THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 281/2017

In the matter between:

LOUIS PASTEUR HOSPITAL HOLDINGS (PTY) LTD **APPELLANT**

and

BONITAS MEDICAL FUND **RESPONDENT**

Neutral Citation: *Louis Pasteur Hospital Holdings (Pty) Ltd v Bonitas Medical Fund* (281/2017) [2018] ZASCA 82 (31 May 2018).

Coram: Navsa, Seriti and Saldulker JJA and Makgoka and Schippers AJJA

Heard: 2 May 2018

Delivered: 31 May 2018

Summary: Cession – whether *in securitatem debiti* or out-and-out cession – in circumstances of case punitive costs order justified.

ORDER

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

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

JUDGMENT

Navsa and Saldulker JJA (Seriti JA and Makgoka and Schippers AJJA concurring):

[1] The right to the proceeds of two Sanlam investment policies, paid to the appellant upon maturity, is at the centre of this appeal. The appeal is directed against a judgment of the Gauteng Division of the High Court, Pretoria, in terms of which the appellant, Louis Pasteur Hospital Holdings (Pty) Ltd (LPH), which conducts business as a health care provider, was ordered to pay the respondent, Bonitas Medical Fund (Bonitas), a medical aid scheme registered in terms of the Medical Schemes Act 131 of 1998, the sum of R44 245 360 (the ultimate proceeds of the policies) with interest thereon at the rate of 15.5 per cent per annum calculated from 29 October 2008 to date of payment, but limited to no more than R44 245 360. The appeal is before us with the leave of this court. The background is set out hereafter.

[2] During 1994 Louis Pasteur Medical Investments (Pty) Ltd (LPMI) and Bonitas embarked on a joint venture to establish a hospital through a then dormant company, Maraba Hospital and Medical Centre (Pty) Ltd (Maraba). In relation to the litigation culminating in the present appeal two documents are of importance, namely, a shareholders' agreement and a funding proposal. These documents will, in due course, be considered alongside the other evidence tendered in the court below.

[3] The shareholders' agreement concluded during October 1994 records that Maraba was formed with the intention of operating a hospital. Maraba ultimately mutated into LPH. It was envisaged that the hospital would operate as a private hospital to be known as the Louis Pasteur Medical Institute, conducting business at Louis Pasteur Medical Centre, on the corner of Schoeman and Prinsloo Streets, Pretoria. Clause 2.4 of the shareholders' agreement notes that 74 per cent of the shares in the company would be held by LPMI and 26 per cent by Bonitas. LPMI is the holding company of LPH. Consequently, LPMI was required to subscribe for a total of 444 shares in LPH in cash, at par, which was one Rand. Bonitas in turn was required to subscribe for 156 shares at par plus a premium of R12 819.51 per share.

[4] Thus, clause 6.1 of the shareholders' agreement, under the heading 'Financing', provides that Bonitas will, when it subscribes for shares, pay an amount of R2 million in cash as the full subscription price. Clauses 6.3, 6.4 and 6.6 are significant:

'6.3 LPMI and Bonitas shall, in proportion to their respective shareholdings in the company, furnish the security necessary for the financing of medical and hospital equipment up to a maximum of R6 000 000. The medical and hospital equipment acquired with the secured borrowed funds in terms of this clause will include, inter alia, the items listed in annexure "B".

6.4 Bonitas shall by no later than fourteen days after the signature date lend an amount of R1 000 000 to the company on loan account. This amount shall accrue interest at the prime rate plus 2%. The capital amount with interest thereon shall be repaid to Bonitas when the board of directors of the company resolves that there are sufficient funds available which are in excess of its requirements for the purpose of the company's business and subject to the availability of after-tax profits.

. . .

6.6 To the extent that any further funds are required by the company for its working capital and medical equipment, LPMI and Bonitas shall, if they agree thereto, furnish the necessary security for those funds, in proportion to their respective shareholding in the company.'

[5] As will become apparent from relevant documentation and the analysis of the evidence that appears later in this judgment, the relatively low amount paid for the 26 per cent shareholding by Bonitas is best explained by the fact that it would provide an exclusive pipeline of patients. Furthermore, LPH would sublease the

building from LPMI, its holding company. The benefits for LPH and associated companies are clear to see.

[6] Clause 13 of the shareholders' agreement is a non-variation clause, the relevant parts of which read as follows:

'13.1 This agreement, together with the appendices thereto, constitutes the sole record of the agreement between the parties in regard to the subject matter thereof.

