THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case number: 299/2008

In the matter between:

JACOBUS DAWID GROBLER **APPELLANT**

and

CECILIA JOHANNA OOSTHUIZEN **RESPONDENT**

Neutral citation: *Grobler v Oosthuizen* (299/2008) [2009] ZASCA 51 (26 May 2009)

CORAM: **BRAND, CLOETE, MLAMBO JJA, HURT *et* LEACH AJJA**

HEARD: **12 MAY 2009**

DELIVERED: **26 MAY 2009**

SUMMARY: Cession of policy in compliance with terms of sale which proved to be null and void – policy paid out to heir of cessionary – claim by cedent against heir for proceeds of policy – plea of prescription by heir premised on postulate that cedent's claim for re-cession of rights under policy which arose more than three years prior to summons – cession construed as cession *in securitatem debiti* and not outright cession – held that re-cession consequently not required – held further that in the premises plea of prescription could not succeed.

ORDER

On appeal from: High Court, Kimberley (Majiedt, Olivier JJ and Mokgohloa AJ, sitting as court of appeal against a judgment of Williams J.)

1. The appeal is upheld with costs, including the costs occasioned by the employment of two counsel.
2. The order of the court a quo is set aside and replaced by an order in the following terms:
   'The appeal is dismissed with costs.'

JUDGMENT

BRAND JA (Cloete, Mlambo JJA, Hurt *et* Leach AJJA concurring)

[1] The appellant, Mr Grobler ('Grobler'), instituted action against the respondent, Mrs Oosthuizen ('Oosthuizen'), and other defendants in the High Court, Kimberley. His particulars of claim incorporated various causes of action supporting a number of claims against the different defendants. Of these only the first claim against Oosthuizen continues to be of relevance on appeal. Against this claim Oosthuizen filed a plea and a counterclaim. She also raised a special plea of prescription. At the commencement of proceedings, the parties agreed and the trial court (Williams J) ordered that the special plea of prescription should be determined separately and prior to all other issues. At the end of the preliminary proceedings that followed, Williams J dismissed the plea of prescription with costs. Oosthuizen's appeal to the full court against that judgment was, however, successful. In terms of the judgment of the full court (Olivier J, with Majiedt J and Mokgohloa AJ concurring) Oosthuizen's plea of prescription was therefore upheld with costs. Grobler's further appeal against the latter judgment is with the special leave of this court.

[2] In the main, the background facts were presented to the trial court by way of a stated case. Certain circumscribed areas of dispute were, however, reserved for the leading of oral evidence. But, as will appear from what follows, even the evidence presented in this way proved to be largely common cause.

[3] On 14 August 1991 Grobler entered into an agreement of sale with a company, Mothibi Crushers & Transport (Pty) Ltd. In terms of the agreement he purchased an immovable property situated at Mothibistat, in the erstwhile Republic of Bophuthatswana, from the company. In entering into the agreement Mothibi Crushers was represented by Oosthuizen's husband, Mr Gert Hendrik Oosthuizen, as its only shareholder and director, who has since passed away and to whom I shall henceforth refer as 'the deceased'.

[4] Payment of the purchase price was governed by the somewhat unusual provisions of clause 2 of the sale agreement, which read as follows:

'2. Die koopprys is die som van R300 000 tesame met rente teen 15% per jaar maandeliks gekapitaliseer vanaf 1 Julie 1991 tot datum van betaling, betaalbaar soos volg: op 30 Junie 2001, vir welke bedrag die koper 'n polis by 'n goedgekeurde versekeringsmaatskappy uitneem, welke polis 'n opbrengs van R1 200 000.00 op 30 Junie 2001 waarborg en welke polis deur die koper aan die verkoper gesedeer word.'

Freely translated from the Afrikaans language, the clause thus determined the purchase price at R300 000 together with interest at 15 per cent, capitalised monthly, from 1 July 1991 payable on 30 June 2001, for which amount the purchaser would acquire an insurance policy from an approved insurance company which guaranteed payment of R1,2m on 30 June 2001 and which policy the purchaser would then cede to the seller.

