



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 187/08

MOMENTUM GROUP LIMITED

Appellant

and

P J M VAN STADEN NO

1ST Respondent

NEDBANK LIMITED

2ND Respondent

Neutral citation: *Momentum Group Ltd v Van Staden NO & another*
(187/2008) 60 [2009] ZASCA (29 May 2009)

Coram: FARLAM, VAN HEERDEN et MLAMBO JJA,
GRIESEL et BOSIELO AJJA

Heard: 21 May 2009

Delivered: 29 May 2009

Summary: *Cession in securitatem debiti – Payment by debtor to
cedent – subsequent claim against debtor by
cessionary – whether debtor had knowledge of the
cession at time of payment to cedent*

ORDER

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

The appeal is dismissed with costs.

JUDGMENT

VAN HEERDEN JA (Farlam and Mlambo JJA, Griesel and Bosielo AJJA concurring)

[1] The issue in this appeal is whether, after cession *in securitatem debiti* of an insurance policy, payment by the debtor (the insurance company) to the cedent (the policyholder) immunises the debtor from a claim by the cessionary under the policy. The answer to this question turns on the debtor's knowledge of the cession at the time of payment by him or her to the cedent.

[2] The first respondent, Mr P J M van Staden, ('Van Staden'), is the trustee in the insolvent estate of one Mr Retief van Heerden ('Van Heerden'). Van Heerden's estate was finally sequestrated on 21 January 2003. Van Staden (in his capacity as trustee) and the second respondent, Nedbank Limited ('Nedbank'), sued the appellant, Momentum Group Limited ('Momentum'), in the Pretoria High Court for payment of an

amount of R250 000, plus interest, out of the proceeds of an insurance policy issued by Momentum in favour of Van Heerden ('the policy'). They claimed to be entitled to this amount by virtue of a cession *in securitatem debiti* by Van Heerden of his rights under the policy to Boland Bank PKS ('Boland'), Nedbank's predecessor in title. This claim succeeded with costs in the court below, Murphy J ordering Momentum to pay Van Staden the sum of R250 000 out of the proceeds of the policy, plus interest *a tempore morae*. With the leave of the court a quo, that judgment now comes before us on appeal.

[3] The judgment of the trial court, in which the facts are set out in considerable detail, is reported¹ and it is not necessary that they be repeated. For the sake of convenience, however, I will outline the factual background very briefly.

[4] On 30 July 1999, Renbes Family Foods CC ('Renbes') borrowed a sum of R750 040 from Boland in terms of a written loan agreement. As security for this loan, Van Heerden signed a suretyship in favour of Boland and a deed of cession in terms of which he ceded to Boland all his rights in a fixed deposit in the amount of R250 000 held with Boland 'and/or any re-investment, renewal or substitution thereof'. The deed of cession expressly limited Van Heerden's liability thereunder to R250 000.

[5] Shortly afterwards, the fixed deposit referred to above was indeed substituted with a so-called 'redemption policy', issued by Momentum on 11 August 1999. A Mr Willem de Wet ('De Wet') of Absa Brokers and Consultants assisted Van Heerden in applying for the policy and made the arrangements necessary for the release of the fixed deposit of R250 000

¹ As *Van Staden NO & another v Firstrand Ltd & another* 2008 (3) SA 530 (T).

by Boland and the payment of this amount into Momentum's bank account.

[6] During the trial, four witnesses testified about the facts and circumstances surrounding the substitution of the investment. They were: Mr Deon Hurter ('Hurter'), a commercial banker in Boland's employ, who represented the bank in the negotiations with Renbes and Van Heerden in regard to the loan and securities, a Mr Tinus de Beer ('De Beer'), a risk manager in the employ of Boland, on behalf of the respondents; and De Wet and a Ms Marietjie de Jager ('De Jager'), a broker consultant and marketing advisor at Momentum, on behalf of the latter.

[7] On 6 August 1999, a letter was written by De Jager to Hurter under a Momentum letterhead containing its recognised commercial logo. The letter was faxed to Hurter on the same day. The accompanying fax cover sheet contains a handwritten inscription made by de Jager in the following terms:

'Hello Deon

Hoop dis vir jou voldoende. Laat weet my asb. sodra die fondse oorgeplaas word.

