THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 1249/17

In the matter between:

FIRSTRAND BANK LTD **APPELLANT**

and

NEDBANK LTD **RESPONDENT**

Neutral citation:	*FirstRand Bank Ltd v Nedbank Ltd* (1249/2017) ZASCA 47 (29 March 2019)
Coram:	Cachalia, Mbha and Van der Merwe JJA and Dlodlo and Rogers AJJA
Heard:	7 March 2019
Delivered:	29 March 2019

Summary: Contract – interpretation of cancellation clauses in Invoice Discounting Agreement and Security Cession – effects of out and out cession considered – Invoice Discounting Agreement bestowed full ownership in Nedbank for book debts delivered to it before its cancellation – cancellation of a contract not affecting accrued rights under it.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Baqwa J sitting as court of first instance):

1 The appeal is dismissed with costs, including the costs of two counsel.

2 The cross-appeal is upheld with costs, including the costs of two counsel.

3 The order of the high court is set aside and replaced with the following order:

'The application is dismissed with costs, including the costs of two counsel.'

JUDGMENT

Mbha JA (Cachalia and Van der Merwe JJA and Dlodlo AJA concurring):

[1] This appeal concerns the effect of the cancellation of an Invoice Discounting Agreement (IDA) concluded between the respondent, Nedbank Ltd (Nedbank) and FT Group Holdings (Pty) Ltd (FT) on 4 September 2012. The appeal turns on a proper interpretation of the IDA, and a Deed of Pledge and Cession (Security Cession), that was executed by FT in favour of Nedbank on the same date.

[2] In terms of the IDA, FT sold its 'Existing Debts' and 'New Debts', as defined in the IDA to Nedbank in terms of a discounting facility which increased from an initial R70

million to R100 million on 17 January 2013 and to R200 million on 2 April 2013. The 'existing debts' were those to be listed from time to time in schedules which FT would deliver to Nedbank. The right, title and interest in the 'Existing Debts' passed to Nedbank on the 'Effective Date' of the IDA, namely 19 September 2012. The right, title and interest in the 'New Debts' passed to Nedbank as and when the relevant schedules were delivered to it. These cessions were out and out cessions that vested full ownership of the debts in Nedbank. Such vesting was not dependent on whether on payment by Nedbank of the purchase price of the debts though in the present case there is no suggestion that Nedbank did not pay the purchase price.

[3] In terms of the Security Cession, FT ceded all its other claims, ie all claims other than the book debts sold to Nedbank in terms of IDA as security for all debts owed by it to Nedbank. It is common cause that the Security Cession was a cession in *securitatem debiti,* the effect of which was that FT retained the *dominium* of those claims, ie a reversionary interest therein. Nedbank, on the other hand, acquired a right over them akin to a pledge.

[4] Nedbank later discovered that FT had defrauded it. It transpired that FT had been double discounting: it had ceded the same book debts to other banks and had sold it inflated and fictitious claims. Thus on 11 May 2012, FT executed a written Cession of Debts whereby it ceded its book debts to the appellant, FirstRand Ltd (FirstRand), as security for an overdraft and a term loan facility (the FirstRand Cession).

It is common cause that the FirstRand cession constituted a cession in *securitatem debiti*.

[5] Upon discovery of this fraud, Nedbank cancelled the IDA. It gave notice thereof in its founding affidavit in an application for the winding-up of FT, on 29 July 2013. FT was provisionally wound up on 6 August 2013 and the provisional order was made final on 2 October 2013. At the time of cancellation of the IDA, Nedbank held unpaid book debts purchased from FT with the aggregate face value of R93 million.

[6] FirstRand contended that when Nedbank cancelled the IDA, the R93 million worth of book debts that it had purchased and paid for, automatically reverted to FT (and subsequently to the liquidators). On the other hand Nedbank, relying on the rule in *Walker's Fruit Farms Ltd v Sumner*,[1] providing that cancellation of a contract did not affect accrued rights under it, took the stance that as it had acquired full ownership of those book debts, its accrued right to those book debts was not affected by the cancellation of the IDA.