[5] In compliance with his obligations under clause 2, Grobler acquired not one but three policies from Sanlam Ltd, which cumulatively adhered to the stipulated requirements. By mutual agreement between the parties involved, these policies were, however, not ceded to Mothibi Crushers, but to the deceased in its stead. In point of fact, the cessions of the policies preceded the sale in that they had been signed by Grobler on 8 August 1991. In terms

of the sale agreement, Grobler was obliged to pay the premiums in terms of the policies. For all intents and purposes he did so regularly until November and December 1996 when he fell into arrears. These two premiums were then paid by the deceased, for which Grobler compensated him in January 1997.

[6] The deceased passed away on 27 January 1997. By that time the property had not yet been transferred to Grobler. Indeed, it was common cause between the parties at the trial that transfer could in fact never occur and that the agreement of sale was null and void from the start. The reason for this, broadly stated, was that according to the laws of the erstwhile Republic of Bophuthatswana, where the property was situated, it could only be alienated to Grobler, who was not a citizen of Bophuthatswana at the time, with ministerial consent, which consent had never been obtained. In the beginning, so Grobler testified, he was not aware that the agreement of sale was void. This only came to his notice after the deceased purported to cancel the agreement in December 1996 by reason of Grobler's failure to pay the premiums on the insurance policies.

[7] After the death of the deceased the executors in his estate made the policies paid up. Thereafter they ceded two of the policies to Oosthuizen as the only heir in the deceased's estate. She thereafter claimed the surrender value of the policies from Sanlam who duly paid her the sum of R741 677.24 on 16 September 1997. Grobler's claim under consideration is for payment of this amount, for which he issued summons on 9 June 2000. Against this background the substructure of Oosthuizen's plea of prescription can broadly be stated thus:

- The underlying basis for Grobler's claim as formulated in his pleadings, she said, is for re-cession of the policies which were ceded to the deceased in compliance with a deed of sale which proved to be null and void.
- From the perspective of the deceased his obligation or 'debt' – as contemplated in Chapter 3 of the Prescription Act 68 of 1969 – was therefore to re-cede the policies to Grobler.

• This debt, she said, 'became due' as envisaged by s 12 of the Act when the cessions occurred, because a claim for restoration of performance under a void agreement arises at the time when that performance is rendered.
• Seeing that the period of prescription provided for in s 11(d) of the Act is three years, she said, Grobler's claim became prescribed in August 1994 which was long before the death of the deceased in 1997.
• As a matter of law, so Oosthuizen's contentions concluded, a claim which has become prescribed against a deceased cannot be enforced by an enrichment claim against the heir, which is the ultimate basis of Grobler's claim.

[8] In this court counsel for Grobler conceded that if the cession of the policies were to be classified as a so-called 'out-and-out' or outright cession, Oosthuizen's plea of prescription would be unanswerable. As I see it, that concession was rightly and fairly made. In the event of an outright cession, Grobler would have lost all his rights under the policies against Sanlam by transferring those rights to the deceased. Nothing would remain vested in him. The only way in which he could again acquire those rights would be by way of re-cession of the policies. Because the cessions were effected in compliance with his obligations under an agreement which proved to be void, his claim for restoration in the form of re-cession would arise immediately, ie in August 1991. In consequence it would have been extinguished by prescription in August 1994 (see eg *Van Staden v Fourie* 1989 (3) SA 200 (A) at 214F-215B).

