THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 245/2016

In the matter between:

BRAYTON CARLSWALD (PTY) LTD **FIRST APPELLANT**

MARTINA BREWS **SECOND APPELLANT**

and

GORDON DONALD BREWS **RESPONDENT**

Neutral citation: *Carlswald & another v Brews* (245/2016) [2017] ZASCA 68 (31 May 2017)

Coram: Theron, Majiedt, Dambuza and Mathopo JJA and Coppin AJA

Heard: 9 May 2017

Delivered: 31 May 2017

Summary: Contract: cession: may be oral: where parties agree to reduce contract to writing there will be no contract until terms have been reduced to writing: once cession reduced to writing parties bound by the terms of the deed of cession and cannot rely on oral negotiations.

At time of execution of deed of cession the judgment debt had been extinguished by payment: cession is a nullity: a non-existent debt cannot be transferred.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Makume, Makhanya and Mokgoatlheng JJ sitting as court of appeal):

1 The appeal is upheld with costs.
2 The order of the court a quo is set aside and replaced with the following:
'The appeal is dismissed with costs.'

JUDGMENT

Theron JA (Majiedt, Dambuza, Mathopo JJA and Coppin AJA concurring):

[1] The issue on appeal is whether, as a matter of law, it is competent to effect cession of a claim after the underlying obligation has been extinguished by payment.

[2] The facts giving rise to this matter are largely common cause. On 18 October 2004, judgment under case number 21149/2002, was granted in favour of Firstrand Bank Limited t/a Origin (the bank) against Brayton Carlswald (Pty) Ltd (the first defendant in that matter and the first appellant in this appeal) and Mr Jonathan Paul Brews (the second defendant) (hereinafter referred to as the defendants) for, inter alia, payment of the sum of R3 227 582,44.

[3] In execution of this judgment, the bank caused certain immovable properties owned by the first appellant, to be attached. In order to avoid a sale in execution of the immovable properties, the defendants approached the respondent, Mr Gordon Donald Brews, with a request that he pay their indebtedness to the bank. On 26 April 2005, the respondent and the defendants concluded a loan agreement in terms of which the respondent agreed to pay the full debt due to the bank. The defendants agreed, as security for the loan, to procure a pledge of shares in the company, KGM 74 Investments (Pty) Ltd, in favour of the respondent, to pass a covering mortgage bond over the properties attached pursuant to the judgment and that the respondent would take cession of the judgment from the bank.

[4] Prior to payment, there had been a series of discussions between the respondent and the bank relating to the cession of the judgment debt to the respondent. The bank agreed to cede the judgment debt to the respondent once the latter had made full payment of the debt. On 3 May 2005 and 10 August 2005, the respondent paid a total amount of R4 439 675,80 to the bank in settlement of the defendants' indebtedness to it, which comprised the judgment debt and an additional claim.

[5] The Deeds Office refused to register a covering mortgage bond as the bank's attachment in respect of the properties had not been uplifted. On 29 June 2007 and after the upliftment of the attachment, the mortgage bond was again lodged for registration in the Deeds Office. The registration could not proceed as there was an amount of R234 320,29 owing to the City of Johannesburg in respect of rates and municipal charges. The defendants sought and were granted further financial assistance from the respondent. By then, their indebtedness to the respondent had increased to more than R10 million. On 29 August 2008, the bank, in writing,

ceded its rights to the judgment and any additional claims against the defendants, to the respondent.

[6] On 23 February 2011, the respondent brought an ex-parte application in the South Gauteng High Court, Johannesburg (the high court) for an order directing that he be substituted as execution creditor in all execution documentation issued or re-issued in the action between the bank and the defendants under case number 21149/2002. The second appellant, Mrs Martina Brews (the former wife of Mr Jonathan Brews), applied for leave to intervene in the application. The basis for her intervention was set out as follows in her affidavit filed in support of the application to intervene:

'4. I am a beneficiary of the Narica Trust, which trust is the sole shareholder of the First Defendant in this matter. The Second Defendant was the previous sole director of the First Defendant and he was removed there from in terms of an application brought before this Honourable Court. The Second Defendant is also a cousin of Gordon and they have undertaken many business ventures between them. I believe that the Second Defendant deliberately, and knowing the effect on the First Defendant, colluded with Gordon in obtaining this judgment for Gordon's benefit. I believe that the First Defendant has been the victim of a fraudulent plot by Gordon and the Second Defendant. These allegations and many more will be more fully dealt with in my answering affidavit should I be granted leave to intervene.