13.2 Neither party shall be bound by any representation, express or implied term, warranty or promise or the like not recorded herein or reduced to writing and signed by the parties or their representatives.

. . .

13.4 No addition to, variation, or agreed cancellation of this agreement or any of the appendices hereto shall be of any force or effect unless in writing and signed by or on behalf of the parties.'

[7] Bonitas met its obligations set out in clauses 6.1 and 6.4, which appear in para 4 above. The cost of establishing and conducting the hospital proved challenging and funding was required. During February 1996, Dr Mohammed Adam, the initiator of the idea of a private hospital in Pretoria, catering for Black people, together with Mr Frikkie Lloyd, the then company secretary of LPH, made representations to Bonitas by way of a funding proposal formulated by a close corporation, namely AFFIN, with which Mr Lloyd was associated. This is the proposal referred to in para 2 above.

[8] Dr Adam is the driving force behind LPH, is involved in the business of LPMI and its holding company and is also the central figure in the litigation culminating in the present appeal. The relevant parts of the AFFIN proposal appear hereunder. Where Maraba is referred to, one should, for present purposes, take it as a reference to LPH:

'1.1 AFFIN has been mandated to obtain the necessary funding to pay for the equipment to be used in the operating of the Louis Pasteur Hospital. An amount of R9 million is required.

Lifecare is also demanding advance payment for drug purchases or acceptable security. The amount required is estimated at R500 000.

In addition cash flow productions indicate that in the short-term the company will also require additional working capital of R1,7 million.

1.2 The financiers which AFFIN approached so far have set demanding security requirements, that is 50% of the facility must be covered by “good security”. Good security is described as easily realisable assets such as debtors, property or investments. If “less good” security is offered (cession of shares, personal guarantees etc.) the requirements is even higher.

The reason for this demanding security arrangement is the lack of a trading record for Maraba.

1.3 Funding will be organised from several financiers i.e

Wesbank	R5 million
Investec/Rand Merchant	R4 million
Lifecare	R0,5 million
First National Bank	R1,7 million

1.4 Whilst most of the above borrowings can be supported by 80% of the expected debtors it is not possible to split the debtors or to make more than one cession. No single financier [wishes] to be second in the queue by accepting a reversionary cession.

Trading projections indicate that debtors will reach R5,5 million when a 55% occupancy is achieved and R7 million at 65% occupancy.

1.5 In terms of the shareholders’ agreement with LPMI, Bonitas undertook to provide *surety* to cover 26% of the equipment funding and support the full working capital requirement whilst LPI undertook to ensure, from its own funds, the necessary building within which 180 beds and 6 theatres can be installed and operated.

1.6 Currently Maraba has working capital available to the value of R3 million which was raised from the sale of shares to Bonitas (R2 million) and a loan from Bonitas (R1 million).’

Under the heading ‘PROPOSAL’ the following appears:

‘2.1 In order to maximise a cession of debtors it is proposed that the debtors are ceded to Bonitas in full. Bonitas must then cede an insurance policy with a surrender value equal to 80% of the debtors plus the Bonitas *surety* commitment in respect of the equipment funding to First National Bank. Ideally it should cover the amount of 80% of the level which debtors will achieve at 55% occupancy (80 % of R5,5 million, that is R4,4 million) plus 26% of R9 million, that is R2,3 million.

2.2. First National Bank will then issue the following guarantees against the respective facility:

	Guarantee	Facility
To Wesbank	R2,5 million	R5 million
To Investec/RMB	R2,0 million	R4 million
To Lifecare	R0,5 million	R0,5 million
To First National Bank	R1,7 million	R1,7 million

Total R6,7 million R11,2 million

It is envisaged that the above guarantees can be re-negotiated annually in response to the trading progress of Maraba.

2.3 In addition to the benefit to Maraba of maximising the efficiency of the security value of its debtors it will also limit the exposure of Bonitas to its current investment and the shareholder undertaking in respect of equipment.

AFFIN trust that Bonitas will be so kind to support the above proposal at conditions to be agreed.' (My emphasis.)

It is clear that the word 'surety' where it appears in the AFFIN proposal is a typographical error and what the parties intended was the word 'security'.

