Case No 515/97

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter of:

P G BISON LIMITED	First Appellant
P G BISON (ALRODE) (PROPRIETARY) LIMITED	Second Appellant
P G BISON (NATAL) (PROPRIETARY) LIMITED	Third Appellant

and

THE MASTER OF THE HIGH COURT, GRAHAMSTOWN	First Respondent
ANDREW STUART PATERSON N O	Second Respondent

CORAM: HEFER, GROSSKOPF, OLIVIER, SCOTT *et* STREICHER JJA.

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Cession *in securitatem debiti* - whether transfer of rights to cessionaries had been suspended - meaning of "to implement".

J U D G M E N T

GROSSKOPF JA/ . . .

GROSSKOPF JA:

[1] The three appellants are proved creditors of a close corporation in liquidation, Pats Planks CC ("the corporation"). The corporation used to purchase products from the appellants. On 7 April 1995 and about a year prior to its liquidation the corporation executed a "General Covering Cession" in terms whereof it ceded its book debts to the appellants *in securitatem debiti.* The cession ranked second to a prior cession to the corporation's bank, but that presented no obstacle to the relief claimed by the appellants. (See *Bank of Lisbon and South Africa Ltd v The Master and Others* 1987 (1) SA 276 (A) at 294 B - I.)

[2] It is common cause that the corporation's attorney inserted the following additional clause ("the additional clause") into the deed of cession prior to its execution by the corporation:

> "This cession will not be implemented unless the account is overdue by 30 days and 7 days notice of the intention to implement this cession has been given."

It is also common cause that at the date of the corporation's liquidation the account was indeed overdue by thirty days, but the seven days notice had not been given.

[3] The second respondent was appointed liquidator of the corporation. The first liquidation and distribution account reflects a portion of the appellants' claims against the corporation as being "secured claims". As a result of an objection to the first liquidation and distribution account the first respondent directed the second respondent to amend the account to reflect the proceeds of the corporation's book debts in the free residue account. The first respondent gave this ruling in the belief that the transfer of the rights (book debts) had been suspended as a result of the additional clause and that the cession accordingly did not confer any security upon the appellants.

[4] The appellants (and for that matter the second respondent) did not agree with the first respondent's interpretation of the additional clause and his ruling that no part of the appellants' claims was secured. As a

result they brought an application in the Eastern Cape Division of the High Court in which an order was sought:

> 1. Setting aside the first respondent's direction to the second respondent to amend the first liquidation and distribution account of the corporation to reflect the proceeds of the book debts in the free residue account;
>
> 2. Confirming the encumbered asset account number 4 in the form prepared by second respondent;
>
> 3. That the costs of the application be a cost of administration in the winding up of the corporation (in liquidation).

The first respondent indicated that he would abide the decision of the court *a quo* and there was no opposition to the application.

[5] The court *a quo* came to the conclusion that on a proper construction of the additional clause —

> "it was the intention of the parties as expressed therein that the whole agreement was suspended thereby and that in

> terms thereof the rights of the corporation against its [debtors] would not be ceded or transferred to the applicants until such time as the conditions provided for have been complied with."

In the result the first respondent's ruling was upheld and the appellants' application dismissed with no order as to costs. The appellants appeal to this court with leave of the court *a quo*. Both respondents have indicated that they abide the decision of this court.

[6] I do not agree with the learned judge's interpretation of the additional clause and his conclusion that the whole agreement had been suspended.

[7] The outcome of the appeal depends mainly upon the interpretation of the additional clause, read in context. The first step in construing the additional clause is to determine the ordinary grammatical meaning of the words in order to ascertain the common intention of the parties. (See *Cinema City (Pty) Ltd v Morgenstern Family Estates (Pty) Ltd and Others* 1980 (1) SA 796 (A) at 803 G - H, 804 C - D; *Coopers*

& Lybrand and Others v Bryant 1995 (3) SA 761 (A) at 767 E - F.)

In interpreting the words used the court must also have regard to the nature and purpose of the contract (*Swart en`n Ander v Cape Fabrix (Pty) Ltd* 1979 (1) SA 195 (A) at 202 C). "[I]t is the duty of the Court to construe their language in keeping with the purpose and object which they had in view, and so render that language effectual" (*per* Kotzé JA in *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1925 AD 245 at 261).

[8] In my view the common intention of the parties in this case can be determined on a proper construction of the additional clause and without reference to extrinsic evidence. The additional clause provides that the "cession will not be implemented" unless the prescribed seven days notice has been given. The crucial word in the additional clause is "implement". The first step therefore is to determine the ordinary meaning of that word in its context.

[9] The dictionary definitions of the verb "implement" include the

following:

> *The Oxford English Dictionary* (1989):
> "to complete, perform, carry into effect (a contract, agreement, etc)."
>
> *Webster's Third New International Dictionary* (1993)
> "to carry out; to give practical effect to."
>
> *Longman Modern English Dictionary* (1984)
> "to carry out; esp to give practical effect to."
>
> *Collins English Dictionary* (1979)
> "to carry out, put into action."

