted, was so even where there is a clear expression of the intention of the parties otherwise.

Discussion

[12] The issue turns on the interpretation of the terms of the second cession agreement. The true character of a cession *in securitatem debiti* depends on the intention of the parties,¹ with the wording of the cession being the appropriate point of departure to determine such intention.² In *Grobler v Oosthuizen (Grobler)*³ this Court, recognised the existence of opposing theories in our law regarding cessions *in securitatem debiti*, namely the 'pledge theory' and the 'outright cession theory'.

¹ *Grobler v Oosthuizen* [2009] ZASCA 51; 2009 (5) SA 500 (SCA) (*Grobler*) para 11; *Thorogood v Hoare* 1930 EDL 354; *Fisher v Schlemmer* 1962 4 SA 651 (T); *Nahrungsmittel GmbH v Otto* [1992] ZASCA 228; 1993 1 SA 639 (A); *African Consolidated Agencies (Pty) Ltd v Siemens Nixdorf Information Systems (Pty) Ltd* 1992 (2) SA 739 (C) at 744.

² *Grobler* para 11.

³ *Grobler* paras 11-15.

However, it found it unnecessary to resolve the debate between these theories one way or another.⁴

[13] On ‘the pledge theory’ the principal debt is ‘pledged’ to the cessionary on the basis that the cedent retains ‘bare dominium’ or a ‘reversionary interest’ in the claim against the principal debtor.⁵ On such construction, only the right to enforce the right upon non-payment is ceded.⁶ Since a cession ordinarily entails a transfer of a right, it is the retention by the cedent of the very substance of the right around which the doctrinal debate regarding the pledge theory has centred. This Court, in *Grobler*, recognised however that such debate had been resolved, primarily for pragmatic reasons, with the pledge theory accepted as the default position.⁷ On this basis a cession *in securitatem debiti* is now taken to resemble a pledge, unless the intention of the parties is different.⁸

[14] On the alternative theory –

‘... a cession *in securitatem debiti* is in effect an outright or out-and-out cession on which an undertaking or *pactum fiduciae* is superimposed that the cessionary will re-cede the principal debt to the cedent on satisfaction of the secured debt. In consequence, the ceded right in all its aspects is vested in the cessionary. After the cession *in securitatem debiti* the cedent has no direct interest in the principal debt and is left only with a personal right against the cessionary, by virtue of the *pactum fiduciae*, to claim re-cession after the secured debt has been discharged.’⁹

⁴ *Grobler* para 15. *National Bank of South Africa Ltd v Cohen's Trustee* 1911 AD 235.

⁵ *Grobler* para 15 with reference to *Picardi Hotels Ltd v Thekwini Properties (Pty) Ltd* [2008] ZASCA 128; 2009 (1) SA 493 (SCA) para 3 and other authorities.

⁶ *Ibid* para 16 with reference to *Land- en Landboubank van Suid-Afrika v Die Meester* 1991 (2) SA 761 (A) 771C-G; *Development Bank of Southern Africa Ltd v Van Rensburg* 2002 (5) SA 425 (SCA) para 50.

⁷ *Grobler* para 17 with reference to *Leyds N O v Noord-Westelike Koöperatiewe Landboumaatskappy Bpk* 1985 (2) SA 769 (A) at 780E-G; *Bank of Lisbon and South Africa Ltd v The Master and Others* 1987 (1) SA 276 (A) at 291H-294H; *Incedon (Welkom) (Pty) Ltd v Qwa Qwa Development Corporation Ltd* [1990] ZASCA 85; 1990 (4) SA 798 (A) at 804F-J; *Millman N O v Twiggs* [1995] ZASCA 62; 1995 (3) SA 674 (A) at 676H; *Development Bank of Southern Africa Ltd v Van Rensburg* fn 6 para 50.

⁸ *Grobler* para 17.

⁹ *Grobler* para 17.

[15] Although the pledge construction has been recognised as the default form of security cession, there is no support for a conclusion that it has subsumed the field of security cessions.¹⁰ This is so since our law favours a recognition of both constructions of security cession.¹¹ It therefore remains open to the parties to structure a cession either as a pledge or as an out-and-out cession, upon which a *pactum fiduciae* is superimposed. This is to be determined by reference to the clear intention of the parties.¹²

[16] The 2014 cession expressly ceded to Engen the debt as defined, with any reversionary rights Windsharp may have to the debt ceded. From the wording used, it is clear that the parties' express intent was to achieve an out-and-out cession on which the *pactum fiduciae* could, as a matter of law, be superimposed. Although Engen, as indicated earlier, did not assert an out-and-out cession with a *pactum fiduciae* in the high court, it is open for it to do so for the first time on appeal, since the correct interpretation of a cession is a question of law.¹³

[17] The result is that given that the 2014 cession was an out-and-out cession, the debt ceded by Windsharp was an asset in the estate of Engen.¹⁴ Windsharp held no right to receive payment from Flotank of the principal debt ceded to Engen but retained a claim by virtue of the *pactum fiduciae* to re-cede once that debt was discharged. It follows that Flotank was obliged, on receipt of notice of the cession, to make payments to Engen and not to Windsharp. In finding differently the high court erred.

[18] It follows for these reasons that the appeal must succeed with costs.

¹⁰ 3 Lawsa 3 ed para 180.

¹¹ 2 Lawsa 2 ed para 53; Van der Merwe *Kontraktereg* 4th ed (2012) at 427.

¹² Grobler paras 11-14; *Worman v Hughes and Others* 1948 (3) SA 495 (A) at 505; *Byron v Duke Inc* [2002] ZASCA 58; 2002 (5) SA 483 (SCA). This was also applied by this Court in *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* [2011] ZASCA 22; 2011 (4) SA 276 (SCA) para 15.

¹³ *Government of the Republic of South Africa v Von Abo* [2011] ZASCA 65; 2011 (5) SA 262 (SCA) paras 18-19; *CUSA v Tao Ying Industries* [2008] ZACC 15; 2009 (2) SA 204 (CC) at para 68.

¹⁴ Van der Merwe, fn 12, at 429; *MT Argun: Master & Crew of the MT Argun v MT Argun* 2003 (3) SA 149 (C) at 158.

Order

[19] The following order is made:

- 1 Leave to appeal is granted.
- 2 The appeal is upheld with costs.
- 3 The order of the high court is set aside and replaced as follows:

‘1. The respondent is to pay to the applicant the following amounts:

- 1.1 R342 389.38 with interest thereon at the legal rate from 12 December 2014 to date of payment, both days inclusive;
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- 1.7 R230 571.36 with interest thereon at the legal rate from 16 January 2015 to date of payment, both days inclusive;
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2. The respondent is to pay the applicant’s costs.’

K M SAVAGE
ACTING JUDGE OF APPEAL

Appearances

For applicant: M Tsele

Instructed by: MCH Attorneys Inc., La Lucia Ridge
Webbers, Bloemfontein

For respondent: P Zietsman SC

Instructed by: Van der Wall Inc., Kimberley
EG Cooper Majiedt Inc, Bloemfontein.