THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1147/2017

In the matter between:

PROPELL SPECIALISED FINANCE (PTY) LTD **APPELLANT**

and

ATTORNEYS INSURANCE INDEMNITY FUND NPC **RESPONDENT**

Neutral citation: *Propell Specialised Finance v Attorneys Insurance Indemnity Fund NPC* (1147/2017) [2018] ZASCA 142 (28 September 2018)

Coram: Lewis, Saldulker, Zondi and Mathopo JJA and Mokgohloa AJA

Heard: 13 September 2018

Delivered: 28 September 2018

Summary: Insurance contract – whether indemnification rights under the Policy providing cover for a specific class of professionals, is cedable – agreement to cede rights under the Policy without the consent of the insurer is invalid ─ the nature of

contractual relationship between the parties involves a *delectus personae* and the adverse effect the cession will have on the insurer.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Dlodlo J sitting as court of first instance): judgment reported *sub nom Propell Specialised Finance (Pty) Ltd v Attorneys Insurance Indemnity Fund & others NPC* [2017] 3 All SA 1005 (WCC).
The appeal is dismissed with costs.

JUDGMENT

Zondi JA (Lewis, Saldulker and Mathopo JJA and Mokgohloa AJA concurring)

[1] The issue in this appeal is whether the rights of indemnification held by Buurman Stemela Lubbe Incorporated (BSL), a law firm, under the professional indemnity insurance contract (the Policy) issued by the respondent, Attorneys Insurance Indemnity Fund NPC (Attorneys Insurance) are cedable. The Western Cape Division of the High Court, Cape Town (the high court) (Dlodlo J) held that they are not. It dismissed the action brought by the appellant, Propell Specialised Finance (Pty) Ltd, formerly Baedex (Propell), for lack of locus standi on the basis that a cession on which it relied for its cause of action, was invalid, but granted Propell leave to appeal to this court.

[2] During the period April 2010 and April 2011 Propell, a private company carrying on a moneylending business instituted six separate actions in the magistrate's court against BSL, arising from a number of bridging finance transactions. In terms of these bridging finance transactions, Propell lent and advanced to certain clients of BSL monies against funds accruing to BSL's clients

from certain property transactions. Propell paid the loan amounts into BSL's trust account. BSL undertook to repay to Propell such loans from the proceeds of the property transactions. BSL failed to make payment as undertaken because Mr Buurman and/or BSL's employee, Ms van der Merwe misappropriated the proceeds of the property transactions.

[3] BSL notified Attorneys Insurance of Propell's claims and sought indemnification from it under the Policy. Attorneys Insurance repudiated liability in respect of Propell's claims on the ground that the money that was paid into BSL's trust account was entrusted to it as contemplated by s 26 of the Attorneys Act 53 of 1979[1] and the loss that Propell suffered was a loss that is excluded in terms of clause 5.1.5[2] of the Policy.

[4] In the meantime BSL instituted an action in the North Gauteng High Court against its auditors, Ashton CA SA Group (Ashtons) and its directors for damages arising from Ashtons' failure to detect and prevent misappropriation of trust moneys by Mr Buurman and/or Van der Merwe.

[5] Following repudiation by Attorneys Insurance of Propell's claims, BSL on 6 September 2012, instead of suing Attorneys Insurance for specific performance,

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[1] Section 26(1) provides:
'Subject to the provisions of this Act, the fund shall be applied for the purpose of reimbursing persons who may suffer pecuniary loss as a result of—
(a) theft committed by a practising practitioner, his or her candidate attorney or his or her employee, of any money or other property entrusted by or on behalf of such persons to him or her or to his or her candidate attorney or employee in the course of his or her practice or while acting as executor or administrator in the estate of a deceased person or as a trustee in an insolvent estate or in any other similar capacity; and
(b) theft of money or other property entrusted to an employee referred to in paragraph *(c*A*)* of the definition of "estate agent" in section 1 of the Estate Agents Act, 1976 (Act No.112 of 1976), or an attorney or candidate attorney referred to in paragraph *(d)* of the said definition, and which has been committed by any such person under the circumstances contemplated in those paragraphs, respectively, and in the course of the performance—
(i) in the case of such an employee, of an act contemplated in the said paragraph *(c*A*)*; and
(ii) in the case of such an attorney or candidate attorney, of an act contemplated, subject to the proviso thereof, in the said paragraph *(d)*.