[7] FirstRand based its contention on the following provisions of the IDA and the Security Cession. Clause 26 of the IDA provides:

'26. CESSION IN SECURITATEM DEBITI

[1] *Walker's Fruit Farms Ltd v Sumner* 1930 TPD 394 at 401, as Greenberg J explains:
'No doubt it is correct that, where there is repudiation and where the other party elects to treat the contract as at an end, the latter cannot thereafter enforce the contract. But it appears to me that this only applies to the executory portion of the contract; but where a certain right has accrued to the one party before the election, such right is not affected after the election. He treats the contract as at an end as from the date when he makes his election; up to that date the rights have come into existence and can be enforced.'
See also *Crest Enterprises v Rycklof Beleggings (Edms) Bpk* 1972 (2) SA 863 (A) at 870; *Nash v Golden Dumps* 1985 (3) SA 1 (A) at 22.

the seller shall sign a cession agreement, in terms of which the seller cedes: -

26.1.1 all its right, title and interest in and to its existing and future claims and book debts that do not form the subject of the sale as contemplated herein, and

26.1.2 with effect from termination (for whatever reason) of this agreement, all its right, title and interest in and to its existing and future claims and book debts that do form the subject of sale as contemplated here to Nedbank in *securitatem debiti* for all its obligations it may have or incur towards Nedbank. The parties confirm that such rights are automatically ceded without further notice.'

Clause 1.5 of the Security Cession provides:

'. . . but excluding, for the duration of the Invoice Discounting agreement entered/ to be entered between Nedbank and me/us, debts sold to Nedbank on the terms of and pursuant to the said Agreement, and subject to clause 29 hereof.'

Clause 29 of the Security Cession provides:

'In the event of the termination of the Agreement referred to in clause 1.5 above, this cession and pledge shall be effective in respect of all debts, claims or amounts whatsoever owing or becoming due to me/us.'

[8] FirstRand's application to the Gauteng Division of the High Court, Pretoria (the high court) in terms of which it sought, in the main, an order that Nedbank pay to the liquidators of FT the proceeds of FT's current and future book debts in respect of which Nedbank had acquired full ownership, was dismissed. The high court nonetheless granted FirstRand limited relief, in respect of book debts that were not in fact part of the FirstRand's claim.

[9] In dismissing FirstRand's main relief for payment of the book debts that FT delivered to Nedbank before 29 July 2013, the high court found that the language of clause 26.1 of the IDA and clause 29 of the Security Cession, was consistent with Nedbank's interpretation and irreconcilable with FirstRand's.

[10] This appeal, with leave of the high court, is against the dismissal of FirstRand's main relief. Nedbank cross-appeals against the limited relief that the High court granted to FirstRand. Pertinently, the issue in this appeal concerns the fate of the R93 million worth of book debts that FT already sold and delivered to Nedbank and for which it received payment from Nedbank prior to termination of the IDA.

[11] FirstRand persists in contending that clause 26.1 of the IDA and clause 29 of the Security Cession offer a justification for a departure from the *Walker's Fruit Farm* rule. It contends that these provisions had the following effect on the cancellation of the IDA:

(a) All FT's claims, including the aforesaid R93 million worth of book debts sold and delivered to Nedbank, were automatically rendered subject to the Security Cession and their *dominium* automatically reverted to FT.

(b) Whereas Nedbank had previously acquired ownership of the book debts that it had purchased from FT, it now merely held them in pledge under the Security Cession.

(c) Effectively, Nedbank not only lost its ownership of the book debts it had purchased from FT, but it was left with a mere Security Cession over them that ranks after the FirstRand Cession.