[9] As formulated in his pleadings, Grobler's claim indeed appeared to rest on a claim for re-cession of an out-and-out cession of the policies to the deceased. This was pointed out and relied upon by Oosthuizen's counsel as his opening argument on appeal. I do not believe, however, that that argument is available to Oosthuizen, at least not at this late stage. From the outset and as the matter followed its meandering way through two courts, Grobler's case had always been that the cession of the policies was not an out-and-out cession but a cession *in securitatem debiti* and that his claim was not founded on a re-cession of the policies. In the circumstances, Oosthuizen

could not be prejudiced in any conceivable way by Grobler's change of stance from his pleadings. That much was rightly conceded on Oosthuizen's behalf. In these circumstances, I believe, it is no longer open to Oosthuizen to revert to a literal interpretation of Grobler's pleadings on appeal (see eg *Shill v Milner* 1937 AD 101 at 105; *Stead v Conradie* 1995 (2) SA 111 (A) at 112A-H; *Fourway Haulage SA (Pty) Ltd v National Roads Agency Ltd* 2009 (2) SA 150 (SCA) para 14).

[10] As I have said, the nub of Grobler's answer to the prescription plea was that the cession of the policies was not an out-and-out cession but a cession *in securitatem debiti*. In accordance with this construction, the policies were ceded to the deceased as security for future payment of the purchase price. The opposing contention by Oosthuizen was that the cession of the policies in itself constituted payment of the purchase price and should therefore be construed as an out-and-out cession for value received. The cession documents themselves support the latter construction, in that each describes itself as an 'out-and-out cession for value received'. That in itself is, however, not decisive. As was held by Lord de Villiers CJ in *National Bank of South Africa Ltd v Cohen's Trustee* 1911 AD 235 at 246, in response to a similar reliance on the wording of a cession document, form should not override substance if on a proper analysis of the transaction as a whole the cession was made with the purpose of securing a debt owed by the cedent to the cessionary (see also *Bank of Lisbon & South Africa Ltd v The Master* 1987 (1) SA 276 (A) at 294D-E). I respectfully subscribe to this practical approach. As the evidence in this matter shows, the reference to an 'out-and-out cession' did not even appear in the documents when they were signed by Grobler.

[11] The true character of the cession therefore depends on the intention of the parties. In determining the intention of the parties in this case, the deed of sale appears to be the appropriate point of departure. Unfortunately the deed of sale is itself inconsistent in its terms. On the one hand there is clause 5 which provides that the purchaser would be entitled to possession of the property sold 'at the time of the out-and-out cession of the policy in terms of clause 2'. Further support for the outright cession construction is to be found

in an addendum which was signed on the same day as the deed of sale, that is 14 August 1991. It provides that Grobler would be liable for any tax that may become due on the proceeds of the policy 'which had been ceded to the seller in discharge of the purchase price'.

[12] To the contrary effect is clause 23. In terms of this clause Grobler undertook to deliver the policy documents to the deceased 'as security for the outstanding balance of the purchase price'. Closely linked to this clause is clause 21 which provides for the registration of a covering bond over the property sold in favour of the deceased 'as security for payment of the purchase price, together with interest, as set out in clause 2 above'. With reference to this covering bond, clause 24 provides that, if upon the death of Grobler, the proceeds of the policy would prove to be less than the outstanding balance of the purchase price, the deceased would be entitled to rely on the covering bond for the residue. It goes without saying that the last mentioned clauses support the construction of a cession *in securitatem debiti*: If the purchase price had been discharged by an out-and-out cession of the policies, future payment of the purchase price would not require to be secured in any form. Likewise there would be no possibility of any residue of the purchase price upon the death of Grobler.

[13] In the light of this ambiguity the parties agreed to present oral evidence on the surrounding or background circumstances to the transaction. Whether it is the one or the other, incidentally, no longer appears to make any difference (see eg *Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd* 2008 (6) SA 654 (SCA) para 7; *KPMG Chartered Accountants v Securefin* [2009] ZASCA 7 (13 March 2009) para 39). The most important point of the evidence thus presented, as I see it, was the testimony of Grobler, which turned out to be undisputed, that both he and the deceased anticipated the proceeds of the policy to exceed the purchase price of R1,2m on the payment date of 30 June 2001 and that he, Grobler, would then be entitled to that excess.