5. I currently reside on the property 267 Papenfus Road, Beaulieu, which property is owned by the First Defendant. Furthermore the property is the sole asset of the First Defendant and the Narica trust.

6. I am financially dependent on the abovementioned property, as I earn a living from the property by keeping an equestrian training academy thereon which academy is and has been for the past 7 (seven) years my sole and only source of income. Furthermore at all times the property was intended to be mine and my two daughter's source of financial security in the future. Should I be deprived of this it will effectively leave me indigent and homeless.

7. In the circumstances, I stand to suffer direct and severe financial loss should the ex parte Application be granted. However as will become more apparent from my Answering Affidavit, Gordon has no right to be substituted instead of First Rand Bank Limited (Plaintiff).

8. Not only will I suffer direct and severe financial loss, I will not be able to provide for my minor daughter and older daughter who are both financially dependant on me. However in the event of me being granted leave to intervene, no other party, including Gordon, will suffer any prejudice of any nature whatsoever.'

The application to intervene was opposed by the respondent.

[7] The high court (Kades AJ) dismissed the respondent's application with costs. An appeal by the respondent to the full court (court a quo), was upheld and an order of substitution, together with costs, was granted in favour of the respondent. The appellants' appeal against this judgment is with special leave from this court.

[8] It was common cause that the high court had made no order in respect of the application to intervene. Similarly, the court a quo also did not pronounce upon this matter, save to record in its judgment that:

'The appellant filed a notice to appeal and set out lengthy grounds of appeal which included an attack on the right of the intervening party to be heard. However, this challenge was not pursued in the Heads of Argument, correctly so'.

At the hearing of this appeal, the respondent accepted, for purposes of this judgment and to prevent any further delay, that the second appellant was a party to these proceedings.

[9] Cession has been defined as a bilateral juristic act in terms of which a right is transferred by agreement between the transferor (cedent) and transferee

(cessionary).[1] Generally, no formalities are required for the antecedent obligatory agreement or the act of cession.[2] The parties may agree on the formalities with which the cession is to comply.[3] A cession may thus be either express or tacit, or may be inferred from the conduct of the parties.[4] While the cession does not have to be reduced to writing, the parties may agree that the cession will only be valid if reduced to writing.[5]

[10] The deed of cession in this matter contains both the antecedent obligatory agreement (the agreement to cede) as well as the act of cession. The Preamble of the Cession records in relevant part:

'1.2 On 3 May 2005 the CESSIONARY settled the JUDGMENT on behalf of the DEBTOR.

1.3 After the JUDGMENT was settled, there remained an additional claim in favour of the BANK against the DEBTOR in the amount of R238 891,51, together with interest on the amount of R209 882,48 at the rate of 8,25% per annum from 3 June 2005 to date of payment, calculated daily an[d] compounded monthly, both days inclusive, ("the ADDITIONAL CLAIM")

1.4 On 10 August 2005, the CESSIONARY made a final payment to the BANK on behalf of the DEBTOR in settlement of the ADDITIONAL CLAIM.

1.5 In return for the payments made by the CESSIONARY on behalf of the DEBTOR, the BANK agreed to cede the JUDGMENT and the ADDITIONAL CLAIM to the CESSIONARY.'

[11] The act of cession reads:

'2.1 The BANK hereby cedes, transfers and makes over unto and in favour of the CESSIONARY, all of the BANK'S right, title and interest in and to the JUDGMENT and the ADDITIONAL CLAIM.'

The cession is accepted by the respondent in the following terms:

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[1] P M Nienaber in the title on 'Cession' 3 Lawsa 3ed para 128; *LTA Engineering Co Ltd v Seacat Investments (Pty) Ltd* 1974 (1) SA 747 (A) at 762A; 1974 (2) ALL SA 6 (A).

[2] *National Sorghum Breweries Ltd v Corpcapital Bank Ltd* 2006 (6) SA 208 (SCA); [2006] 2 ALL SA 376 (SCA) para 1.

[3] *National Sorghum Breweries supra* para 1.

[4] *Botha* v Fick 1995 (2) SA 750 (A) at 762B-H and 778F-G.

[5] S Scott, *The Law of Cession* 2ed (1991) at 26 fn 16.

'The CESSIONARY hereby accepts the cession upon and subject to the terms of this Agreement.'

