THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case number: 348/2007

In the matter between:

LYNN & MAIN INCORPORATED Appellant

and

BRITS COMMUNITY SANDWORKS CC Respondent

Neutral citation: *Lynn & Main Incorporated v Brits Community Sandworks CC* (348/2007) [2008] ZASCA 100 (17 September 2008)

Coram: MPATI P, FARLAM, HEHER JJA, KGOMO and MHLANTLA AJJA

Heard: 8 MAY 2008

Delivered: 17 SEPTEMBER 2008

Summary: Cession – Deed of suretyship – interpretation – two sureties binding themselves to creditor, each as surety for payment of debts of the other – clause in deed permitting creditor to cede rights under suretyship 'on written notice to us' – cession of rights under deed not invalid for want of prior written notice but ineffective as against surety until written notice given.

ORDER

On appeal from: High Court, Pretoria (Du Plessis J sitting as court of first instance)

1 The appeal succeeds with costs, such costs to be taxed on the scale as between attorney and own client.

2 The order of the court *a quo* is set aside and replaced with the following:

'The defendant is ordered to pay to the plaintiff:

(a) the sum of R550 932.02;

(b) interest on the said sum calculated at the prime interest rate plus 1% from date of judgment to date of payment;

(c) costs of suit on the scale as between attorney and own client.'

JUDGMENT

MPATI P (HEHER JA, KGOMO and MHLANTLA AJJA concurring):

[1] This appeal concerns the validity of a cession of rights under a suretyship agreement. Pursuant to a number of instalment sale agreements between them, a close corporation named Crocodile Transport CC (Crocodile) became indebted to Citibank NA (Citibank) in various amounts. The agreements provided that Crocodile would be in breach if, among other things, it is wound up, whether provisionally, or finally.

[2] On 1 March 2001 the respondent and Crocodile signed a written document headed 'CROSS SURETYSHIP/CROSS GUARANTEE', in terms of which the one bound itself 'as surety for and co-principal debtor in solidum' with the other to Citibank 'for the due and punctual payment of all amounts and performance of any obligation of whatever nature which may now or in the future become owing' by them to Citibank. The deed of suretyship thus binds the one as surety for the other for debts owed by them, respectively, to Citibank. Clause 11 of the deed of suretyship provides:

'Citibank may at any time, on written notice to us, cede its rights and/or delegate its obligations under this suretyship to a third party, in which event the third party shall be deemed to have been

substituted for Citibank under this suretyship, and in particular this suretyship shall operate as a continuing covering security for all debts, from time to time owed by the Debtor to that third party.' (My underlining.)

[3] On 24 April 2001 Citibank ceded to the appellant all its rights, title and interest in and to all book debts owed to it, all claims against any third party and all book debt security.[1] Subsequently, Crocodile was wound up and on 1 October 2002 the Manager, Remedial Management of Citibank issued a certificate of balance, certifying that the balance outstanding 'in respect of the facility entered into by [Crocodile] and [Citibank]', together with interest, totalled R1 970 485.30. Clause 7 of the deed of suretyship provides that such certificate 'shall be *prima facie* proof of the contents thereof . . .'.

[4] Having received an advance dividend from the liquidators of Crocodile, the appellant, as cessionary, instituted action in the Pretoria High Court against the respondent, as surety, under the deed of suretyship for the indebtedness of Crocodile, for payment of the sum of R550 932.02, being the balance still outstanding, together with interest. In its plea the respondent, *inter alia*, denied 'that the rights and/or obligations in terms of the purported suretyship were properly ceded to the [appellant] in that [the respondent] was not notified in writing of such intended cession'. It consequently averred that the appellant had no *locus standi* to claim payment from it of the amount allegedly still outstanding by Crocodile.

[5] The court *a quo* (Du Plessis J) held that the words 'on notice to us' in clause 11 of the deed of suretyship qualify the words 'Citibank may at any time cede' and thus mean that Citibank 'may cede on written notice and conversely . . . that it may not cede otherwise than on written notice'. Du Plessis J concluded that the words 'plainly mean that notice is a prerequisite for a valid cession'. It being common cause, or at least not in dispute, that no prior written notice of the cession had been given to the respondent, the learned Judge held that Citibank did not validly cede its rights under the suretyship to the appellant and therefore dismissed the latter's claim with costs. This appeal is with his leave.