[10] The verb "carry out" is one of the dictionary meanings of "implement" and in my view that is what "implement" in the present context probably connotes. The additional clause accordingly provides that the cession will not be carried out (by the cessionary) unless the account is overdue and notice has been given (to the cedent). It certainly does not follow that the actual transfer of the rights is suspended. The appellants as cessionaries are merely prevented from personally

exercising those rights until the corporation defaults and notice has been given. The conclusion that the parties did not intend to suspend the transfer of the rights is borne out by a number of provisions and clauses in the deed of cession referred to in [12] to [14] hereunder.

[11] According to the Oxford English Dictionary the verb "implement" can also mean "complete", which would denote that the cession had in fact been incomplete. According to such a construction of the additional clause the actual transfer of the rights would occur automatically seven days after the cessionary had given notice, not to the corporation's debtors, but to the corporation as cedent. I cannot accept that the parties intended that the transfer of the rights should be accomplished in this unusual manner. Such a construction would further entail that the parties failed to achieve their purpose of providing the appellants with security. As pointed out in [7] above the court should construe the language used in keeping with the purpose and object which the parties had in mind.

[12] There are certain provisions in the deed of cession which manifest an intention forthwith to transfer the rights. The following are examples:

> "We . . . do hereby pledge, cede *in securitatem debiti,* transfer and make over . . ."
>
> ". . . the claims hereby ceded . . ."
>
> ". . . all claims which we may now or at any time hereafter have . . ."
>
> ". . .which we may now be or become bound to perform . . ."
>
> ". . . then these presents shall operate as a cession of all my reversionary rights . . ."
> (Emphasis added.)

[13] Some of the clauses in the deed of cession also show a clear intention of an unconditional transfer of rights. There is for instance the clause which provides for the interim collection of debts by the corporation, but then acting as the agent of the appellants. This clause

reads as follows:

> " . . . that whether or not my/our debtors will have been notified of this cession, all sums of money which I/we will collect from my/our debtors, or any of them, shall be collected and received by me/us as agent(s) on the creditors' behalf provided that the creditors collectively [i e the appellants and other related companies] shall be entitled at any time to terminate my/our mandate to collect all or any such sums of money and that with effect from the termination of such mandate, I/we will cease to collect or accept any payments on account of the debts in respect of which my/our mandate will have been terminated . . ."

It follows that the corporation could enforce the rights as agent of the appellants only if it had previously divested itself of those rights.

[14] Further support for the conclusion that the corporation had in fact divested itself of the rights is to be found in the following provision:

> "I/we agree that the creditors collectively shall be entitled at any time or times hereafter to give notice of this cession to all or any of my/our debtors and to take such steps as

> they may deem fit to recover the amounts respectively owing by my/our debtors to me/us from time to time and for the time being: . . .”

This provision can be reconciled with the additional clause on the basis that the appellants will only take steps to recover the debts directly once they have terminated the corporation’s mandate by giving notice in terms of the additional clause.

[15] It should be borne in mind that we are here dealing with a cession *in securitatem debiti.* As a rule the appellants as cessionaries would in any event not be entitled to recover directly from the corporation’s debtors until such time as the corporation is in default. (See *Land- en Landboubank van Suid-Afrika v Die Meester en Andere* 1991 (2) SA 761 (A) at 771 D.) That may explain why the corporation in the mean time was afforded the right, as the appellant’s agent, to claim from its debtors. The appellants were however entitled to terminate the corporation’s mandate at any time. Such termination would ordinarily

take place in the event of the corporation's default. The seven days notice which the appellants were obliged to give in terms of the additional clause can therefore be regarded as the appellants' termination of the corporation's mandate.

[16] Reference has been made to the case of *Ovland Management (Tvl) (Pty) Ltd and Another v Petprin (Pty) Ltd* 1995 (3) SA 276 (N) where the full court held that upon a proper construction of the cession in that case, the cedent had not denuded itself of the right to sue on certain lease agreements. On a proper construction of the deed of cession in the present matter I am, however, of the view that the right to sue did not remain vested in the corporation as cedent.

[17] There can be no doubt in my opinion that the rights were duly transferred to the appellants and remained vested in them. In the result the cession *in securitatem debiti* provided the required security. Such a result would also accord with the intended purpose and object of the parties.

[18] In my judgment the appeal should accordingly be upheld. The following order is made:

1. The appeal is upheld with costs, such costs to be a cost of administration in the winding up of Pats Planks CC (in liquidation).
2. The order of the court *a quo* is set aside and the following order is substituted therefor:-

"(i) The first respondent's direction to the second respondent to amend the first liquidation and distribution account of Pats Planks CC (in liquidation) to reflect the proceeds of the book debts in the free residue account is set aside;

(ii) The encumbered asset account number 4 in the form prepared by the second respondent is confirmed;

(iii) The costs of this application to be a cost of administration in the winding up of Pats Planks CC (in liquidation)."

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F H Grosskopf
Judge of Appeal

HEFER JA)
OLIVIER JA)
SCOTT JA)
STREICHER JA)

CONCUR