[12] In this court and in the court a quo, it was contended, on behalf of the appellants, that at the time when the deed of cession was executed and fulfilled on 9 September 2008, there was nothing to cede because the debt had been extinguished by payment. This argument was rejected by the court a quo which reasoned as follows:

'[25] In my view the first respondent's argument is without merit because shortly before the appellant paid the judgment debt the respondents acknowledged their indebtedness to the appellant and agreed on the 26th April 2005 that the appellant should take cession of the judgment debt. This was before the appellant settled the judgment debt on the 3rd May 2005.

[26] It is clear from the ratio of the above cited cases that the appellant stepped in as a form of surety for the respondents' debt at a time when the respondents' immovable property was under judicial attachment and was due to be sold. The fact that the deed of cession between plaintiff and the appellant was only executed three years later and after payment of the judgment debt, does not in my view divest the appellant of the right to the judgment debt which was ceded to him prior to payment.

[27] Transfer of the right to the judgment debt was achieved by the interactive meeting of the minds of the respondents and the appellant. By their mere agreements when the loan was advanced transfer of the right to the judgment was effected irrespective of the date of signing of the deed of cession which was a mere formality confirming what had been agreed upon on the 26th April 2005 prior to payment of the debt.'

[13] The reasoning of the court a quo is flawed in a number of respects. The defendants could not transfer a right in the judgment debt to the respondent. They could not cede something that did not belong to them and to which they had no right. This is in accordance with the common law adage that nobody can transfer

more rights to another than he himself has (*nemo plus iuris ad alium transferre potest quam ipse haberet*).[6] The right could only be transferred from and by the bank to the respondent or any other party it chose. There could therefore not have been a 'transfer of the right to the judgment debt . . . by the interactive meeting of the minds' of the appellants and the respondent as the court a quo found.[7]

[14] The cession was not a 'mere formality' as found by the court a quo. The deed of cession was a juristic act in terms of which the cession was executed. Whatever happened prior to the execution of the cession was of an obligatory nature and a duty to cede arose on account of a promise made by the Bank. That duty was fulfilled by the execution of the deed of cession.

[15] The court a quo failed to distinguish between the agreement to cede (the obligatory agreement whereby an obligation is created) also referred to as the *pactum de cedendo* and the cession itself (the real agreement whereby rights are bilaterally transferred) also known as the *pactum cessionis*. In *Grobbelaar & others v Shoprite Checkers Ltd*,[8] Brand JA explained that '[a] cession is an abstract legal act that is independent of the underlying, obligationary, agreement'.[9] Justice P M Nienaber puts it well in his contribution to the Law of South Africa, aptly distinguishing between these two types of agreements:

'The undertaking to cede and the actual cession will often coincide and be consolidated in a single document, yet they remain discrete juristic acts. However, because they are frequently merged into one transaction the clear distinction between the obligatory agreement to cede and

[6] *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC & others* (2011 (2) SA 508 (SCA); [2011] 3 All SA 173 (SCA)) [2010] ZASCA 166; 126/2010 (1 December 2010) para 26.
[7] Para 12 above.
[8] *Grobbelaar & others v Shoprite Checkers Ltd* (710/2008) [2011] ZASCA 11 (11 March 2011).
[9] Ibid, para 18.

the actual cession sometimes tend to be smudged. They are nevertheless distinct in function and can be so in time: by the former a duty to cede is created, by the latter it is discharged.'[10]

[16] It has already been stated that while a cession does not have to be reduced to writing, the parties may agree that the cession will only be valid if reduced to writing.[11] The leading judgment on this point is that of Innes CJ in *Goldblatt v Fremantle*[12] where the learned Chief Justice said that the question in each case is one of construction.[13] He stated, in a passage that is often referred to with approval:[14]

'Subject to certain exceptions, mostly statutory, any contract may be verbally entered into; writing is not essential to contractual validity. And if during negotiations mention is made of a written document, the Court will assume that the object was merely to afford facility of proof of the verbal agreement, unless it is clear that the parties intended that the writing should embody the contract. (*Grotius* 3.14.26 etc.). At the same time it is always open to parties to agree that their contract shall be a written one (see *Voet* 5.1.73. V. *Leeuwen* 4.2., sec. 2, *Decker's* note); and in that case there will be no binding obligation until the terms have been reduced to writing and signed'.[15]

[17] The deed of cession, far from being a 'mere formality', as found by the court a quo, is critical in determining the intention of the parties. When interpreting documents, words must be read in their context and in application of the subject