Groete

Marietjie de Jager'

[8] The typed letter reads as follows:

'Boland Bank: Silverton

Die Bestuurder

Aandag: mnr Deon Hurter

Geagte mnr Hurter

INSAKE MNR R VAN HEERDEN: MOMENTUM BELEGGING 92079647

Hiermee word bevestig dat bogenoemde polis met onmiddellike effek aan Boland bank gesedeer word. Sodra die fondse na Momentum Lewens se bankrekening oorgeplaas word kan die polis aanvaar word. Die sessie vorm deel van die polis en word onmiddellik met aanvaarding teen Boland Bank aangeteken.

U sal derhalwe nie ongesekureer wees tussen die uitbetaling van die fondse en die uitreiking van die kontrak nie. Die kontrak sal egter binne 'n week na uitreiking van die polis beskikbaar wees.

Groete

M de Jager

Momentum Lewens'

(Emphasis added.)

[9] The money was transferred to Momentum's bank account on 11 August 1999. According to De Beer, he authorised the transfer of the R250 000 from Boland to Momentum because the former had received an assurance from Momentum, in the form of the letter from De Jager set out above, that as soon as the funds were transferred to Momentum, Boland would become the cessionary of the policy, the cession in Boland's favour would be noted on the policy documents and Boland's security would be protected.

[10] On 12 December 2000, after certain queries were made, Momentum granted an interest-free loan against the policy to Van Heerden in the amount of R267 891.

[11] In the meantime, Renbes was liquidated on 28 November 2000 and Boland became entitled to enforce its suretyship against Van Heerden. As

the latter was not able to pay the debt, Boland invoked the cession and attempted to collect its security in the amount of R250 000 from Momentum. The latter informed Boland, however, that a loan had been granted against the policy and advised it not to surrender the policy as this would result in a minimal payout, the value of the policy having been greatly reduced by the loan. Boland persisted with its claim, ultimately issuing summons (together with Van Staden) against Momentum in October 2003. Momentum adopted the stance that it was only obliged to pay the plaintiffs the surrender value of the policy (subsequent to deduction of the loan made to Van Heerden) in the amount of R29 690, payment of which it tendered in its plea.

[12] The main defences raised by Momentum were, first, that De Jager lacked authority to bind Momentum to any agreement or to make any representation on its behalf and, second, that when making the interest-free loan against the policy to Van Heerden, Momentum (as debtor) had no knowledge of the cession in favour of Boland and acted *bona fide*. Neither of these defences succeeded in the court below.

[13] The legal principles applicable to the present appeal are cogently stated by P M Nienaber² as follows:

‘Performance by the debtor, more particularly payment, to the cessionary, the new creditor, discharges the debt. It should follow as a corollary that payment to the cedent ought *not* to release the debtor. Yet it is a well-established rule, based on the palpable need to protect a blameless debtor who rendered performance to the party he or she genuinely believed to be the true creditor, that payment to the cedent absolves or at least releases the debtor, provided that he or she was unaware of the earlier cession or, if aware thereof, that he or she nonetheless acted in good faith in effecting the payment. The debtor’s prior knowledge of the cession, however gained, would

² Joubert (ed) *The Law of South Africa* 2ed, vol 2 Part 2 (2003) sv ‘Cession’ para 48.

normally exclude good faith and defeat the payment. But it has been said that the debtor will be released from liability if such debtor can show that, notwithstanding his or her prior knowledge of the claim by the cessionary, he or she nevertheless paid the cedent in good faith.

...

The rule is essentially based on the blamelessness of the debtor. It may thus be refined, so it is suggested, to read that the debtor will be deemed to be absolved by performance or any other form of discharge rendered to the cedent if, at the time thereof, *he or she genuinely and reasonably believed the cedent to be his or her true creditor*.

...

Although notice to the debtor of the cession is not a pre-requisite for cession, it is thus incumbent on the cessionary, in whose interest it is to do so, to inform the debtor of the cession to him or her at the risk, if this is not done, that his or her claim may be pre-empted by *the unsuspecting debtor's performance to the cedent . . . whom he or she genuinely and reasonably identifies as his or her true creditor*'.

(Emphasis added, footnotes omitted.)

[14] Momentum contended that De Jager was a mere broker with no authority to bind Momentum. In her testimony, De Jager described her role as that of a 'go-between' between the broker and Momentum: the broker ensured that all the requisite documents were provided by the client, handed this documentation to her and she then sent it through to the Momentum Head Office where all transactions relating to the policy were attended to.

