**IN THE HIGH COURT OF SOUTH AFRICA**
**SOUTH GAUTENG HIGH COURT**
**JOHANNESBURG**

**CASE No. 15683/09**

**REPORTABLE**

**(IN THE ELECTRONIC REPORTS ONLY)**

| **DELETE WHICHEVER IS NOT APPLICABLE** | |
|---|---|
| (1) REPORTABLE: YES / NO | |
| (2) OF INTEREST TO OTHER JUDGES: YES / NO | |
| (3) REVISED. | |
| ..... | ..... |
| DATE | SIGNATURE |

In the matter between:

**COURIER DIRECT LOGISTICS (PTY) LTD**

**(IN LIQUIDATION)** Applicant

and

**GIDANI (PTY) LTD** Respondent

---

**JUDGMENT**

---

**WILLIS J:**

[1] This is an application for payment of the sum of R1 659 103, 55; interest thereon at the rate of 15,5% per annum from 26 February, 2011 to date of payment and costs.

[2] The applicant rendered courier services to the respondent in distributing various lottery products to retailers and outlets in the country. The respondent is a licensed operator of the National Lottery. The applicant has been placed in liquidation. The debt of the respondent to the applicant is one which the respondent has admitted. In effect, the claim of the applicant is one for "goods sold and delivered". The goods were sold by the applicant to the respondent on account. Prior to the applicant having been placed in liquidation, the respondent had been making regular payments to the applicant.

[3] Some time before the applicant had been placed in liquidation, the applicant had ceded its book debts to both Nedbank Bank Ltd ("Nedbank") and the Industrial Development Corporation Ltd ("the

IDC"), it having been expressly agreed that IDC would rank behind Nedbank. Both Nedbank and IDC have proved their separate claims against the applicant at meetings of creditors of the applicant. The application has been brought with the sanction of the liquidator of the applicant.

[4] The respondent contests its liability to pay on three bases:

(i) The cession to IDC was not a cession *in securitatem debiti* but an "out-and-out" cession;

(ii) The cession to Nedbank was not a cession *in securitatem debiti* but an "out-and-out" cession;

(iii) although the respondent may have acknowledged its indebtedness to the applicant, the respondent has a counterclaim which exceeds the amount of the applicant's claim and accordingly the respondent disputes its liability to pay the applicant.

[5] The agreement between the applicant and the IDC was entered into on 20 June 2007 (before the agreement between the applicant and Nedbank) but records that "the cession in terms of this document shall rank behind Nedbank's rights to the debtors" The document is headed "Reversionary Cession of Debtors". Mr *Hutton*, who together with Ms *Robertson* appeared for the respondent contended that this was a cession of the applicant's reversionary right in the debts ceded to Nedbank and accordingly was an "out-and-out" cession. I disagree for the following reasons:

(i) the document of cession refers specifically to the cession being given "as security for its (the applicant's) obligations to the creditor (the IDC) in terms of the loan";

(ii) the document of cession refers in several places to the cession operating as "continuing covering security";

(iii) the document nowhere refers to a cession of any reversionary interest that may have been held by the applicant;

(iv) it would have made no commercial sense whatsoever for the IDC to have taken a cession of the applicant's reversionary interest in debts ceded to Nedbank;

(v) IDC, by proving its claim in the liquidation of the applicant, was *ipso facto* disavowing that there could have been any intention as between the applicant and the IDC that the cession be an "out-and-out" cession;

(vi) the document seems deliberately to have avoided any use of any Latin phrases with which lawyers and those who may have received some training in commercial law will be familiar and, in context, the words "Reversionary Cession of Debtors" must have been a "plain English" attempt to translate *in securitatem debiti* – in other words, in the event that the applicant's debt to IDC was extinguished, the applicant's full right title and interest to claim from its book debtors (the debts of whom had been ceded to IDC) would revert it, the applicant.

[6] I also disagree that the cession entered into between the applicant and Nedbank was an "out-and-out" cession. My reasons are the following:

(i) the document specifically records that the cession is made *in securitatem debiti* and even explains that this means that the cession is given as security for a debt;

(ii) the document refers to the cession operating as "continuing covering security";

(iii) the document in several instances refers to a pledge operating, in circumstances where, to the extent that this is possible, the cession is considered to be coextensive with a pledge.

[7] The defence of the counterclaim cannot succeed. It is an afterthought. The respondent does not, in its answering affidavit dispute the allegation in the applicant's founding affidavit that the reason it gave for not for not paying was that applicant was in liquidation. The decision in *Chemfos Limited v Plaasfosfaat (Pty) Limited*[1] does not, therefore, assist the respondent. The facts of the present case are distinguishable from those of the *Chemfos v Plaasfosfaat* case on another basis as well. In the *Chemfos v Plaasfosfaat* case the plaintiff had relied exclusively on the admission of indebtedness by the defendant and not on the underlying *causa* of "goods sold and delivered".[2]

[8] Counsel for both parties agreed that the distinction between a cession made *in securitatem debiti* and an "out-and-out" cession has been resolved and made clear in the cases of *Picardi Hotels Limited v Thekweni Properties (Pty) Limited*[3] and *Grobler v Oosthuizen*.[4] The

[1] 1985 (3) SA 106 (A) at 115B-116C
[2] See, for example at p113C-E and 114C-H.
[3] 2009 (1) SA 493 (SCA)
[4] 2009 (5) SA 500 (SCA)

*dominium* in the book debts remained vest in the applicant. Accordingly, once the applicant went into liquidation, it fell to the liquidator to collect the book debt, including the indebtedness due by the respondent to the applicant. This has been the position in our law for more than 100 years. The judgment of *National Bank v Cohen's Trustees*[5] has been followed in innumerable cases, including the recent *Grobler v Oosthuizen*[6] decision in the Supreme Court of Appeal ("the SCA"). The position has been re-affirmed, in general terms, by the SCA in another recent decision of *Momentum Group Limited v Van Staden N.O. and Another*.[7] The applicant therefore succeeds.

[9] The following order is made:

The respondent is to pay the applicant-

(i) The sum of R1 659 103, 55;

(ii) Interest on the aforesaid sum at the rate of 15,5% per annum from 26 February, 2011 to date of payment; and

(iii) Costs of suit.

**DATED in JOHANNESBURG this 11TH DAY OF AUGUST, 2011.**

[5] 1911 AD 235
[6] 2009 (5) SA 500 (SCA) at paragraph [10]
[7] 2010 (2) SA 135 (SCA) at paragraph [20]

**N.P. WILLIS**

**JUDGE OF THE HIGH COURT**

Counsel for the Applicant: Adv. *B.M. Gilbert*

Counsel for the Respondent: Adv. *R. Hutton SC* (with him, Adv. *C.L Robertson*)

Attorneys for the Applicant: Reitz Attorneys

Attorneys for the Respondent: Bowman Gilfillan Inc.

Date of hearing: 3 August, 2011.

Date of judgment: 11 August, 2011