[9] On 2 February 1996 Bonitas' Finance Committee met to consider the AFFIN proposal and the following decision was recorded:

'. . . that the Fund may sign cession of Sanlam Policy No. 13113913X1 in respect of facilities availed to Maraba Hospital and Medical Centre (Pty) Ltd at First National Bank and that YEKANI RICHARD TENZA

in his capacity as Principal Officer, may sign the necessary forms on behalf of the Fund.'

Two days later Bonitas informed LPH that it had approved the AFFIN proposal. Mr Tenza on behalf of Bonitas completed the necessary Sanlam forms which gave it notice of the cession of the policy to LPH. That form, signed by Mr Tenza, indicated that it was a cession of the rights in the policy to Maraba (LPH) as security for debt. This was purportedly done in accordance with the terms of the AFFIN proposal. LPH purported to on-cede the policy to First National Bank (FNB). Subsequently, Bonitas surrendered the policy and Sanlam paid it the surrender value. To ensure that the financing arrangement referred to in the AFFIN proposal remained in place, Bonitas was called upon by LPH to replace the paid up policy which had been provided as security. This it did by agreeing to cede two further Sanlam investment policies to LPH. The necessary form in relation to the cession of the two policies giving notice to Sanlam was once again completed on behalf of Bonitas by Mr Tenza. *This time*, however, the standard form contained an annotation providing the following reason for the cession of the policies:

'Outright cession. Yes.'

Yet again, the policies were on-ceded to FNB.

[10] On 1 December 2006 both policies reached their maturity date. The proceeds amounted to R39 293 353. According to LPH the proceeds were reinvested and restructured resulting in a total sum of R 44 245 360 which it ultimately received. Part of the proceeds of the policies was used by LPH to pay off its indebtedness to FNB flowing from the finance facility provided. The remainder was retained for LPH's benefit.

[11] Bonitas took the view that it was clear from the shareholders' agreement and the AFFIN proposal, the terms of which were agreed with LPMI and LPH, that it remained the beneficial owners of the policies. Bonitas was adamant that LPH had no right to the proceeds of the policies. Consequently, during 2008, Bonitas instituted action in the Gauteng Division, Pretoria, for the recovery of the amount ultimately paid to LPH together with interest thereon.

[12] Bonitas claimed repayment of the amount of R44 245 360 on a number of grounds. Principally, Bonitas relied on the 'material, express and/or tacit and/or implied terms' of the AFFIN proposal which, it alleged, were essentially that Bonitas would cede an insurance policy with a surrender value of R6.7 million to secure the funding to be provided by FNB to LPH on overdraft, to fund the acquisition of equipment and to meet the hospital's working capital requirements. In its particulars of claim, Bonitas alleged that, in terms of the agreement, it remained the beneficial owner of the policy and was entitled to its net proceeds in the event of it not being required as security. It noted that the cession of the policy was accessory to the funding agreement and that LPH would not be permitted to increase its borrowing without Bonitas' prior consent. As a quid pro quo, so it was alleged, LPH would cede and assign its debtor book *in securitatem debiti* to Bonitas. Furthermore, so Bonitas stated, when LPH no longer required the use of the policy as security and was itself able to secure its debts, it would immediately procure replacement security so as to release the policy from any security which it had previously been used for, and that the policy would then be re-ceded back to Bonitas.

[13] In its particulars of claim, Bonitas alleged that if the policy reached its maturity date before the need for the security expired and Sanlam made payment thereof, LPH or FNB would be entitled to request Bonitas to provide replacement security to

the satisfaction of FNB, to enable LPH continued access to the finance facility up to an amount equal to that which was in place or in respect of any such amount as Bonitas may have agreed to. According to Bonitas, in the event that replacement security was called for but not provided by Bonitas, FNB would be entitled to apply the proceeds of the policy up to an amount of R6.7 million and LPH would be obliged to pay the balance to Bonitas.

[14] Bonitas stated that LPH, unilaterally, without obtaining prior permission from Bonitas and in breach of the AFFIN proposal, increased the FNB facility to an amount in excess of the agreed exposure. The particulars of claim assert that there was thus a breach of the funding agreement and that in the circumstances Bonitas was entitled to payment of the full proceeds of the policies.

[15] In the alternative, Bonitas asserted, in relation to any indication that the cession of the policies was one which could be construed as being other than in the terms set out in the present claim that it was due to a bona fide mutual error by LPH and Bonitas. Thus, Bonitas claimed it was entitled to rectification of the form notifying Sanlam that there had been an 'out-and-out' cession of the policies. The rectification sought was as follows:

'Notwithstanding anything contained in this cession it is recorded that the cedent remains the beneficial owner of the proceeds of the policies and the cessionary shall upon receipt of any proceeds thereof pay such proceeds to the cedent.'