[12] The principles governing the interpretation of contracts are now firmly established. Contracts must be construed by having regard to their language, context and purpose in what is a unitary exercise. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the contract.[2] The process is objective and is aimed at what the parties must be taken to have intended, having regard to the words they used in the light of the document read as a whole and of the factual matrix within which they concluded the contract.[3]

[13] In accordance with these principles, it is necessary to consider the language, context and purpose of the clauses under consideration. A striking feature of the context in which the two clauses must be interpreted is that the IDA provided for the transfer of full ownership of FT's book debts to Nedbank, resulting in FT not retaining any rights in such book debts. This is made clear, as the high court correctly found, by the following provisions of the IDA:

(a) Clause 3.1 states that FT would sell its book debts to Nedbank and clause 6 determines the purchase price Nedbank would pay for them.

(b) Clause 3.2 says that FT's delivery of the book debts to Nedbank "shall constitute out and out cession thereof and Nedbank shall become the absolute holder of such debts." It adds that until FT repurchases a debt from Nedbank, it shall have no rights thereto, whatsoever.

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[2] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA); [2012] ZASCA 13 at para 18; *Picardi Hotels Ltd v Thekwini Properties* 2009 (1) SA 493 (SCA) para 5.

[3] *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 (SCA) para 12.

(c) Clause 5.1 says FT cedes to Nedbank 'all its right, title and interest in and to' its existing debts.

(d) Clause 5.2 says that FT cedes 'all its right, title and interest in and to' its future book debts to Nedbank for value received.

(e) Clause 5.7 expressly states these cessions 'will be out and out cessions' and not 'cessions in *securitatem debiti'.*

(f) In clause 9.1 the parties agree 'that ownership of the Existing Debts will pass to Nedbank on the Effective Date, notwithstanding that the Purchase has been paid or has not been paid in full by Nedbank to the Seller'.

(g) In clause 9.2 the parties agree that 'ownership of the New Debts will pass to Nedbank on delivery thereof, notwithstanding that the Purchase Price has not been paid in full by Nedbank to the Seller'.

(h) Clause 12 provides:

'SCHEDULE OF DEBTS, DELIVERY OF INVOICES AND MONTHLY CERTIFICATE

12.1 The Seller will on the Effective Date deliver to Nedbank a schedule in such form as Nedbank may specify and (by way of electronic download if required by Nedbank) notifying Nedbank of the existence of all of the Existing Debts and thereafter from time to time (but not more than once every 7 days or at such other interval as Nedbank may agree), the Seller will deliver further schedule in respect of the New Debts.

12.2 With each schedule, the Seller will deliver to Nedbank the original or a copy of the Invoice referred to therein or computerised listing in a form acceptable to Nedbank or a combination thereof and proof of delivery and any other documents which Nedbank in its absolute discretion may require together with such proof as Nedbank may require of the performance of each of the

contracts giving rise to the Debts, together with the terms of each such contract'. (My emphasis.)

[14] The high court accordingly found that it was apparent from the clauses referred to, that the parties sought to make it 'abundantly clear' that cessions of book debts to Nedbank in terms of the IDA, were out and out cessions. Professor Christie describes the effect of such a cession as follows: -

'The effect of an absolute cession will be examined first. It divests the cedent of all the rights ceded, the extent and nature of these rights being a matter of interpretation of the contract of cession, and vests them in a cessionary. . . .'[4]

[15] FirstRand particularly relies on clause 26.1.2 of the IDA for its contention that book debts that had been sold and delivered to Nedbank under the IDA, became subject to the Security Cession. The high court correctly found that this interpretation is incompatible with the language of the clause. It only requires FT to cede to Nedbank 'all its right, title and interest in and to its existing and future claim'.

[16] This is so because on cancellation of the IDA, FT no longer had any right, title or interest in its book debts that had been delivered to Nedbank. Its right, title and interest in these book debts were ceded to and thereafter vested in Nedbank. FT therefore could not cede rights to Nedbank under the Security Cession that no longer vested in it.

[4] G B Bradfield *Christie's The Law of Contract in South Africa* 7 ed at 543.