[14] Direct support for the security construction is also to be found in the evidence about the subsequent conduct of the parties which was rightly admitted (see eg *Coopers & Lybrandt v Bryant* 1995 (3) SA 761 (A) at 768D), and particularly in the correspondence between the attorneys acting for the parties at the time. First, there was the letter by Grobler's attorneys of 25 September 1991, seeking an undertaking from the deceased that he would not put up the insurance policies ceded to him as security for his own debts. Shortly thereafter this undertaking was then given by the deceased's attorneys on his behalf. Then there was the letter by the deceased's attorneys of 29 October 1991 in which they required the original of the policies 'which had been ceded to our client as security'. Apparently the original policies were subsequently delivered directly to the deceased, because on 11 November 1991, his own attorneys sought written confirmation from him that he held these policies 'as security for future payment of the purchase price'. In the light of all this I am satisfied that the factual finding by both the trial court and the full court that the policies were ceded to the deceased *in securitatem debiti,* should be upheld.

[15] Evaluation of the conclusions arrived at by both the trial court and the full court in applying the law to these facts, requires some reference to the opposing theories in our law in regard to cessions *in securitatem debiti.* The principle that one debt (the principal debt) can be employed as security for due performance of another debt (the secured debt), is not in doubt. The opposing theories relate to the doctrinal basis for this principle. Of these theories there are essentially two (which are discussed in more detail, eg in W A Joubert (founding editor) *The Law of South Africa* 2ed Vol 2 Part 2 sv 'Cession' (P M Nienaber) para 53; De Wet & Yeats *Kontraktereg & Handelsreg* 5ed (by De Wet & Van Wyk) 415 et seq; Van der Merwe et al *Contract General Principles* 3ed para 12.5.3; Susan Scott *The Law of Cession* 2ed para 12.2; Van der Merwe, *Sakereg* 2ed 673 et seq). The one theory is inspired by the parallel with a pledge of a corporeal asset and is thus loosely referred to as 'the pledge theory'. In accordance with this theory, the effect of the cession *in securitatem debiti* is that the principal debt is 'pledged' to the cessionary while the cedent retains what has variously been described as the

'bare dominium' or a 'reversionary interest' in the claim against the principal debtor (see eg *Land- en Landboubank van Suid-Afrika v Die Meester* 1991 (2) SA 761 (A) 771C-G; *Development Bank of Southern Africa Ltd v Van Rensburg* 2002 (5) SA 425 (SCA) para 50).

[16] Critics of the pledge theory have difficulty with the concept of a real right of pledge over the personal rights arising from the principal debt (see eg De Wet & Yeats *op cit* 416; Van der Merwe *Sakereg* 683). Concomitantly they also have difficulty with the description of the interest retained by the cedent in the personal right against the debtor as that of 'ownership' or 'dominium'. This difficulty is well formulated in the following dictum by Broome JP in *Moola v Estate Moola* 1957 (2) SA 463 (N) at 464B-D:

'The word "dominium" is therefore out of place, and it does not help much to describe plaintiff as the "owner" of the ceded rights. Ownership of a right of action would seem to imply the right to sue, and if the right to sue has passed to the cessionary it is difficult to imagine what can remain with the cedent. The truth probably is that the cedent by way of security retains only his "reversionary right", that is to say his right to enforce the ceded right of action after the [secured debt] . . . has been discharged.'

(See also eg *Barclays Bank (D, C & O) v Riverside Dried Fruit (Pty) Ltd* 1949 (1) SA 937 (C) at 946.)