[2] '5.1 Unless specifically stated to the contrary this policy does not cover any loss, destruction or damage whatsoever or any legal liability of whatever nature:
. . . .
5.1.5 arising from theft by any principal, partner, director, candidate attorney, employees or "in-house" consultant of the insured or of the insured's predecessors in practice of any money or other property referred to in Section 26 of the Act.'

purportedly ceded to Propell its indemnification rights against Attorneys Insurance under the Policy. The agreement embodying the cession was entered into without Attorneys Insurance's consent. The agreement in its relevant parts read:

'PREAMBLE

WHEREAS Baedex has instituted a number of claims against BSL, Lubbe, Stemela and one EVERT GERRIT BUURMAN ("BUURMAN") jointly and severally, the one paying the other to be absolved, arising from a number of "bridging transactions" where;

[a] Baedex lent and advanced to certain clients of BSL monies ("the loans") against funds accruing to such clients from certain property transactions; and

[b] BSL had undertaken, in writing, to repay to Baedex such loans from the proceeds of the property transactions; and

[c] BSL failed to make payment in terms of the written undertakings; and

[d] Buurman and/or BSL's employee, van der Merwe, had misappropriated the proceeds of the property transactions, or had stolen the loan amounts, or failed to make payment to Baedex and

WHEREAS neither Baedex, Stemela and/nor Lubbe had been aware of the theft and misappropriation, or the omission as referred to above and

WHEREAS BSL has suffered a loss caused by the aforesaid misappropriation or omission referred to above and is liable to Baedex for such funds that Baedex had lost by the aforesaid misappropriation and/or omission, and

WHEREAS BSL is in the process of instituting an action against its accountants **ASHTON CA SA GROUP** and three of its partners (**"ASHTONS")** for damages arising from the inadequate auditing of BSL's books of account which inadequate auditing BSL contends was the direct cause or foreseeable cause of the loss suffered by BSL and consequently, the loss suffered by Baedex.

. . . .

ABANDONMENT OF CLAIMS AND PENDING LITIGATION

11. Baedex hereby irrevocably abandons all and every claim that it may have against Lubbe and/or Stemela arising from any cause of action whatsoever, but in particular arising from their joint and several liability with BSL in respect of the claims that Baedex has instituted against BSL and referred to above.

12. The pending litigation between Baedex and BSL will be suspended with all further steps in the litigation suspended, until the litigation between BSL and Ashtons has been finally resolved or if BSL abandons its claim against Ashtons or fails to pursue the claim with diligence. It is agreed that each party will be liable for its own costs caused by such suspension.

CESSION AND ASSIGNMENT

13. In the event of BSL resolving to abandon its claim against Ashtons or failing to pursue the claim with due diligence and care, BSL undertakes to forthwith cede its rights under the claim to Baedex. Baedex may then pursue the claim for its own benefit and at its own cost.

14. BSL hereby cedes makes over and assigns to Baedex any claim that BSL may have against Glen Rand Insurance Company or its successor in title [Attorneys Insurance] on the following terms and conditions:

    14.1 Baedex may not institute any action while the litigation between BSL and Ashtons is in progress unless the action is instituted to prevent the claims becoming prescribed.

    14.2 BSL does not guarantee or warrant that it has any claim to cede and assign in terms of this cession and the sole risk of instituting any such claim rests on Baedex.

    14.3 The cost of any proposed action to be instituted by Baedex in terms of cession will be for the account of Baedex and Baedex hereby indemnifies BSL against all claims that may arise from this cession.

