THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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

Today the Supreme Court of Appeal (SCA) handed down judgment upholding, with costs, an appeal against the decision of the Northern Cape Division of the High Court, Kimberley (the high court).

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. On 5 November 2014, at Engen's instance, a provisional order of liquidation was obtained against Windsharp. 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. After Engen failed to provide Flotank a copy of the cession relied upon, Flotank disregarded Engen's notice and 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, Engen applied to the high court for an order that Flotank pay Engen the nine amounts it had paid to Windsharp. 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. The high court found that the *concursus creditorum* was created by operation of law on 5 November 2014 when Windsharp was placed into provisional liquidation. The high 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 found that notice to Flotank by Engen of the cession had been sufficient. The high 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. It reasoned that this was so because the cession entered into had amounted to a pledge, this having been the basis on which the matter proceeded in the high court.

In its reasoning, the SCA recognised the distinction between the 'pledge theory' and the 'outright cession theory'. 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. In essence, under such theory, only the right to enforce the right upon non-payment is ceded. The alternative theory is that of an out-and-out cession. In terms of this theory, 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, with all ceded right in all aspects vested in the cessionary.

The SCA held that, although the pledge construction has been recognised as the default form of security cession, it had not subsumed the field of security cessions. Our law favoured a recognition of both constructions of security cession. It 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 was superimposed. The form adopted is to be determined by reference to the clear intention of the parties. The SCA held that, from the wording of the 2014 cession, 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 did not rely on the cession as constituting an out-and-out cession with a pactum fiduciae in the high court, it was open for it to do so for the first time on appeal, since the correct interpretation of a cession was a question of law. As a result, the SCA held that the 2014 cession amounted to an out-and-out cession and that the debt ceded by Windsharp was an asset in the estate of Engen. 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 have the debt re-ceded if such debt was discharged. It followed that Flotank was obliged, on receipt of notice of the cession, to make payments to Engen and not to Windsharp. The SCA found that the high court erred in its decision and for those reasons the appeal was upheld with costs.

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