[6] It is trite that a cession is a method by which incorporeal rights are transferred from one party to another.[2] It is an act of transfer from a creditor, as cedent, to the cessionary, of a right to recover a debt (vorderingsreg) from a debtor.[3] Although it entails a triangle of parties, viz the cedent, cessionary and debtor, the cession takes place without the concurrence of the debor.[4] The transfer of the right is effected by the mere agreement between the transferor (cedent) and the transferee (cessionary).[5] Notice to the debtor is not a prerequisite for the validity of the cession 'but a precaution to pre-empt the debtor from dealing with the cedent to the detriment of the cessionary'.[6]

[7] In the instance of cession of a principal debt, payment of which had been guaranteed by a surety, 'the cessionary, by reason of cession of the principal debt or obligation, acquires rights in respect of the surety agreement as well'.[7] A formal cession of the rights against the surety is unnecessary.[8] It follows, as a matter of logic, that since notice to the principal debtor of cession of the principal debt is not a prerequisite for the validity of the cession, notice to the surety is also not a prerequisite for the acquisition of the rights in respect of the surety agreement.

[8] But, as was said in *Pizani*,[9] this does not mean that in all cases the cessionary necessarily acquires rights against the surety upon cession of the principal debt or obligation. The terms of the cession or surety agreement might limit the surety's liability. The surety might have been agreeable, for example, to guarantee payment of the principal debt on condition only that no cession of the principal debt would take place, or that it may be ceded only to a particular category of persons or institutions.

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[1] Book debt security is defined in the deed of suretyship, among other things, as 'any suretyship'.
[2] *Hippo Quarries (Tvl)(Pty)Ltd v Eardley* 1992 (1) SA 867 (A) at 873E-F; *Uxbury Investment (Pty) Ltd v Sunbury Investments (Pty) Ltd* 1963 (1) SA 747 (C) at 752A.
[3] *Johnson v Incorporated General Insurances Ltd* 1983 (1) SA 318 (A) at 330H-331H.
[4] *Lawsa* 2nd, vol 2, para 6.
[5] *Johnson v Incorporated General Insurance*, fn 3 at 331H.
[6] *Lawsa*, fn 4, para 6.
[7] *Pizani v First Consolidated Holdings (Pty) Ltd* 1979 (1) SA 69 (A) at 76G-78E.
[8] Ibid.
[9] Ibid, at 78F-H.

[9] The question, then, in the present matter is: what is the purpose of clause 11 of the deed of suretyship and, in particular, what is the meaning of the words 'on notice to us'? Do these words mean that in the absence of a notice of cession there shall be no valid cession of the rights and obligations in respect of the surety agreement?

[10] As has been mentioned above, the court *a quo* held that the words 'plainly mean that notice is a prerequisite for a valid cession'. It reasoned that the preposition 'on' bears the meaning 'immediately after (and because of or in reaction to) as a result of'. The court said:

'[Citibank's] entitlement to cede (may at any time cede) arises only after and as a result of the written notice (on written notice). If the clause is not understood to mean that the parties intended to limit [Citibank's] right to cede by requiring prior written notice, the words "on written notice" serve no purpose at all. It then simply restates the law ([Citibank] may at any time cede) and adds to it a notice requirement that has no purpose. That, . . ., would not be the correct interpretation of the clause because that would render the words meaningless.'

The court concluded that the words 'Citibank may at any time on written notice to us cede' mean that 'prior notice is a prerequisite for a valid cession'.

[11] I do not agree that by clause 11 of the deed of suretyship the parties intended to limit Citibank's right to cede 'by requiring prior written notice'. The clause clearly stipulates that Citibank 'may . . . at any time, cede' its rights and obligations under the suretyship to a third party. That right (to cede) Citibank always had: it could cede its rights in respect of the principal debt, in which event its rights and obligations under the suretyship agreement would pass on to the cessionary without a separate or formal cession or any notice to the surety.[10] It may well be that the clause requires a formal cession of the rights and obligations under the suretyship agreement, but it is not necessary to consider that issue. This is because there was in any event a formal cession, in the Deed of Cession, of 'all book debt security' (defined as 'any suretyship').

[10] *Pizani*, fn 7 at 78C-E.

[12] It has been held, correctly so in my view, that a cession of rights is ineffective as against a debtor until such time as he has knowledge of it and that payment by him to the cedent, without knowledge of the cession, renders him immune to a claim by the cessionary.[11] Put differently, for a cession to be effective as against a debtor, the debtor must have had knowledge thereof, which would serve to pre-empt him from dealing with the cedent to the detriment of the cessionary. Where the debtor pays the cedent without knowledge of the cession and the surety is subsequently sued for payment of the debt, the surety would be entitled to plead that the debt had been discharged and this at a time when the debtor had no knowledge of the cession, a defence which the debtor would have been entitled to raise. But such defence would not be grounded on absence of knowledge of the cession on the part of the surety, but of the debtor. There is no common law rule that the acquisition of rights under a suretyship agreement following a cession of the principal debt is ineffective as against the surety until such time as the surety has knowledge of the cession. It follows that the reasoning of the court *a quo* that if the words in issue mean that the cession in this case will become effective upon the giving of notice thereof to the surety then the clause would simply be restating the law, cannot be supported.