[17] In the light of these problems associated with the pledge theory, an alternative theory had been preferred by the majority of academic authors and even in some earlier decisions of this court (see eg *Lief, NO v Dettmann* 1964 (2) SA 252 (A) at 271H; *Trust Bank of Africa Ltd v Standard Bank of South Africa Ltd* 1968 (3) SA 166 (A) at 173G-H and the writings of academic authors previously cited). According to this theory a cession *in securitatem debiti* is in effect an outright or out-and-out cession on which an undertaking or *pactum fiduciae* is superimposed that the cessionary will re-cede the principal debt to the cedent on satisfaction of the secured debt. In consequence, the ceded right in all its aspects is vested in the cessionary. After the cession *in securitatem debiti* the cedent has no direct interest in the principal debt and is left only with a personal right against the cessionary, by virtue of the *pactum fiduciae,* to claim re-cession after the secured debt has

been discharged. It is readily apparent that if the *pactum fiduciae* theory were to be applied to the facts of this case, the plea of prescription must be upheld, because Grobler's case would then depend on a claim for re-cession which arose in August 1991. But despite the doctrinal difficulties arising from the pledge theory, this court has in its latest series of decisions – primarily for pragmatic reasons – accepted that theory in preference to the outright cession/ *pactum fiduciae* construction (see eg *Leyds NO v Noord-Westelike Koöperatiewe Landboumaatskappy Bpk* 1985 (2) SA 769 (A) at 780E-G; *Bank of Lisbon and South Africa Ltd v The Master (supra)* at 291H-294H; *Incledon (Welkom) (Pty) Ltd v Qwa Qwa Development Corporation Ltd* 1990 (4) SA 798 (A) at 804F-J; *Millman NO v Twiggs* 1995 (3) SA 674 (A) at 676H; *Development Bank of Southern Africa Ltd v Van Rensburg (supra)* para 50). In the light of these decisions the doctrinal debate must, in my view, be regarded as settled in favour of the pledge theory.

[18] In the trial court Williams J therefore quite rightly accepted that she was bound to apply the pledge theory. Based on this theory her reasoning essentially went as follows: after the cession *in securitatem debiti*, dominium or ownership of the principal debt remained with Grobler; what he therefore essentially sought to enforce was the *rei vindicatio*; and in terms of s 1 of the Prescription Act, the prescription period for the *rei vindicatio* is 30 years. In consequence, the learned judge concluded, Grobler's claim did not become prescribed. I find this line of reasoning unsustainable in all three of its constituent parts. First, for the reasons given, in eg *Moola,* the concept of dominium or ownership in its literal sense is ill-suited to describe the cedent's remaining interest. But the description of that interest as 'ownership' becomes virtually nonsensical in a case such as this where the principal debt had been discharged before action was instituted. When Sanlam paid out the policies, the principal debt was extinguished. Grobler would then be the owner of nothing and that could hardly constitute the underlying basis for his claim. Closely related to my first problem is the second, namely that whatever remedies associated with ownership could be said to be retained by the cedent, it does not appear to include the *rei vindicatio* which only pertains to corporeals (see eg Van der Merwe *Sakereg* 20-23). Finally, the prescription

period of 30 years in s 1 of the Prescription Act relates to acquisitive prescription. For extinctive prescription, the period can, in the present context, only be the three years provided for in s 11(d) of the Act (see eg *Evins v Shield Insurance Co Ltd* 1979 (3) SA 1136 (W) at 1141F-G; *Barnett v Minister of Land Affairs* 2007 (6) SA 313 (SCA) para 19).

[19] The full court therefore quite rightly, in my view, refused to follow the reasoning of the trial court. It, in turn, focused on the designation of the interest retained by the cedent after the cession *in securitatem debiti* as a 'reversionary interest'. With regard to the meaning of this concept it referred to the following statement in *Incledon (Welkom) (Pty) Ltd v Qwa Qwa Development Corporation Ltd (supra)* at 804I-J:

'When the company executed the [cession *in securitatem debiti*] it thus retained the ownership of its rights against the [principal debtor] . . . . That ownership, as appears from the authorities, consists in a reversionary interest which entitled the owner (cedent) to claim the re-cession of the rights upon payment of the indebtedness.'

(My emphasis.)

In the light of this statement the full court understood Grobler's reversionary interest to lie in a claim for re-cession of the policies. Departing from this premise, the court held that, because of the invalidity of the sale agreement, Grobler's claim for re-cession must have arisen at the time when the policies were ceded to the deceased. Thus construed, the court further held, the debt relied upon by Grobler became prescribed three years later in August 1994.