[17] FirstRand's interpretation of clause 26.1.2 is thus incompatible with its language because its operation is confined to claims of which the right, title and interest still vest in FT. Clause 26.1.2 cannot apply to FT's book debts already sold and transferred to Nedbank. Although clause 26.1.2 deals with claims and book debts that do form the subject of sale under the IDA, they are specifically qualified as claims and book debts that vest in FT. Thus clause 26.1.2 applied only to FT's existing and future book debts that had not yet been sold and delivered to Nedbank at the time when the IDA was cancelled. These of necessity must fall under the Security Cession after the IDA has been cancelled and no longer existed.

[18] FirstRand's interpretation of the Security Cession suffers from the same defect. It provides that when the IDA is cancelled, the Security Cession is extended to all claims of whatever nature 'owing or becoming due to me / us', that is, to FT. Thus, it is quite clear that this could not have included FT's book debts that had already been delivered to Nedbank. They were, as the high court correctly found, owing and due to Nedbank.

[19] The purpose of clause 26.1 of the IDA and clauses 1.5 and 29 of the Security Cession is clear and sensible. They recognise the transfer of FT's book debts under the IDA. These book debts are accordingly excluded from the Security Cession. Cancellation of the IDA clearly had only a prospective effect. It did not affect past sales concluded under the IDA. They remained undisturbed under the *Walkers' Fruit Farm* rule.

[20] FirstRand's interpretation leads, as Nedbank submitted, to quite bizarre results. It would mean that despite the fact that Nedbank cancelled the IDA as a result FT's fraudulent conduct, Nedbank would be stripped of the book debts that admittedly then vested in it, without requiring FT to repay the purchase price it had received for them. Such absurd outcome could clearly not have been intended. The high court correctly found that Nedbank's interpretation 'makes good business sense and that it must prevail over FirstRand's interpretation that is unbusinesslike to the point of being absurd'.

[21] Clause 17.5 of the IDA also supports Nedbank's interpretation. It provides that upon the occurrence of certain listed events, including when Nedbank gives notice to terminate the agreement, Nedbank would be entitled to demand that FT repurchase all or any of the debts at a repurchase price. Clause 18.6 of the IDA further fortifies Nedbank's interpretation. It provides that in the event of cancellation, FT's obligations will continue in respect of each debt purchased by Nedbank prior to such cancellation and remain of full force and effect until all amounts due to Nedbank have been paid in full. These clauses are clearly incompatible with FirstRand's interpretation that on cancellation of the IDA, all book debts automatically revert to FT, subject to a cession in *securitatem debiti*.

[22] In attempt to avoid this difficulty, FT argued that clause 17.5 only dealt with termination and not cancellation. In my view clause 17.5 does not exclude termination as result of cancellation. In any event, clause 18.6.5 puts this aspect beyond any doubt

by expressly providing for the effect of cancellation. In light of what I have stated above, this appeal must fail.

[23] I now turn to consider Nedbank's cross-appeal. Whilst the high court was correct in its interpretation and findings regarding the IDA and the Security Cession, it is apparent that the learned Judge mistakenly thought that Nedbank had laid claim to FT's book debts beyond the R93 million worth of book debts.

[24] It is however common cause that FirstRand's claim was confined to the book debts which FT had delivered to Nedbank in terms of the out and out cession. FirstRand never alleged that Nedbank laid claim to any other book debts and did not seek to defend the judgment of the high court in respect of its finding in this regard.

[25] As the high court correctly concluded that FirstRand's claim to the R93 million worth of book debts which FT had delivered to Nedbank before 29 July 2013, should fail, it ought to have dismissed FirstRand's application with an appropriate order as to costs, as Nedbank was entirely successful in its defence.

[26] I accordingly make the following order:

1 The appeal is dismissed with costs, including the costs of two counsel.

2 The cross-appeal is upheld with costs, including the costs of two counsel.

3 The order of the high court is set aside and replaced with the following order:

'The application is dismissed with costs, including the costs of two counsel.'

