THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
CASE NO 50/2005

In the matter between

NATIONAL SORGHUM BREWERIES LTD Appellant

and

CORPCAPITAL BANK LTD Respondent

CORUM: MPATI DP, NUGENT, JAFTA JJA and
COMBRINCK, MAYA AJJA

HEARD: 21 NOVEMBER 2005

DELIVERED: 23 FEBRUARY 2006

Neutral citation: This judgment may be referred to as National Sorghum Breweries Ltd v Corpcapital Bank Ltd [2006] SCA 1 (RSA)

Summary : Contract - interpretation - non-variation clauses found not applicable to subsequent cession agreements.

JUDGMENT

JAFTA JA

[1] As a general rule a creditor is free to cede its rights in whatever form it chooses. It does not need its debtor's consent nor is it necessary for it to give notice to the debtor. But this power can be restricted by means of a contract to which the creditor is a party. In that case the creditor would be required to comply with the terms of the restriction when ceding its rights. The issue in this appeal is whether the creditors' powers to cede rights were restricted by non-variation clauses contained in contracts they had concluded with third parties.

[2] The respondent, Corpcapital Bank, instituted an action against the appellant (which I will refer to as the defendant) in the Johannesburg High Court for the recovery of damages arising from the alleged breach of various lease agreements. Corpcapital Bank was formerly known as Fulcrum Science and Technology Bank Ltd, and was at times referred to simply as Fulcrum Bank, but for convenience I will refer to it throughout this judgment as Corpcapital Bank.

[3] Corpcapital Bank instituted the action in its capacity as the cessionary of the rights in various lease agreements (referred to in the evidence as 'full maintenance rental agreements') that were concluded between the defendant and a company called Afinta Financial Services (Pty) Ltd (Afinta Financial Services). In terms of those agreements the latter company leased vehicles to the

defendant. The defendant challenged Corpcapital Bank's right to sue, contending that the rights of Afinta Financial Services had not been validly ceded. The court *a quo* (Cachalia J) was asked to determine that issue separately from the other issues. It dismissed the defence with costs and the defendant appeals against that order with the leave of the court *a quo*.

[4] The facts are briefly these. Afinta Financial Services carried on a vehicle leasing business and leased vehicles to various customers, including the defendant. In February 1999 Afinta Financial Services and Corpcapital Bank Ltd became parties to a joint venture that was to continue the leasing business. The joint venture was to be conducted through the medium of a company called Afinta Finance Ltd (Afinta Finance) that was owned by the joint venturers.

[5] The joint venturers agreed that at the outset Afinta Financial Services would transfer certain of its existing lease agreements to Afinta Finance and that it would thereafter direct all new business to Afinta Finance. The business was to be financed by loans to be made to Afinta Finance by Corpcapital Bank that were to be secured by a cession to Corpcapital Bank of the debtors of Afinta Finance.

[6] To that end the various parties signed two standard-form agreements referred to as 'Master Cession Agreements' on 26 February 1999. One purported to be a cession from Afinta Financial Services to Afinta Finance. The document however reflected a cession in *securitatem debiti* when the intention was to effect an out and out cession. The other cession between Afinta Finance and

Corpcapital Bank correctly reflected a cession in *securitatem debiti* as intended by the parties. Both agreements were substantially the same and provided for the cession from the cedent to the cessionary of

'the [lease agreements] listed on a document completed and signed by the Cedent in the form of the Schedule annexed hereto as Annexure "A"'.

Each agreement contained a non-variation clause in the following terms:

'1. no variation, alteration, consensual cancellation, addition to or novation of this cession and no waiver by [the cessionary] of any of its rights hereunder shall be of any force or effect unless reduced to writing and signed by [the cessionary's] authorised representative and [the cedent or the cedent's] duly authorised representative.'

[7] The lease agreements that were to be transferred at the outset had to meet the credit criteria of Corpcapital Bank. For purposes of identifying such agreements a firm of auditors was appointed to conduct a due diligence investigation, which was completed only in June 1999. By then Afinta Financial Services and Afinta Finance were no longer satisfied that the master cession they had signed on 26 February 1999 was an appropriate instrument for achieving their purpose, probably because they realised that the master cession had been a cession in *securitatem debiti* and not an out and out cession. As a result a new agreement (which they referred to as a 'sale' agreement) was concluded by Afinta Financial Services and Afinta Finance on 14 July 1999.

[8] The sale agreement provided in Clause 1 as follows:

'[Afinta Finance] hereby purchases from [Afinta Financial Services] all right, title and interest in and to the Vehicle Finance debts set out in column "F" of annexure A hereto ("debts') and

all of its claims and rights of action against the debtors set out in column "D" of annexure A hereto ("debtors") including the cession and transfer of all rights in and to the debts'.

It also incorporated, by reference to another agreement that the parties had concluded, a non-variation clause in the following terms:

'1. No amendment or consensual cancellation of this agreement or any provision or term thereof or of any agreement or other document issued or executed pursuant to or in terms of this agreement and no settlement of any disputes arising under this agreement and no extension of time, waiver or relaxation or suspension of any of the provisions or terms of this agreement or other document issued pursuant to or in terms of this agreement shall be binding unless recorded in a written document signed by the parties.'

[9] Attached to the sale agreement as annexure A was a list of about eighty lease agreements that had been concluded between Afinta Financial Services and its customers, included amongst which were eleven lease agreements with the defendant.