15. Lubbe and/or Stemela undertake not to take any steps to wind up or deregister BSL while the litigation with Ashtons or Glen Rand is pending.'

[6] Armed with the cession, Propell on 14 October 2013 instituted action against Attorneys Insurance in the high court as cessionary of BSL's claims against Attorneys Insurance under the Policy.

[7] Attorneys Insurance defended the action and raised three special pleas. It contended first, that two of Propell's six claims had prescribed. This special plea was subsequently withdrawn by Attorneys Insurance. Secondly, Attorneys Insurance

contended that Propell lacked locus standi to sue it on the ground that the cession on which it was relying to assert its claims, was invalid. Attorneys Insurance relied on clauses 6.6 and 6.8 of the Policy in support of this contention. Thirdly, Attorneys Insurance contended that the proceedings had to be stayed pending the finalisation of BSL's claims against Ashtons.

[8] Attorneys Insurance argued that the purported cession on which Propell relied, was invalid as BSL's rights of recourse and/or claims against it arising out of the Policy are not capable of being ceded and that, for that reason Propell lacked locus standi to sue it. The grounds upon which that contention is based are pleaded as follows:

'2.1 Cession of the insured's rights of recourse and/or claims in terms of the contract of insurance is *per se* a contravention of the provisions of clause 6.6 of the contract of insurance, inter alia because it appears *ex facie* the Memorandum of Agreement relied upon by Plaintiff, that the insured, i.e. Second Defendant not only admitted liability but also without the written consent of the insurer negotiated in connection with the claim of the Plaintiff.

2.2 Due to the *sui generis* identity of the insurer, and insured involved inclusive of the *sui generis* relationship between them and due to the *sui generis* origin, nature and extent of the insurance contract and related legislation, the rights of recourse and/or claims of the insured are not legally susceptible to and/or capable of being ceded and/or intended to be capable of being ceded.

2.3 Cession of the insured's rights of recourse and/or claims in terms of the insurance contract create conflict of interest on the part of the insured that give rise to a breach and/or contravention and/or a violation of the provisions of the contract of insurance, for example inter alia the contravention and/or violation of the insurer's rights in terms of clause 6.6 of the contract.

2.4 It is implied from the *sui generis* nature of the contract of insurance and the surrounding circumstances applicable to claims in terms of the particular contract of insurance, that the insured's rights of recourse and/or claims in terms of the insurance contract cannot be ceded without the consent of the debtor, i.e. the insurer.

2.5 As a matter of principle, cession of the insured's right of recourse and/or claims in terms of the contract of insurance give rise to the weakening of the insurer's position and/or renders it more onerous.

3.

In addition to the content of paragraph 2 supra, clause 6.8 of the insurance contract entered into between the Second Defendant and First Defendant stipulates that:

"Unless otherwise expressly stated nothing contained in this policy shall give any rights against the insurer (a reference to First Defendant) to any person other than the insured (a reference to Second Defendant)."

4.

Properly construed and specifically taking into consideration the identity of the parties to the insurance contract, and the specific nature, aim and extent of the insurance policy, clause 6.8 thereof should be interpreted as an out and out prohibition against alienation and/or cession.'

[9] At the commencement of the trial the parties asked the high court to order a separation of issues. In terms of the separation order, the trial proceeded only in respect of the two remaining special pleas. The remaining issues concerning Propell's damages claims stood over for later determination.

[10] For the purposes of determining the issue regarding Propell's locus standi and the validity of the cession agreement on which Propell relied, Attorneys Insurance relied on the evidence of its General Manager, Mr Thomas Harban.

[11] The high court upheld Attorneys Insurance's plea that the cession by BSL of its rights to Propell was not valid in law and dismissed the action. It held that BSL's claims against Attorneys Insurance under the Policy were incapable of cession on the grounds first, that the nature of the Policy is such that it involves a *delectus personae*, secondly, that the parties to the Policy had expressly, alternatively tacitly agreed not to cede rights and/or claims (*pactum de non cedendo*) and thirdly, the cession would impair Attorneys Insurance's position and negatively impact its rights.