Bonitas, on the basis of the rectification, claimed repayment of the total proceeds of the policies. Bonitas' further alternative claim was based on enrichment.

[16] LPH, in its plea resisting Bonitas' claim, was adamant that the funding agreement between the parties envisaged an 'out-and-out' cession of the investment policy to LPH and that Bonitas would retain no reversionary interest. In addition, LPH alleged that it was agreed between them that Bonitas' loan account in LPH's books would be credited with an amount equal to the value of the policy on the date of the 'outright cession' on which date it became the 'owner of the policy'. LPH alleged further that the loan account would be repayable to Bonitas when LPH's board of directors resolved that there were sufficient funds in excess of its requirements and

subject to the availability of after-tax profits. LPH went on to state that to secure the loan it would cede *in securitatem debiti* its entire debtors book to Bonitas.

[17] Bonitas insisted that the first policy and the two replacement policies were ceded on the same basis. LPH admitted receiving the policies but was emphatic that it was entitled to retain the proceeds for its own benefit.

[18] The dispute between the parties was adjudicated by Baqwa J. He had regard to the pleadings, the documentation and *viva voce* evidence tendered during the trial. The court below considered the evidence of Mr Yekani Tenza, who was Bonitas' Principal Officer in 1994. It had regard to Mr Tenza's testimony concerning the origins of the shareholding agreement and how he represented Bonitas in relation thereto. Mr Tenza testified about how Bonitas was determined to establish private hospitals aimed at treating previously disadvantaged communities. He informed the court about how he was introduced to Dr Adam and about his involvement in the establishment of LPH.

[19] Baqwa J described the essential parts of Mr Tenza's evidence as follows:

'The crux of Tenza's evidence was that at all material times the policies which had been ceded by the plaintiff to the defendant remained the property of the plaintiff and that the plaintiff would be entitled to the proceeds thereof. He refuted the suggestion that the plaintiff had parted with ownership of the policies in favour of the defendant. His evidence was in line with a body of objective evidence in Board minutes, financial statements and correspondence between the parties.'

[20] The court below recorded that the standard Sanlam form in respect of the first policy had been completed by an FNB employee before Mr Tenza appended his signature. Baqwa J went on to note that the problem for Bonitas was that the standard Sanlam form in relation to the substitution policies contained the annotation referred to earlier in this judgment, at para 9, namely, that in respect of those two policies there was 'an outright cession – yes'.

[21] The evidence adduced on behalf of Bonitas in the court below was that the standard Sanlam forms in relation to the replacement policies had been completed

by an FNB employee and had been presented to Mr Tenza, who signed it without due regard and a proper understanding of the nature of cessions. Baqwa J considered that Mr Tenza was unequivocal that the nature of the cession of the substituted policies had been agreed between Bonitas and LPH on exactly the same basis as the cession of the first policy and in line with the board decision, the shareholders' agreement and the AFFIN proposal.

[22] Mr Berman Mofokeng, who at the time of the trial in the court below was 76 years old, had been involved with Bonitas between 1982 and 1998 as a member of the board of trustees. Between 1995 up to 1998 he was chairperson of the board. Mr Mofokeng testified that the policies constituted an investment of investors' funds and it was always intended that Bonitas would remain the beneficial owner of the policies and would ultimately be entitled to the net proceeds. Mr Tenza and Mr Mofokeng were the only two witnesses for Bonitas.

[23] Dr Mohammed Adam was the only witness for LPH. He was called, ostensibly in support of LPH's plea, referred to in para 17 above. At all material times Dr Adam was the controlling mind of LPH. Baqwa J had regard to his evidence confirming, as testified to by Mr Tenza, that he had been involved in discussions with Bonitas that led to the shareholders' agreement and the funding agreement. The following part of the judgment of the court below is relevant (para 44):

'More importantly, however, whilst Adam admitted that the initial cession by the plaintiff was as security, he testified that the policies which were subsequently ceded to replace the initial policies were an outright cession which resulted in ownership of the policies by the defendant and that this entitled the defendant to do whatever they wished to do with the policies. Adam relied for his evidence regarding the cession of the policies on the cession document which recorded that the cession was an *"outright cession"*. Whilst Adam's evidence was in line with the cession document, his evidence was contradicted by numerous contemporaneous documents such as Board minutes, correspondence and financial statements.'