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B H Mbha

Judge of Appeal

Rogers AJA (Cachalia JA concurring):

[27] I agree with my colleague Mbha JA's judgment. I wish to add a few words of my own on the significance of clause 17.5.4 of the IDA in the interpretation of clause 26.1.2 thereof. Clause 17.5.4 is one of several listed circumstances in which Nedbank may require FT to repurchase debts sold to and vesting in Nedbank. That circumstances is 'the giving of notice by Nedbank to [FT] to terminate this agreement'. Clause 17.5.4 shows unambiguously that, upon termination of the IDA, the re-acquisition by FT of the sold book debts was not an automatic consequence. Nedbank had an election whether to require FT to repurchase such debts. Furthermore, if Nedbank elected to require FT to repurchase the debts, re-cession (and thus the re-vesting of title to the debts in FT) would only take place upon Nedbank's receipt of the 'Repurchase Price' as defined. In that regard, clause 17.6 provides:

'Nedbank undertakes, upon receipt of the Purchase Price, to cede such Debt [ie the repurchased debt] to [FT] and [FT] undertakes to accept such cession.'

This is precisely what one would expect commercially – Nedbank would not part with purchased book debts for which it had paid without getting the purchase price back from FT.'

[28] If upon termination there is the election set out in clause 17.5.4, there can be no question of debts automatically re-vesting in FT pursuant to clause 26.1.2. As my colleague has pointed out, FNB's counsel sought to escape the implications of clause 17.5.4 by arguing that that clause only dealt with termination on notice, meaning – counsel submitted – termination on three months' notice in accordance with clause 25.3. There was a difference, he argued, between termination on notice and cancellation for breach.

[29] Whatever merit this semantic distinction may have in other contexts, I do not regard it as sound in relation to clause 17.5.4. The distinction urged by counsel would give rise to an unreasonable and unbusinesslike result. Nedbank's right to require FT to repurchase sold debts is clearly a valuable mechanism in its arsenal of remedies. Why would this valuable remedy be available to FT when it terminates the IDA on three months' notice but not when it terminates the agreement on account of FT's breach? One would regard the latter as an a fortiori case for the conferral of the remedy. Indeed, one of the circumstances in which Nedbank may require FT to repurchase sold debts is if FT is in default or commits any breach of the IDA (see clause 17.5.1). This is perfectly understandable. The parties could not have intended that Nedbank would lose this right if it took the further step of cancelling the agreement on account of the default or breach in question.

[30] It was also pointed out to counsel that the word 'termination' is the very word used in clause 26.1.2. He was then driven to argue that there was a distinction between

'termination (for whatsoever reason)' in terms of clause 26.1.2 and termination on notice in terms of clause 17.5.4, the former – but not the latter – including cancellation. Again, I do not regard the distinction as sound in the present case. When a party cancels a contract due to breach, it would be perfectly natural to describe the result as a termination of the contract. Furthermore, a decision to cancel which is not notified to the other party has no effect, in other words notice of termination is a necessary element of cancellation (*Swart v Vosloo* 1965 (1) SA 100 (A) at 105G).

[31] However, even if the distinction for which counsel argued were valid, it would not remove the obstacle which clause 17.5 poses to FirstRand's interpretation of clause 26.1.2. The interpretation of the latter clause must apply uniformly to all forms of termination. The terminations contemplated in clause 26.1.2 are terminations for whatsoever reason. Termination by giving three months' notice would be one such form of termination. So would termination of the IDA by FT in accordance with the IDA's provisions (see clause 17.5.5). The interpretation of clause 26.1.2 has to be capable of sensible operation inter alia in circumstances where the IDA has been terminated by Nedbank or FT as contemplated in clauses 17.5.4 and 17.5.5. If – as must be the case – there is no automatic re-vesting of sold book debts where the IDA is so terminated, clause 26.1.2 cannot be construed as providing for automatic re-vesting in any circumstances.

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O L Rogers

Acting Judge of Appeal

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