[12] In light of the dismissal of the action for lack of locus standi by the high court it was unnecessary for it to consider the stay of proceedings plea as there were no proceedings to be stayed following the dismissal of the action. Nothing further need be said about this special plea.

[13] Propell's answers to the high court's line of reasoning were manifold. It contended that the high court erred and misdirected itself by finding that the claims under the Policy were incapable of being ceded to it on the ground that BSL was a *delectus personae*. Propell contended that the relationship between Attorneys Insurance and BSL cannot be said to be personal and *sui generis* in nature. It argued that at all material times the relationship between these two parties was regulated by the Policy and that the rights and obligations flowing from it have to be determined according to ordinary contractual principles.

[14] As regards the finding of the high court that on a proper interpretation of the Policy, the parties had agreed not to cede the rights under it, Propell contended that the preamble and clauses 1, 2.5, 6.6 and 6.8 of the Policy on which the high court's conclusion was based, cannot be construed as constituting a *pactum de non cedendo*.

[15] I agree with Propell's contention that neither clause 6.6 nor clause 6.8 of the Policy contains or constitutes a *pactum de non cedendo*. Clause 6.6 is irrelevant to the enquiry as it does not deal with the transfer of rights under the Policy. This clause stipulates that the insured shall not without the written consent of the insurer repudiate liability, negotiate or make admissions, offers, promises or payments in connection with any claim. Clause 6.6 embodies the terms regulating the enforcement of an insurance claim. The clause merely reminds the insured (BSL) that it is the insurer, and not the insured, who must regulate and control the institution and enforcement of a claim under the Policy. This makes sense because it is the insurer who bears the risk.

[16] The relevant clause that deals with claims against Attorneys Insurance other than by the insured (BSL) personally, is clause 6.8. But clause 6.8 does not prohibit cession of rights to indemnification under the Policy. Clause 6.8 stipulates that

'[u]nless otherwise expressly stated nothing contained in this Policy shall give any rights against the insurer to any person other than the insured'. It merely means that the Policy does not give rights of indemnity to anyone else but the insured; in other words, it covers or indemnifies the insured solely or exclusively. Clause 6.8 properly construed merely emphasises the inherent right of the insurer, Attorneys Insurance, to insist upon the insured being in the class of persons insurable under the Policy.[3]

[17] I accordingly hold that this matter concerns a *delectus personae* not a *pactum de non cedendo* and must therefore be approached on that basis. The question is whether the nature of contractual rights flowing from the Policy is such that it excludes the transfer of the personal rights created. In general, all contractual rights can be transmitted unless their nature involves a *delectus personae* or the contract itself shows that they were not intended to be ceded.[4]

[18] In *Scott on Cession A Treatise on the Law in South Africa* 1 ed (2018) at 185 Professor Susan Scott explains:

'A person's entitlement to dispose freely of his/her personal rights (assets) is restricted in circumstances where we are dealing with a *delectus personae*. This means that the nature of a particular juristic act (mostly a contract) is such that it excludes the transfer of the personal right created by it. This would be the position where the nature of the legal relationship between the parties is such that, legally, it will only be recognised as such if it binds the determined specific creditor and debtor. Under these circumstances, the identity of the parties becomes part of the substantive content of the juristic act.' (Footnotes omitted).