[10] Subsequent to the conclusion of the sale agreement some of debts that had been 'sold' were found to be irrecoverable and by agreement between Afinta Financial Services and Afinta Finance a list was prepared of other lease agreements that were to be ceded in their stead. Later a further list was compiled under similar circumstances. Those lists between them reflected seven further lease agreements with the defendant. Neither of the lists was signed by either Afinta Financial Services or Afinta Finance.

[11] Earlier I pointed out that a 'master cession' was signed by Afinta Finance and Corpcapital Bank on 26 February 1999 in contemplation of the cession of

debts from the former to the latter as security for loans that were to be advanced by Corpcapital Bank. Because the rights that were to be transferred by Afinta Financial Services to Afinta Finance at the outset – and thereafter ceded to Corpcapital Bank – had yet to be identified the master cession naturally did not reflect any ceded debts at the time the document was signed. But once the relevant lease agreements had been identified, and Afinta Financial Services had purported to transfer them to Afinta Finance, various schedules were prepared purporting to record a cession of the rights in those agreements to Corpcapital Bank pursuant to the master cession. In February 2000 those schedules were consolidated into a single schedule. It is not disputed that the consolidated schedule was signed on behalf of Afinta Finance, but it was not signed by or on behalf of Corpcapital Bank. Amongst the lease agreements reflected on the schedule were the eighteen lease agreements with the defendant to which I referred earlier and those lease agreements are the subject of the action with which this appeal is concerned. It is alleged that the defendant breached the agreements, with resultant damage, which Corpcapital Bank seeks to recover as cessionary.

[12] The argument advanced on defendant's behalf, both in this court and the court below was that there was no valid cession of debts from Afinta Financial Services to Afinta Finance in respect of the seven lease agreements that were not reflected in the original annexure to the 'sale' agreement because, so it was contended, the purported addition of those lease agreements constituted a

variation of the 'sale' agreement that did not comply with the formalities of the non-variation clause in the sale agreement. Moreover, it was argued on behalf of the defendant that there was no valid cession by Afinta Finance to Corpcapital Bank of the rights arising from any of the eighteen lease agreements because the later addition of the schedule constituted a variation of the master cession that similarly did not comply with the required formalities.

[13] The court *a quo* found that the purported cession to Afinta Finance of the seven lease agreements, and the purported cession to Corpcapital of all eighteen lease agreements, constituted amendments of the 'sale' agreement and the master cession respectively. It went on to find, however, relying on a remark to that effect in *Aussenkehr Farms (Pty) Ltd v Trio Transport* 2002 (4) SA 483 (SCA) 494A[1], which the learned judge considered to be binding upon him, that the non-variations clauses in each case could not be relied upon by a third party (the defendant) where 'the parties to the agreement (the cedent and the cessionary) were not relying on the provisions of their contract requiring written variations or amendments'. In the circumstances, the learned judge concluded, it was 'not open to the defendant to attack the consensus achieved by Afinta Finance and Afinta Financial Services, (and similarly the consensus achieved between Afinta Finance and Corpcapital Bank) and, as a third party, to insist upon formalities between them'.

[1] '… if the parties were not contending that a written termination was needed it was not open to the defendant to argue invalidity of the act.'

[14] I have some doubt that contractually created rights and obligations may vary depending upon the perspective from which they are viewed. The remark to that effect in *Aussenkehr Farms*, which the learned judge relied upon, was clearly *obiter*, and may also have overlooked the earlier decision of this court in *Traub v Barclays National Bank Limited* 1983 (3) SA 619 (A) 631E-633A in which the topic was more extensively considered albeit in another context. But it is not necessary to consider that issue further in the present case because in my view the court *a quo* erred in any event in relation to the construction of the various agreements.

[15] The 'sale' agreement between Afinta Financial Services and Afinta Finance regulated the transfer of the rights in the lease agreements referred to in the annexure (annexure A). Their later agreements – concluded by their conduct in preparing the two further lists when seen in the context in which they did so – to transfer the rights in seven further leases did not purport to amend any of the terms of the former transaction. They were no more than later transactions in similar terms, which the sale agreement did not preclude them from concluding, and which required no formalities to be valid. The defendant's reliance on the non-variation clause in the 'sale' agreement was quite misconceived because no amendment to that agreement purported to be effected at all. It follows that the rights relating to all eighteen vehicles leased to the defendant were properly transferred to Afinta Finance.

[16] Similarly the master cession concluded between Afinta Finance and Corpcapital Bank on 26 February 1999 did not purport to preclude the parties from ceding rights in the future. Indeed, the master cession contemplated that future cessions would be effected, and its very purpose was to regulate the terms that would govern those cessions. What was required to effect such future cessions on the terms agreed to in the master cession was no more than that the relevant lease agreements should be listed in a schedule compiled and signed by Afinta Finance, which is what occurred in relation to the eighteen lease agreements that are now in issue. The parties did not thereby purport to vary or alter, or even add to, the master cession. On the contrary, they purported only to give the master cession its intended effect.

[17] It was also submitted on behalf of the defendant that Corpcapital Bank's pleaded case did not rely upon cessions effected by the parties subsequent to the conclusion of each of the written agreements. That is not correct. On the contrary, the very case that Corpcapital Bank pleaded was that the relevant cessions were effected subsequent to the conclusion of the respective written agreements. Indeed, it is difficult to see how its case could have been pleaded in any other form.

[18] In the circumstances the court *a quo* correctly dismissed the defence, albeit on incorrect grounds. The appeal is dismissed with costs, including costs occasioned by the employment of two counsel.

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C N JAFTA
JUDGE OF APPEAL

CONCUR:) MPATI DP
) NUGENT JA
) COMBRINCK AJA
) MAYA AJA