[24] Baqwa J had regard to LPH's audited financial statements for the period 1996 to 2008. Neither the first, nor the substituted policies during that period, were reflected as an asset in the financial statements of LPH. Furthermore, it is common

cause that there was no concomitant reflection of a credit to Bonitas in the loan accounts. The only loan reflected in LPH's financial statements is an amount of R1 million from Bonitas which is consistent with what is contained in the shareholders' agreement.

[25] Dr Adam was confronted with board minutes and other contemporaneous documents, including financial statements and correspondence, which contradicted the crux of his evidence set out in para 24 above. Baqwa J noted that his responses were long-winded, rambling and evasive.

[26] Not only did the minutes of Bonitas' board meetings, attended by Dr Adam reflect that Bonitas had ceded the policies for purposes of security for LPH's debt, but they also stated categorically that Bonitas would remain the 'beneficial owner' of the policies. Mr Lloyd, a co-author of the AFFIN proposal, and a director of LPH, in correspondence with Sanlam, stated emphatically that the policies were ceded by Bonitas as security for funds made available by FNB and that LPH and FNB would only be entitled to exercise such rights as they might have in terms of the cession in the event of default by LPH.

[27] The court below had regard to the board minutes, the correspondence by Mr Lloyd, the failure by LPH to call Mr Lloyd as a witness, as well as to an affidavit made in related litigation by Dr Adam, which was consonant with the position adopted in the present litigation by Bonitas.

[28] Baqwa J rejected Dr Adam's explanation for the contradictions which, amongst others, was that he had been misled by Mr Lloyd and Mr Nkosi, who at one stage was Bonitas' principal officer. The court below considered the explanation hollow in the face of board meetings at which resolutions were adopted without demur by Dr Adam.

[29] In his judgment, Baqwa J concluded that it was inescapable that the AFFIN proposal catered for the cession of a policy as security and that it was always contemplated that Bonitas would remain the 'beneficial owner' of the policies. It is

unchallenged, as recorded by the court below, that the LPH loan secured by the policies was never called up by FNB.

[30] The following two paragraphs are the conclusions of the court below in relation to the evidence presented (paras 105 and 106):

'On the evidence the defendant appropriated the proceeds of the policies. In the circumstances where FNB and/or the defendant had failed to request the plaintiff to provide replacement security to the satisfaction of FNB to enable the defendant to continue to have access to overdraft facilities, I find that the defendant breached the funding agreement by applying a portion of the proceeds of the policies in order to settle the defendant's indebtedness under the FNB facility and/or retaining a portion of the proceeds of the policies for itself and not paying the proceeds of the policies to the plaintiff.

As a matter of law, the plaintiff is entitled to interest on the sum of R44 245 360.68 at the prescribed rate of interest as provided for in terms of Section 1 of the Prescribed Rate of Interest Act 55 of 1975. The prescribed rate of interest given the time of the issuing of summons on 29 October 2008 would be subject to the in duplum rule.'

[31] In respect of costs Baqwa J had regard to what he considered LPH's dishonest conduct, particularly in relation to pursuing a case which was completely at odds with the objective evidence. He also held Dr Adam's petulant conduct in the witness box against him. The conduct included his personal attacks on Bonitas' lead counsel. Consequently, the court below made the following order:

'1. The defendant is ordered to pay the plaintiff:

1.1. The sum of R44 245 360.68.

1.2. Interest on the sum of R44 245 360.68 at the rate of 15.5% per annum calculated from 29 October 2008 to date of payment, but limited to no more than R44 245 360.68.

2. Cost of suit on the scale as between attorney-and-client, which costs are to include the costs occasioned by the employment of two counsel.'

[32] It is necessary at the outset to consider the distinction between an out-and-out cession and a cession *in securitatem debiti*. In L F van Huyssteen et al *Contract General Principles* (2016) 5 ed at 467 (and the authorities there cited) an out-and-out cession is described as:

'A cession made to effect an alienation of a right effects a complete transfer of the right to the cessionary.'