[19] This court in *Densam*[5] at 112A-D held that:

'The question whether a claim (that is, a right flowing from a contract) is not cedable because the contract involves a *delectus personae* falls to be answered with reference, not to the nature of the cedent's obligation *vis-à-vis* the debtor, which remains unaffected by the cession, but to the nature of the debtor's obligation *vis-à-vis* the cedent, which is the counterpart of the cedent's right, the subject-matter of the transfer comprising the cession. The point can be demonstrated by means of the lecture-room example of a contract between

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[3] *Northern Assurance Company Ltd v Methuen* 1937 SR 103 at 112.
[4] *Friedlander v De Aar Municipality* 1944 AD 79 at 93; *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 31G-H. Quoted with approval in *Densam (Pty) Ltd v Cywilnat (Pty) Ltd* 1991 (1) SA 100 (A) (*Densam*) at 113D.
[5] Id.

master and servant which involves the rendering of personal services by the servant to his master: the master may not cede his right (or claim) to receive the services from the servant to a third party without the servant's consent because of the nature of the latter's obligation to render the services; but at common law the servant may freely cede to a third party his right (or claim) to be remunerated for his services, because of the nature of the master's corresponding obligation to pay for them, and despite the nature of the servant's obligation to render them.'

[20] To determine whether the nature of indemnification rights under the Policy involves a *delectus personae* and whether the Policy itself shows that the rights are not capable of being ceded, it is necessary to interpret the terms of the Policy in accordance with the principles enunciated in the recent cases of this court such as *KPMG,*[6] *Endumeni,*[7] *Bothma-Batho*[8] and *Novartis*.[9] The approach to the interpretation of written instruments is usefully summarised in *Novartis* by Lewis JA in paras 26 and 27.

[21] In argument before us counsel for Propell relied on two grounds in support of the appeal. He contended, first, that after the repudiation of BSL's claims by Attorneys Insurance the rights under the Policy became cedable as at that stage BSL was, as he put it, 'on its own'. Secondly, he contended that there is no evidence that a cession will prejudice Attorneys Insurance and render its position weaker.

[22] With regard to the first point, counsel for Propell submitted that after Attorneys Insurance had repudiated the claims submitted to it by BSL, the latter had no option but to deal with the actions instituted against it by Propell and, in the exercise of its discretion, BSL concluded the cession agreement with Propell. He emphasised that the effect of the cession agreement was not to substitute Propell as the insured in terms of the Policy. Propell, counsel argued, only acquired the claims and stepped into the shoes of BSL.

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[6] *KPMG Chartered Accountants (SA) v Securefin Ltd & another* [2009] ZASCA 7; 2009 (4) SA 399 (SCA) paras 39-40.
[7] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.
[8] *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) para 12.
[9] *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* [2015] ZASCA 111; 2016 (1) SA 518 (SCA).

[23] That argument can be disposed of by having regard to the terms of the Policy, in particular clause 1 describing the nature of indemnification afforded by the Policy; clause 2.5 defining 'the insured' and the relevant provision of the Attorneys Act which established Attorneys Insurance.

[24] Attorneys Insurance is a non-profit, short term insurance company, established in 1993 by the Attorneys Fidelity Fund Board of Control in terms of s 40A(a)(i) of the Attorneys Act and subject to the Short-Term Insurance Act 53 of 1998. Its primary purpose is to provide insurance cover to attorneys who are obliged to be in possession of a Fidelity Fund Certificate in respect of claims which may proceed from their professional conduct. Attorneys Insurance also provides bonds of security to attorneys appointed as executors of deceased estates.

[25] Mr Harban, explaining the nature of Attorneys Insurance and its primary purpose, testified that Attorneys Insurance was established in order to provide specific services to a specific group or class of people. As a creature of statute, Attorneys Insurance can only carry out the functions as set out in the Attorneys Act, the empowering legislation. Unlike any other insurance company, Attorneys Insurance cannot branch into other areas of business. Its duties are restricted to legal practitioners and to provide specific services.

[26] Because of the nature of Attorneys Insurance's funding ─ funded by way of a single annual premium that is paid by the Attorneys Fidelity Fund on behalf of all practising attorneys ─ the individual attorney is not expected to pay any premium. Due to its restricted nature Attorneys Insurance has one Policy applicable to all practitioners insured by it.