[13] It seems to me that the purpose of clause 11 of the deed of suretyship and the meaning of the words 'on notice to us' may be ascertained from a reading of the clause as a whole. The dictionary meaning of the preposition 'on' in isolation offers no solution, in my opinion. A reading of the clause as a whole, applying the plain meaning of the words therein, reveals that a consequence of the cession and a written notice thereof to the surety is that the cessionary 'shall be deemed to have been substituted for Citibank under the suretyship'. Further, the suretyship shall, thereupon ('in which event'), 'operate as a continuing covering security for all debts from time to time owed by the Debtor to [the cessionary]'. What the clause envisages, it seems to me, is that upon cession and notice thereof to the surety, the cessionary steps into the shoes of Citibank as creditor ('shall be deemed to have been substituted for Citibank'), not only in respect of the current debt, but in respect of debts from time to time owed to it by the debtor and which will be secured by

[11] *Pillay v Harichand* 1976 (2) SA 681 (D) at 684F-H.

the continuing cover of the suretyship.

[14] In my view, therefore, the validity of the cession does not depend on when or whether or not written notice of the cession was given to the surety. If the intention of the parties, when including the words 'on written notice to us' in the suretyship agreement, was to convey that prior written notice was a prerequisite for a valid cession then they failed to make their intention clear when they could easily have done so. I can think of no reason, if that were their intention, why the phrase should not have read: 'on prior written notice to us'. Read as a whole, clause 11 of the deed of suretyship provides that the rights and obligations under the suretyship may be ceded; that on the giving of written notice to the surety the cession shall take effect as against the surety, with the cessionary being substituted for Citibank (cedent) and the suretyship operating as a continuing covering security for all debts from time to time owed by the debtor to the cessionary. This, in my view, is the only logical and commercially sound meaning to be given to the wording of the clause. Whether the surety receives notice of the cession one day before or one day after it takes place cannot provide the slightest practical benefit to the surety. Interpreting 'on' as 'after' or 'a reasonable time after' offers the surety a technical excuse for avoidance, which, even though the surety may have known for years of the cession, will defeat the practical operation of the clause.

[15] It was, however, submitted on behalf of the respondent that the summons was in any event premature in the sense that until such time as the respondent had had notice of the cession, the cause of action was incomplete and the appellant had no *locus standi* to sue the former on the cession. To counter this contention counsel for the appellant, relying on the very short reported judgment of Watermeyer J in *Eaton Robins Ltd v Visser*,[12] argued that the summons and particulars of claim constituted valid notice of the cession.[13]

[16] In my view, the objection is overly technical. The present is not a matter where

[12] 1926 CPD 245.
[13] The particulars of claim allege that '[d]espite notice of the cession and demand, *alternatively* notice hereby given and demand hereby made, the Defendant has failed . . . to pay . . .'.

summons was issued at a time when there was no cause of action,[14] or where a statutory requirement had to be complied with prior to service of summons.[15] It is not in dispute that the principal debt was due and payable. The appellant, as cessionary, claimed and received a dividend from the liquidators of Crocodile. All that was required to validate a claim (not the cession) against the respondent was a notice to it of the cession. In *Garb v Leoper Investment (Pty) Ltd*[16] the plaintiff, as cessionary, sued the defendant for provisional sentence on a mortgage bond, which provided, *inter alia*, that 'the mortgagee shall not cede or assign this bond without the written consent of the [United Building Society]'. The defendant objected, *in limine*, that there was not annexed to the summons a copy of the original document evidencing the consent of the United Building Society. Rule 9(3) of the Uniform Rules provided that 'copies of all documents upon which the claim is founded shall be annexed to the summons and served with it'. Nicholas J said:

'In the present case, the written consent of the United Building Society to the cession is a condition precedent to its validity, and without it the plaintiff can have no claim against the defendant. Consequently that written consent is clearly one of the documents "upon which the claim is founded" within the meaning of the Rule.

It follows that the summons is defective in that it failed to annex a copy of this document. Consequently the plaintiff is not entitled, without an amendment, to provisional sentence. Counsel for the plaintiff has now applied for an appropriate amendment to the summons, to read as follows: "copies of the said mortgage bond and cession and consent by the United Building Society are annexed hereto marked 'A' and 'B' and 'C' respectively",

and has handed in a letter by the United Building Society, . . . consenting to the cession.