Starting with *National Bank of South Africa Ltd v Cohen's Trustee* 1911 AD 235, this court has, in a series of decisions, held that a cession *in securitatem debiti* resembles pledge and that the cedent is not wholly divested of an interest in the asset he provided as security to the cessionary. Notwithstanding the cession the cedent retains what has been described as a reversionary interest.[1]

[33] Next, we turn to consider the legal principles in relation to how cessions are effected. A cession is effected by mere agreement. In 2 *Lawsa* 2 ed para 5 the following appears:

'Since the object of a personal right is the as yet unrealised performance due by another, delivery by the cedent or possession by the cessionary is not, in a physical sense, possible. Transfer is accordingly achieved not by reference to the object of the right (the performance) or the concurrence of the debtor who is to render it, but by the interactive meeting of minds of the transferor and the transferee. By their mere agreement the transfer is effected, irrespective of the prior knowledge or consent or the subsequent notification of the debtor.' (Footnotes omitted.)

[34] It will be recalled that in the court below, LPH relied on the evidence of Dr Adam to establish its pleaded case, namely, that the cession of the two Sanlam policies was an out-and-out cession and that it was entitled to the proceeds when the policies matured. Before us, however, counsel for LPH was constrained not to argue against the proposition that a careful examination of the record reveals that Dr Adam was a palpably bad witness in that he contradicted himself, was evasive and appeared to make things up as he went along. Counsel contended, however, that the objective evidence including documentary evidence and the probabilities supported LPH's case that there had been an 'out-and-out cession' without any reversionary right and that LPH had, in consequence, become the beneficial owners of the two Sanlam policies.

[1] See the discussion concerning the doctrinal differences on cessions *in securitatem debiti* in P M Nienaber's 'Cession' in 2 *Lawsa* 2 ed paras 52-53 and the decisions by this court there cited. See also *Grobler v Oosthuizen* 2009 (5) SA 500 (SCA) para 17 and the authorities there cited; see also L F van Huyssteen et al *Contract General Principles* (2016) 5 ed at 471-473.

[35] In our view it is clear that Dr Adam's evidence cannot be relied on and that the court below was correct in rejecting his evidence concerning the nature of the cessions. The submission on behalf of LPH that the objective evidence, including relevant documentation, and the probabilities support its pleaded case falls to be scrutinised. It is important to bear in mind that in terms of the shareholders' agreement, LPMI and Bonitas would, in proportion to their respective shareholdings, furnish 'the security necessary' for the financing of medical and hospital equipment 'up to a maximum of R6 000 000'. It will be recalled that the shareholders' agreement provided for the eventuality of further funding becoming necessary and in that event security would once again be provided by LPMI and Bonitas in proportion to their respective shareholding.

[36] We referred earlier, in para 26, to the documentation that had been put to Dr Adam for comment including board minutes, correspondence and financial statements that aligned with Bonitas' case and contradicted LPH's pleaded case. We consider it necessary to refer once again to those documents and to record that after the cession of the two substituted Sanlam policies, Bonitas continued paying the premiums which, in itself, is at odds with LPH's case. In addition, Mr Lloyd, who was intimately connected to the AFFIN proposal, during 1999, wrote to Bonitas seeking consent to an increase in the finance facility at FNB and recorded specifically that the facility was secured by the cession of two investment policies 'owned by Bonitas'. Mr Lloyd then wrote to FNB in the following terms:

'In discussion with the Principal Executive Officer of Bonitas he confirmed that it is the policy (sic) of Bonitas to continue to provide security acceptable to First Commerce in respect of the hospital's liability until the hospital can adequately provide in its own funding and or security requirements. Bonitas do (sic) not plan to divest from the policies which First Commerce now hold as security.'

[37] During August 1999, at an LPH board meeting, the following was discussed and decided, as recorded in the minutes of that meeting:

'Mr Lloyd advised that the facility of R10 million is now in place. Mr Nkosi tabled a letter from Bonitas dated 18th August 1999 advising of problems with regard to the ownership of the two policies ceded (sic) to the company. The board confirmed that it was always the intention of

the company that Bonitas remains the beneficial owner of the policies and that any benefits declared by Sanlam will belong to Bonitas.'

At the following LPH board meeting, what is set out above was reconfirmed.