[27] In relation to the present matter the applicable Policy is one that was issued for the period of insurance commencing on 1 July 2008 and terminating on 30 June 2009. Consistent with the objectives of the Attorneys Act, the Policy provided indemnity to the insured in respect of 'the insured's legal liability to any third party arising out of the conduct of the profession by the insured'.[10] The indemnity granted

[10] Clause 1 of the Policy.

covered also approved costs. The term 'insured' in the Policy is defined as 'every individual practitioner and every firm, partnership or incorporated practice consisting of one or more practitioners who . . . is practising as such in the Republic of South Africa, and is in possession of or would have been obliged to apply for a Fidelity Fund Certificate'[11]

[28] Clause 5 of the Policy deals with exceptions. In terms of clause 5.1.5 of the Policy the following event is excluded from cover:

'any loss, destruction or damage whatsoever or any legal liability of whatever nature . . . arising from theft by any principal, partner, director, candidate attorney, employees or "in-house" consultant of the insured . . . of any money or other property referred to in Section 26 of the Act'.

[29] Clause 6, which sets out conditions of indemnity, provides inter alia for further circumstances other than those set out in clause 5, in which Attorneys Insurance may repudiate liability. These conditions are set out in clause 6.1, which requires the insured to give immediate written notice to the insurer of any claim or intimation of a claim; clause 6.7.2 which provides that all benefits afforded under the Policy may be withdrawn by the insurer should the insured fail or refuse to provide assistance. Clause 6.9 stipulates that the insured shall forfeit benefits should the insured use fraudulent means to obtain benefits in respect of the claim under the Policy.

[30] The preceding analysis makes it clear that the rights flowing from the Policy are not cedable. The specific group or class of people for whose benefit the insurance was established is specifically defined in clause 2.5 of the Policy. The insured is defined as every individual practitioner who, on the date on which the claim was made, is practising as such in the Republic and is in possession of or would have been obliged to apply for a current Fidelity Fund Certificate. Clause 6.8 is another clause which indicates that the Policy applies to the restricted group of people. These factors viewed cumulatively show that the nature of the contractual rights under the Policy indicate that the insured is a *delectus personae*. The contract gives no rights of indemnity to anyone but a legal practitioner. These contractual provisions ensure that Attorneys Insurance will not be exposed to the risk of

[11] Clause 2.5 of the Policy.

defending actions at the suit of unknown claimants.

[31] The nature of the legal relationship between Attorneys Insurance and BSL is such that it binds the determined specific creditor and debtor.[12] Attorneys Insurance's obligation to BSL is to indemnify it against legal liability arising from its professional conduct. In turn BSL must be in possession of a Fidelity Fund Certificate for the relevant period to enjoy cover. From the point of view of Attorneys Insurance the identity of the insured matters to it. The present matter thus falls squarely within the ambit of the lecture room example referred to by Botha JA in *Densam*,[13] of a contract between master and servant which involves the rendering of personal services by the servant to the master which the master cannot cede to a third party without the servant's consent. BSL may not cede its right to obtain indemnification under the Policy from Attorneys Insurance to a third party without Attorneys Insurance's consent because of the personal, restricted and statutorily regulated nature of Attorneys Insurance's obligation to BSL.

[32] As regards Propell's argument that after repudiation of BSL's claims by Attorneys Insurance, BSL's rights under the Policy became cedable, a simple answer to that proposition is that repudiation did not terminate the Policy. BSL remained bound by the Policy and was obliged to comply with its terms including the restriction on the transfer of its rights. BSL could contest the repudiation of liability in court and if the court were to find that the repudiation was unlawful, then Attorneys Insurance would need to step into the shoes of BSL in defending Propell's claims. The repudiation of a claim by the insurer does not afford the insured the right to cede the rights under the Policy.

[33] The effect of the purported cession is that not only does Propell become the third party who is making the claim, but it would also be the insured who is applying for indemnity under the Policy. In other words, Propell, a victim of fraudulent conduct, steps into the shoes of the fraudster. That would bring about an untenable situation which will undermine the significance of the unique nature of the legal relationship between the parties on which the Attorneys Act places a premium.