Mr. *Nestadt*, on behalf of the defendant, has not been able to point to any prejudice which the defendant can suffer if the amendment is granted subject to a postponement and an appropriate order for costs.'[17]

In *Eaton Robins*[18] the terms of a mortgage bond provided that the capital amount should

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[14] For which see *Lebedina v Schechter and Haskell* 1931 WLD 247, but contra *Barclays Bank International Ltd v African Diamond Exporters (Pty) Ltd* 1976 (1) SA 93 (W).
[15] Compare *S.A.N.T.A.M. Insurance Company Ltd v Vilakasi* 1967 (1) SA 246 (A).
[16] 1969 (4) SA 534 (W).
[17] At 537A-D.
[18] Above fn 12.

become payable upon notice to the mortgagor, but did not contain the usual provisions with regard to foreclosure upon failure to pay interest. Upon failure by the mortgagor to pay interest the mortgagee sued for provisional sentence. Watermeyer J granted provisional sentence, holding that the summons constituted sufficient notice to the defendant calling up the bond.

[17] In the present matter counsel for the respondent did not point to any prejudice which the respondent would suffer if the summons were to be held to constitute sufficient notice of the cession. I am satisfied that the summons did constitute sufficient notice of the cession to the respondent. The objection raised must therefore fail.

[18] There was, however, another string to the respondent's bow. It was argued on its behalf that the words 'on written notice to us' in clause 11 of the deed of suretyship mean that notice must be given to both the respondent and Crocodile. It is common cause that no such notice was given to Crocodile.

[19] There is no substance in this contention. The respondent and Crocodile signed the deed of suretyship as sureties, one guaranteeing payment of the debt of the other. It is in their capacities as sureties that notice of cession is required to be given to both. But in this case Crocodile is not a surety, but a debtor. The suretyship agreement does not require that notice of cession be given to the debtor.

[20] The appellant's counsel asked for costs on the scale as between attorney and own client in the event that the appeal succeeds. This was in terms of clause 2 of the deed of suretyship. Counsel for the respondent did not oppose this request. I am aware that there have been conflicting decisions as to the effect of such an order.[19] In view of the attitude of the parties it is not necessary for the conflicting decisions on the point to be considered in this case.

[19] See Erasmus *Superior Court Practice* E12-24 (service 30, 2008).

[21] I make the following order:

1 The appeal succeeds with costs, such costs to be taxed on the scale as between attorney and own client.

2 The order of the court *a quo* is set aside and replaced with the following:

'The defendant is ordered to pay to the plaintiff:

(a) the sum of R550 932.02;

(b) interest on the said sum calculated at the prime interest rate plus 1% from date of judgment to date of payment;

(c) costs of suit on the scale as between attorney and own client.'

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L MPATI P

FARLAM JA dissenting:

[21] I have had the advantage of reading the judgment prepared in this matter by the President of this court. In view of the fact that I am of the view that the appeal must fail it is necessary for me to state my reasons.

[22] In my view the important word in clause 11 of the deed of suretyship is 'on' and for the reasons that follow I think it means, 'a reasonable time after'. It is reasonable to assume that the words 'on written notice to us' were inserted for a reason. Prior to the cession the surety knew who the creditor was and was prepared to deal with it if the debtor fell into default. When a new creditor came on the scene, through the cession of the debt, it would be important for the surety to know who the new creditor was. If it felt that it was not prepared to go on standing surety for the debt or debts secured by the suretyship, regard

being had to the identity of the new creditor, it could have taken steps to ensure as far as it could, that debts then outstanding were paid or paid the debt itself and sought to recover what it had paid from the debtor and thereafter given notice of termination of its liability under the suretyship.

[23] I think that it is important to bear in mind that on the wording of the clause the creditor's power to cede is qualified by the words 'on written notice to us'. These words are accordingly not only used in order to achieve the purpose set out in the second half of the clause, ie, to make the suretyship operate as a continuing one in favour of the new creditor. I agree, however, that the language used is ambiguous. In my view it is appropriate in this case to apply the rule of construction to which Davis AJA referred in *Cairns (Pty) Ltd v Playdon & Co Ltd* (1948 (3) SA 99 (A) at 122 (viz 'that in case of doubt, a burden is to be construed as lightly as possible') as well as the *contra proferentem* rule (it is clear that the wording of the clause emanated from the appellant). In this case both rules point to the same conclusion, viz that the appeal must fail.

[24] In my opinion the appeal should be dismissed with costs.

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IG FARLAM
JUDGE OF APPEAL

Appearances:

For appellant:	A M Stewart SC
	Instructed by
	Lynn & Main Pietermaritzburg
	McIntyre van der Post
	Bloemfontein
For respondent	A A Louw SC
	H P D van Wyk
	Instructed by
	Haupt & Earle Pretoria
	Symington & de Kok Bloemfontein