[38] Insofar as LPH's annual financial statements are concerned, the following is to be noted. For the entire period from 1996 to 2006 LPH's annual financial statements did not reflect any of the ceded investment policies as an asset (or assets) in its balance sheet. The LPH annual financial statements covering the entire period from 1996 to 2006 in each case reflected that the only loan from Bonitas to LPH is a loan of R1 million (as per clause 6.4 of the shareholders' agreement). The LPH annual financial statements of 1997, 1998 and 1999 in each case reflected that LPH's debtors were ceded to Bonitas as 'security for the Sanlam investments policy'. In respect of the LPH annual financial statements for 1998 and 1999, the directors' report in each case recorded that the policies are 'owned by the shareholders'.

[39] The harsh criticism on behalf of LPH of Mr Tenza's evidence is not justified. It was contended that his evidence was contradictory and not credible. More particularly, it was contended that he was unable to satisfactorily explain why there was a cession to LPH rather than to FNB directly and that his testimony concerning the nature of the cessions and the basis on which they were effected was unsatisfactory. In our view, it is clear that his evidence on this aspect and in relation to the cessions in general was based on a lack of appreciation of the technical nature of cessions and their legal basis and effect and he placed reliance on support staff to guide him in this respect. Mr Tenza's evidence as to how the annotation 'outright cession - yes' was inserted erroneously in the notification to Sanlam can be attributed to these factors.

[40] The objective evidence referred to above, coupled with Dr Adam's manifestly vacillating and manufactured testimony lead to the ineluctable conclusion that the findings by the court below concerning the nature of the cessions in question and the basis on which they were effected are unassailable. Furthermore, one might rightly ask, why there would be an 'out-and-out cession' by Bonitas in the face of their

statutory fiduciary duty to protect the interests of the scheme's beneficiaries and to act with due care and diligence in relation to its assets.[2]

[41] As stated above, Bonitas, in consequence of the AFFIN proposal, reached agreement with LPH that it would cede the first Sanlam policy as security for the finance facility to be provided by FNB. The cession was complete when Bonitas, the cedent, reached agreement with LPH, the cessionary, which, in turn, it was understood, would on-cede the policies to FNB. Notice to Sanlam was to afford the ultimate cessionary, FNB, protection when it sought to enforce its right against Sanlam in justifiable circumstances, namely, default by LPH.[3]

[42] From what is set out above, it is clear that the cession of the two policies was *in securitatem debiti*. It was always intended that the cession would serve as security for LPH's finance facility with FNB. In the present case there is no question of default, which would have entitled FNB to proceed to obtain payment up to the extent of the security from Sanlam.[4] By this time LPH would have had a significant trading record and it does not appear that FNB required replacement security before LPH settled its debt. Neither the shareholders' agreement nor the agreement, post the AFFIN proposal, entitled LPH to appropriate the proceeds of the policies. In so doing, LPH acted in breach of both agreements, as contended for by Bonitas.[5] That Bonitas' particulars of claim were not elegantly framed or with exactitude is of no moment. It was always clear that the dispute between the parties centred on the terms of the shareholders' agreement and the agreement following on the AFFIN proposal. The cessions in question were premised on those two documents. The issue set out at the beginning of this judgment is the one understood by the parties to be adjudicated. For all the reasons set out above, the essential reasoning and conclusions of the court below cannot be faulted. The approach of the court below to the question of costs was motivated and compelling. There is, in our view, no reason to interfere with the costs order. The order of the court below in relation to interest,

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[2] See s 57(6) of the Medical Schemes Act 131 of 1998.
[3] See P M Nienaber 'Cession' 2 *Lawsa* 2 ed paras 6 and 26 and the authorities there cited. See also *Agricultural & Industrial Mechanisation (Vereeniging) (Edms) Bpk v Lombard en andere* 1974 (3) SA 485 (O).
[4] See also *P G Bison Ltd & others v The Master & another* 2000 (1) SA 859 (SCA) at 15 and *Land- en Landboubank van Suid-Afrika v Die Meester en andere* 1991 (2) SA 761 (A) at 771D-G.
[5] See *Grobler* fn 1 para 26.

which on the face of it seems peculiar, is due to the application of the in-duplum principle.

[43] In the result, the following order is made.

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

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M S Navsa

Judge of Appeal

_____

H K Saldulker

Judge of Appeal

Appearances:

On behalf of the appellant:	B Burman SC (with him G Girdwood) Instructed by: Terry Mahon Attorneys, Johannesburg Webbers, Bloemfontein
On behalf of the respondent:	M Maritz SC (with him D van Zyl) Instructed by: Gildenhuys Malatji Inc., Pretoria Honey Attorneys, Bloemfontein