[10] 2 Lawsa 2ed Part 2 para 8; *Botha* supra fn 4 at 765A-B.
[11] S Scott, *The Law of Cession* 2ed (1991) at 26 fn 16.
[12] *Goldblatt v Fremantle* 1920 AD 123.
[13] Ibid at 129.
[14] See *Weinerlevin v Goch Buildings Ltd* 1925 AD 282; *Sapro v Schlinkman* 1948 (2) SA 637 (A); *Morgan & another v Brittan Boustred Ltd* 1992 (2) SA 775 (A); *Lambons (Edms) Bpk v BMW (Suid-Afrika) (Edms) Bpk* 1997 (4) SA 141 (SCA); *Pillay & another v Shaik & others* [2008] ZASCA 159; 2009(4) SA 74 (SCA) ; [2009] 2 All SA 435 (SCA).
[15] *Goldblatt* supra fn 10 at 128-129.

matter to which they relate.[16] The ordinary meaning of the words must be determined in the context of the document, read as a whole.[17]

[18] It is clear from the deed of cession that the parties intended that the written document embody their contract. The words of clause 2.1, 'The BANK hereby cedes, transfers and makes over' make plain what was intended by the bank and the respondent. In terms of the deed of cession, the respondent accepted the 'cession upon and subject to the terms of this [a]greement.' The parties intended that upon signature thereof, transfer of the right would take effect.

[19] When the deed of cession was executed and fulfilled, there was nothing to cede because the debt had been extinguished by payment. Payment usually serves to extinguish a debt. The author JC Sonnekus in *Unjustified Enrichment in South African Law* states that 'a debt is after all fulfilled and extinguished through payment.'[18] Brand JA in *Grobler v Oosthuizen*[19] held that a cession cannot stand without a principal debt and 'it matters not whether the principal debt is extinguished or never existed at all'.[20] The learned judge quoted and found support for this view in the following dictum by Watermeyer J in *Standard Bank of SA Ltd v Neethling NO*:[21]

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[16] *Consolidated Diamond Mines of South West Africa Ltd* v *Administrator, SWA & another* 1958 (4) SA 572 (A) at 599A-C.
[17] *Liebenberg NO & others v Bergrivier Municipality* [2013] ZACC 16; 2013 (5) SA 246 (CC); 2013 (8) BCLR 863 (CC) para 39. See *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) paras 17-26; A*ir Traffic and Navigation Services Company v Esterhuizen* (668/2013) [2014] ZASCA 138 (25 September 2014) para 22; *Nelson Mandela Bay Municipality v Amber Mountain Investments 3 (Pty) Ltd* (576/2016) [2017] ZASCA 36 (29 March 2017) para 14.
[18] J C Sonnekus, *Unjustified Enrichment in South African Law*, (2008) at 237.
[19] *Grobler v Oosthuizen* [2009] ZASCA 51; 2009 (5) SA 500 (SCA); [2009] 3 All SA 508 (SCA).
[20] Ibid para 21.
[21] *Standard Bank of SA v Neethling NO* 1958 (2) SA 25 (C).

'. . . [T]he next point which arises is whether the cession of the policy and the security created thereby was rendered null and void on the extinction of the principal debt. In this regard I refer first to *Kilburn v Estate Kilburn*, 1931 AD 501 at p. 506, where WESSELS, A.C.J., said:

"It is therefore clear that by our law there must be a legal or natural obligation to which the hypothecation is accessory. If there is no obligation whatever there can be no hypothecation giving rise to a substantive claim."

Kilburn's case was not a case where a principal obligation subsequently became extinguished. It was a case where there never had been a principal obligation. It seems to me however that there is no distinction in principle between the two cases . . . After . . . the principal debt was extinguished . . . there remained no obligation to support the cession by way of security.'[22]

[20] It follows that when 'transfer' of the real right was effected, there was no right which could be transferred. The respondent had paid the bank all that was due to it. Transfer of a 'right' which has been extinguished is a nullity as there is nothing which can be transferred. I agree with the principle that as a matter of logic, a non-existent right can never in law be transferred as the subject matter of a cession.[23] The respondent, the bank and their legal representatives, ought to have considered the effect of the payment of a debt, which had been ceded where the cessionary was not a surety.

[21] The court a quo relied on and applied principles of the law of suretyship (para 26 of the judgment quoted above). The respondent was not a surety for the debt of the defendants. It was common cause that they had not concluded a suretyship agreement. The court a quo's reasoning in this regard is thus based on an incorrect premise.

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[22] Ibid, at 30A-D.

[23] See Joubert JA in *First National Bank of SA Ltd v Lynn NO & others* 1996 (2) SA 339 (A) at 346C (minority judgment).