[20] The full court's understanding of the concept 'reversionary interest' is undoubtedly supported by the statement of this court in *Incledon (Welkom)* on which it relied. The question is, however, whether that statement constitutes good authority. With respect, I think not. First, I believe it would simply amount to a recapitulation of the outright cession-*cum-pactum fiduciae*-theory (see *Lawsa op cit* para 53 note 14). Secondly, it is, in my view, in direct conflict with those decisions which held that a claim ceded *in securitatem debiti* automatically reverts to the cedent once the secured debt is extinguished and that in such event a re-cession by the cessionary is not required (see eg *National Bank of South Africa Ltd v Cohen's Trustee (supra)* at 246-247; *Bank*

of Lisbon and South Africa Ltd v The Master (supra) at 294E-F). Susan Scott (*op cit* para 12.2.1.3) explains the reasoning behind these decisions as follows, with reference to the analogy of a pledge:

'The accessory nature of pledge has the effect that on the discharge of the principal debt, the right of pledge is automatically extinguished. In the case of a pledge of corporeals the pledgee is, after the extinction of the right of pledge, still in possession of the pledged article, which he must then hand over to the pledgor. In the case of a pledge of incorporeals where only the power to realise the right is transferred, this power reverts to the pledgor automatically rendering it unnecessary for the pledgee to re-cede it to him.'

[21] The full court did refer to the decisions in *National Bank* and *Bank of Lisbon.* It concluded, however, that they only apply where the secured debt is extinguished by payment and not to a case such as this where the secured debt proved to be non-existent from the start. I cannot agree with this distinction. As appears from Susan Scott's explanation, the reason why a re-cession was found to be unnecessary in those cases, was based on the accessory nature of a cession *in securitatem debiti*. Without a principal debt the cession cannot stand and it matters not whether the principal debt is extinguished or never existed at all. This point of view, I believe, also finds support in the following dictum by Watermeyer J in *Standard Bank of SA v Neethling NO* 1958 (2) SA 25 (C) at 30A-D:

'[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] As to the real meaning of the cedent's 'reversionary interest', I can do no better than to refer to the following explanation by Nienaber JA in *Development Bank of Southern Africa Ltd v Van Rensburg (supra)* para 50 with which I respectfully agree:

'This reversionary interest, properly understood, refers to the cedent's interest in the debtor's performance (ie satisfaction of the principal debt by the debtor) rather than to his interest in the cessionary's performance (ie re-cession of the principal debt on satisfaction of the secured debt - which is [*sc* would be] a right *ex contractu* against the cessionary).'

(See also eg *Moola v Estate Moola (supra)* at 464B-D; P E Streicher 'Toekomstige Regte, Boekskulde en Insolvensie' in Sessie *in securitatem debiti – Quo Vadis?* (Susan Scott ed) 136 at 145-146; Van der Merwe et al *Contract op cit* 499; *Lawsa op cit* paras 53 (note 14) 55 and 56 (note 17).)

[23] I therefore conclude that, in accordance with the principles emanating from the pledge theory, Grobler never required a re-cession from the deceased. Because the principal debt arising from the sale proved to be invalid, the rights under the policy automatically reverted to him. There was therefore no claim for re-cession that could become prescribed. This leads one to Oosthuizen's alternative argument which was based on the postulate that even though this court – in the series of decisions I have referred to – opted for the pledge theory it did not thereby in effect forbid the parties to mould their cession *in securitatem debiti* in the alternative form of an out-and-out cession coupled with a *pactum fiduciae*. The validity of this postulate appears to be accepted by some authorities (see eg *Alexander v Standard Merchant Bank Ltd* 1978 (4) SA 730 (W) 739-740; *African Consolidated Agencies (Pty) Ltd v Siemens Nixdorf Information Systems (Pty) Ltd* 1992 (2) SA 739 (C) at 744F-I; Susan Scott *op cit* para 12.2.2) while it is doubted by others (see eg Farlam & Hathaway *Contract Cases Materials and Commentary* 3ed (by Lubbe & Murray) 700; *Lawsa op cit* para 53 footnote 18 and the authorities there cited).