[15] It is, however, clear from the terms of the contract between De Jager and Momentum that she was appointed to represent Momentum in the solicitation and maintenance of policies. It was common cause that she had authority to use Momentum letterheads and often did so.

[16] I agree with the learned judge that it was eminently reasonable for Boland to have relied upon De Jager's conduct and representations and to assume that she had the necessary authority, at the very least to accept and record a notification of the existence of the cession of Van Heerden's policy in Boland's favour. As in the case of *Glofinco v Absa Bank t/a United Bank*,³ Boland was entitled to assume that De Jager's functions encompassed these activities. It could not reasonably have been expected of it to know of any internal limitations on De Jager's actions⁴ and, therefore, even if De Jager did not have actual authority to deal with Momentum in the way she did, Momentum is bound by her ostensible authority.

[17] As regards the factual question whether Momentum had knowledge of the cession before or at the time of payment of the interest-free loan to the cedent (Van Heerden), the probabilities in this case point overwhelmingly to the conclusion that Momentum *did* have imputed knowledge of the cession in favour of Boland at the relevant time. This appears clearly from the terms of De Jager's fax cover sheet and letter to Hurter dated 6 August 1999.⁵ Murphy J made a fairly strong credibility finding against De Jager⁶ and there are no grounds to interfere with this finding. Interestingly, appellant's counsel did not seek to challenge it in argument before us in any way.

[18] The knowledge of the cession in favour of Boland to secure Van Heerden's debt to it was certainly material and important. It cannot be

³ 2002 (6) SA 470 (SCA), where this court held (paras 15-16) that the appointment by a bank of a branch manager implied a representation to the outside world to the effect that the branch manager is empowered to represent the bank in the sort of business and transactions that a branch of the bank and its manager would ordinarily conduct. What this ordinary kind of business is, is a factual matter and depends on the evidence before the court.

⁴ See the *Glofinco* case paras 17-18.

⁵ Set out in paragraphs 7 and 8 above.

⁶ See paras 32 to 34 of the reported judgment, at 539H-540E.

gainsaid that, in the ordinary course of business, a reasonable person in the position of De Jager would be expected to impart this knowledge to Momentum, the entity who had delegated to her the control and conduct of its affairs in this regard.⁷ This being so, Momentum must be said to have had knowledge of the cession in favour of Boland in August 1999, long before it authorised and paid out to Van Heerden the loan against the policy in question. There is nothing in the evidence to indicate that, despite such knowledge, Momentum can nonetheless be said to have acted in good faith in paying out such loan.⁸

[19] Murphy J proceeded from the premise that the cessionary bears the onus of proving knowledge of the cession on the part of the debtor in a situation such as the present,⁹ but on the facts of the present case, nothing turns on that and this aspect warrants no further discussion.

[20] It follows from the above that Nedbank (Boland's successor in title), as pledgee of the proceeds of the policy, was entitled to realise its security at the time it sought to do so.¹⁰ In the meantime, however, Van Heerden's estate was sequestrated in January 2003. Van Staden, in his capacity as trustee of the cedent's (Van Heerden's) estate is thus 'the person entitled to recover the proceeds [of the policy] as part of his duty to realise the assets of the estate, but subject to the real right of pledge held by Nedbank who consequently remains fully protected.'¹¹

⁷ *Town Council of Barberton v Ocean Accident and Guarantee Corporation Ltd* 1945 TPD 309 at 311, subsequently referred to with approval by this court, see eg *Wilkens NO v Voges* 1994 (3) SA 130 (A) at 141H.

⁸ See *Brook v Jones* 1964 (1) SA 765 (N) at 767E-F.

⁹ See para 34 of the reported judgment at 540D, read with para 29 at 539C-D.

¹⁰ By claiming payment of R250 000 from the proceeds of the policy in February 2001 – see para 11 above.

¹¹ Paragraph 42 of the reported judgment of the trial court, at 543B-D.

[21] In the result the appeal must fail and it is dismissed with costs.

B J VAN HEERDEN
JUDGE OF APPEAL

Appearances:

For the Appellant:	J F Steyn Gerings Attorneys c/o Hendriëtte Muller Pretoria
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For the Respondent:	F J Erasmus De Swart Vögel Mahlafonya Pretoria
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