[22] Cession of an action is an *ex lege* benefit afforded to a surety who pays a creditor and that entitles a surety to claim cession of action from the creditor. This is a clear exception to the principle that once a liability has been extinguished by payment, the right to payment is extinguished and cannot be transferred.[24]

[23] It was contended, on behalf of the respondent, that the correspondence exchanged between the legal representatives of the respondent and the bank, contains the cession itself and is not merely an intention to cede. It was further contended that the intention of the parties should be ascertained with regard to such correspondence and that the deed of cession was merely a recordal of their previous agreement.

[24] It would appear that negotiations between the aforementioned legal representatives commenced during April 2005. On 3 May 2005 the respondent's attorneys, Stanley Brasg & Associates, wrote a letter to Routledge Modise Moss Morris, who acted on behalf of the bank, in which they recorded that they had paid an amount of R4,2 million into the bank account nominated by the respondent. The concluding sentence of that letter reads:

'Kindly confirm that your client will sign the required Cession of Judgment in favour of our client'

The reply from Routledge Modise, reads, in relevant part:

'We confirm that your Mr Brasg will draft the cession of the judgments obtained by our client on a basis suitable to your client and which will be signed by our client once the balance of the monies owing to our client, have been paid'.

This exchange of correspondence is not without significance. Despite the fact that the respondent had paid R4,2 million to the bank, the latter still refused to sign the

[24] S Scott, *The Law of Cession* 2ed (1991) at 218 and C F Forsyth and J T Pretorius *Caney's The Law of Suretyship in South Africa*, 6ed (2010) at 154 fn 69.

draft deed of cession on the basis that further monies were owed to it by the defendants.

[25] On 1 June 2005 Stanley Brasg wrote a letter to Routledge Modise in which they recorded that they had been placed in funds, they were in a position to make payment and requested details of the final amount due. They attached a draft Agreement of Cession of the judgment in favour of the bank, to the respondent. The response to that letter, dated 6 June 2005, recorded the amount due and stated:

'Upon receipt of payment of the aforesaid amount into our client's account . . . we will arrange for our client to sign the agreement of cession attached to your telefax of 1 June 2005.'

[26] The contention advanced on behalf of the respondent cannot be sustained. It is clear from the correspondence that the deed of cession would be executed after payment was made by the respondent and was not to be contemporaneous with payment. The correspondence between the parties is consistent with an intention on the part of the bank to execute the deed of cession *after* payment of the judgment debt.

[27] In his Founding Affidavit, the respondent relied on the written deed of cession for the relief of substitution. He made the following averment in support of his application:

'In settlement of the Defendants' total indebtedness to the Plaintiff, I made payment to the Plaintiff's attorneys of the sum of R4 439 675,80. Against such payment, the Plaintiff, on 29 August 2008, signed an Agreement ceding its rights to the Judgment and its additional claims against the Defendants, to me. I attach hereto marked "FA6", a copy of the Agreement of Cession'.

A copy of the deed of cession was attached to his affidavit.

[28] In his Replying Affidavit, the respondent's version was altered to encompass a contemporaneous cession upon payment of the judgment debt. He stated that:

'The condition precedent to my paying the Plaintiff the amount of the judgment, was that I take cession of the judgment from the Plaintiff. Only after the Plaintiff had agreed to my condition and had agreed to cede the judgment to me, was payment made. I effectively purchased the Plaintiff's rights in and to the judgment.'

[29] In my view, there are two insurmountable hurdles in the 'new' version being accepted. First, the general rule in motion proceedings is that an applicant must stand or fall by the averments made out in its founding affidavit.[25] It is not permissible to make out a new case in the replying affidavit.[26] Secondly, the terms of the deed of cession are inconsistent with the 'new' version. The parties thereto, having elected to reduce their agreement to writing, are bound by such election and the resultant agreement.

[30] For these reasons the following order is made.

1 The appeal is upheld with costs.

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

'The appeal is dismissed with costs.'

LV Theron

Judge of Appeal

[25] *Betlane v Shelly Court CC* [2010] ZACC 23; 2011(1) SA 388 (CC) para 29; 2011 (3) BCLR 264 (CC); *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* [2008] ZASCA 78; 2008 (5) SA 339 (SCA) paras 29-30.

[26] *Betlane* supra ibid; *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 636A-B.

APPEARANCES:

For the Appellants:	P Pauw SC
Instructed by:	Botoulas Krause & Da Silva Inc, Johannesburg
	McIntre & Van der Post, Bloemfontein
For the Respondent:	S M Katzew
Instructed by:	Stanley Brasg & Associates, Johannesburg
	Lovius Block, Bloemfontein