[24] I find it unnecessary to decide this debate one way or the other. Suffice it to say, in my view, that at best for Oosthuizen, the position must be this:

even if the option of an alternative form of cession *in securitatem debiti* were held to be open to the parties, their intention to do so would have to be clearly expressed. Absent such clear expression of intention, the pledge construction must prevail (see *Lawsa op cit* para 53), which means that the default position will be that the pledge theory will apply. I say this because the contrary view – contended for by Oosthuizen – which would render the nature of every cession *in securitatem debiti* dependent on the court's determination of the intention of the parties on the facts of that particular case, will in my view give rise to an unacceptable level of commercial uncertainty. The reality is of course that in the vast majority of cases the parties to a cession *in securitatem debiti* would not have applied their minds one way or the other to this rather esoteric aspect of their transaction, which in most cases will make little difference to the terms of their contractual relationship. On the facts of this case, I can find no clear indication that Grobler and the deceased intended to mould their cession *in securitatem debiti* in any particular form. In the premises the pledge construction must, in my view, carry the day.

[25] The final alternative argument raised by Oosthuizen was that if the claim under the policy automatically reverted to Grobler, he can still institute that claim against Sanlam who will in turn be able to recover its payment to her by means of an enrichment claim. As I see it, this argument has very little to do with Oosthuizen's defence of prescription which relied on the hypothesis that a re-cession was essential to Grobler's claim. But, in any event, I find it untenable. When Sanlam made payment to Oosthuizen it was obviously unaware that the claims under the policies had reverted to Grobler. In the circumstances I find the conclusive answer to the argument under consideration in the following succinct statement by P M Nienaber in *Lawsa (op cit* para 54):

'Once the secured debt has been repaid by the cedent to the cessionary the cession *in securitatem debiti* has fulfilled its primary function [of securing the secured debt] and the right [as creditor in terms of the principal debt] reverts to the cedent. The erstwhile cessionary is no longer the true creditor, but if the debtor who has been informed of the cession *in securitatem debiti* but not of its termination, pays him or her, the debtor will enjoy immunity against any further claim by the cedent.'

In support of this statement the learned author then refers (in note 9), by way of analogy, to the trite principle of the law of cession that a debtor who renders performance to the original creditor (the cedent) in ignorance of the cession, is thereby absolved from liability. Suffice it to say that I too find the analogy irresistible (see also P E Streicher *op cit* 149).

[26] One's instinctive reaction is that if the claim to the proceeds of the policies that Grobler rightfully had against Sanlam had been discharged by the latter through payment to Oosthuizen, Grobler must have a claim against her. Any conclusion to the contrary would be too inequitable to contemplate. But what would the conceptual basis for such a claim be? I think the simple answer is this: once the principal debt had automatically reverted to the cedent – either because the secured debt never existed or because it had been discharged – collection of the principal debt by the erstwhile cessionary must be for the account of the erstwhile cedent for the recovery of which the latter then has a claim against the former (see eg *Bank of Lisbon and South Africa Ltd v The Master (supra)* 294C-D; *Lawsa op cit* para 53 note 14). This being so, Grobler's claim against Oosthuizen arose when she received payment from Sanlam on 16 September 1997. That took place less than three years before summons was issued on 9 June 2000. In consequence, the trial court was right in finding – albeit for different reasons – that Oosthuizen's plea of prescription could not succeed.

[27] For these reasons:

1. The appeal is upheld with costs, including the costs occasioned by the employment of two counsel.
2. The order of the court a quo is set aside and replaced with an order in the following terms:

'The appeal is dismissed with costs.'

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F D J BRAND
JUDGE OF APPEAL

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