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[12] Scott on *Cession* page 185.
[13] *Densam* Fn 4 at 112.

[34] As regards prejudice, counsel for Propell in argument before us, rejected the suggestion that the cession impairs the position of Attorneys Insurance and negatively impacts its rights. He argued that the objection to the transfer of indemnification rights by cession, in the absence of proof of actual prejudice to Attorneys Insurance, is unfounded.

[35] In para 71 of his heads of argument counsel for Propell formulated the contention regarding prejudice as follows:

'[Buurman Stemela Lubbe Inc] did not breach clause 6.6 of the Policy by entering into the Cession Agreement, and even if it did so, it was clearly entitled to do because of the repudiation of the Claims. As such, even if the respondent suffered any prejudice because of the cession of the Claims to the appellant, which is denied, it clearly was the author of its misfortune in that regard.'

[36] I do not agree with this contention for the following reasons. In general, the change in creditor resulting from a cession must not impose greater burdens on the debtor than those with which he would otherwise have been faced.[14] The debtor does not have to show that a cession will occasion it actual prejudice. It must only show that a cession will impose greater burdens on it.

[37] Counsel for Attorneys Insurance, with reference to various clauses of the Policy and the purpose of the insurance, demonstrated how the cession of rights under the Policy will compromise Attorneys Insurance's position. The legislative mandate ─ providing insurance cover to attorneys ─ would be violated by the cession because the effect of the cession would be to allow an entity which is not a firm or incorporated practice consisting of one or more practitioners, to become an insured. Mr Harban specifically testified that BSL in the cession agreement, and in violation of the provisions of clause 6.6 of the insurance policy, admitted liability in respect of the six claims that the Propell has instituted against BSL. The admission of liability appears from the cession agreement where it is stated that BSL has suffered a loss caused by misappropriation of money and is liable to Propell for such funds that Propell has lost. Prejudice to Attorneys Insurance is self-evident in this case.

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[14] *Goodwin Stable Trust v Duohex (Pty) Ltd* 1998 (4) SA 606 (C) at 616G-H.

[38] The evidence of Mr Harban is that in addition to this admission being in contravention of the provisions of clause 6.6 of the Policy, it also renders the position of Attorneys Insurance more grievous and it in fact impacts on its rights as it would be bound by the admission of its insured (BSL) if it is held that it is liable in terms of the insurance policy to indemnify the insured. The same applies to the right of Attorneys Insurance to insist upon assistance from BSL in defending Propell's claims made against BSL, as envisaged in clause 6.6 of the Policy in the event of it being held that Attorneys Insurance is liable to indemnify BSL. The effect of the cession of BSL's rights is thus to deprive Attorneys Insurance of the opportunity to invoke the provision of clause 6.6 of the Policy, which affords it a right to insist upon the assistance from BSL in defending Propell's claims, a third party.

[39] Propell's suggestion that because of the repudiation, the right to step into the shoes of the insured, ie BSL, and to defend the six underlying claims in the name of BSL as well as the right to insist upon assistance from BSL, can never be claimed or relied upon after repudiation, cannot be correct. This argument ignores entirely the fact that the Policy did not in fact or in law terminate as a result of the repudiation. The Policy endured for the entire period of insurance and continued to exist for as long as BSL remained a legal firm and was in possession of a Fidelity Fund Certificate or was obliged to apply for one for the relevant period.

[40] I conclude therefore that the high court was correct in holding that the rights of indemnification under the Policy are not capable of being ceded on the grounds that first, the nature of the contractual relationship flowing from the Policy involves a *delectus personae* and secondly, the cession has the effect of burdening Attorneys Insurance's position. The purported agreement of cession concluded by BSL and Propell is therefore invalid and that being the case, it was incapable of conferring locus standi on Propell.

[41] The appeal is dismissed with costs.

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D H Zondi

Judge of Appeal

APPEARANCES

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	Symington & De Kok Attorneys, Bloemfontein
For the Respondent:	G F Heyns
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