REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO 39068/2009

(1) REPORTABLE: No.
(2) OF INTEREST TO OTHER JUDGES: No.
(3) REVISED.

....
DATE SIGNATURE

In the matter between

BORN FREE INVESTMENTS **PLAINTIFF**

and

FIRSTRAND BANK LIMITED **DEFENDANT**

J U D G M E N T

WEPENER J:

[1] The plaintiff, as a cessionary, instituted an action against the defendant seeking payment of damages which it alleges arose as a result of a breach of a development loan agreement as read with a settlement agreement, which latter fact is not relevant for purposes of this judgment. It is further alleged that breach constituted a repudiation of the agreement, which was accepted by the cedent. There are two similar claims by the plaintiff as cessionary. The

cedent, it is alleged, is the liquidator of the entities that entered into the contracts with the defendant, the first cedent being the liquidators of Central Lake Trading 256 (Proprietary) Limited ('Central Lake') and the second cedent, the liquidators of Summer Season Trading 49 (Proprietary) Limited ('Summer Season'). I refer to the liquidator either in the singular or the plural because there was more than one liquidator appointed for each company in liquidation. Nothing turns on this fact.

[2] In addition, and based on the cession in the Central Lake matter, the plaintiff, in the alternative, claims damages based on misrepresentation allegedly made by the defendant. During the proceedings before me this claim was withdrawn and abandoned.

[3] Both parties were in agreement that the provisions of the Companies Act 61 of 1973 ('the Companies Act'), as read with the Insolvency Act 24 of 1936 ('the Insolvency Act'), are applicable to the disputes between them.

[4] At the commencement of the proceedings, the defendant launched an application pursuant to Rule 33(4) of the Rules, regulating the conduct of proceedings in the High Courts of South Africa, seeking that the issue of quantum of damages ('the damages issue') and the issue of the validity of the cessions relied upon by the plaintiff ('the cession issue') be separated from the remaining issues in dispute. The plaintiff agreed that the damages issue be heard separately after the merits have been disposed of. After hearing argument, I ruled that the cession issue is to be separated from all other issues and that it be determined *ab initio* prior to the remaining issues between the parties being ventilated. It was quite apparent to me that the cession issue was a matter that could be conveniently and sensibly decided separately and that it was a matter distinct from all other disputes between the parties. The plaintiff however, although initially agreeing that the cession issue

also be heard separately and that the question of damages should be separated out, resisted the application to deal with the question of cession *ab initio*.

[5] I will not dwell on my reasons for ordering a separation for too long. When the defendant suggested a separation of the cession issues to the plaintiff in a letter, it was met with a bland refusal and accompanied by a suggestion that the matter be heard by the court. Nothing in the correspondence indicated why the plaintiff objected to such a separation and why the defendant was invited to apply to court for such a separation. This, the defendant duly did and upon reading the affidavit in opposition to the separation, one finds little substance in the opposition to the application. An attorney acting for the plaintiff stated that not much time will be saved by the separation; special defences foreshadowed in the defendant's affidavit are not complex; she denied that the defendant required so many witnesses as it stated it wished to call; she denied that it would be convenient to separate the issues; she stated that the defendant's defences regarding the cession issues were makeweights; she speculated that it will take nine years for the trial to finalise should the matter be separated. None of these statements or arguments are supported by facts. On the contrary, both parties advised me during argument that the witnesses required for the cession issue are extremely limited. It is not for the plaintiff to speculate how many witnesses the defendant may need to call on the merits of the matter. No inconvenience has been shown. The fact that the trial may take a few years has already been occasioned by the parties' agreement to separate out the quantum issue. In my view, the plaintiff's opposition to the separation sought by the defendant lacks substance and it would be eminently convenient to decide the cession issue separately. Indeed to use the words of the deponent to the affidavit on behalf of the plaintiff: the reasons for opposing the separation appear to be 'makeweight'. Mr Potgieter, appearing with Mr S.J van Niekerk, arguing for the plaintiff, referred to a number of cases in support of his legal argument why this matter should not be separated. Many of these cases deal

with the position regarding separation prior to the amendment of Rule 33(4). Rule 33(4) reads as follows:

> '*If, in any pending action, it appears to the court mero motu that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately.*'

The proviso places an onus on the plaintiff to show why the cession issue cannot be conveniently decided separately. In *Berman & Fialkov v Lumb* 2003 (2) SA 674 (C) Van Reenen J said at para 17:

> *'In terms of the provisions of Rule 33(4) in its present form, an application for the separation of issues by any party must be granted unless it appears that such issues cannot conveniently be decided separately (see Edward L Bateman Ltd v C A Brand Projects (Pty) Ltd 1995 (4) SA 128 (T) at 132D) and it is incumbent on the party who opposes such an application to satisfy the Court that such an order should not be granted (see Braaf v Fedgen Insurance Ltd 1995 (3) SA 938 (C) at 939G).'*

See also *Edward L Bateman Ltd v C A Brand Projects (Pty) Ltd* 1995(4) SA 128 (T) at 132C-E.

[6] The affidavit filed by the plaintiff falls far short from discharging such an onus. Arguments regarding a possible appeal are unconvincing as no facts were placed before me to substantiate the real possibility of an appeal. It remained an argument. Mr Potgieter conceded that there may be a saving of court time and that 90% of the issue was a matter of construction of the relevant cessions. It was quite apparent that the issue would require limited evidence as it concerns primarily a matter of law. That concession goes much further. There will be a large saving of costs and less inconvenience for witnesses if the cession issue is determined separately. A further consideration is that the parties have compiled a trial bundle comprising of some 944 pages, together with two further lever arch files containing relevant other applications, being the liquidation application and a successful application to set aside a previous cession of rights. Both applications include evidence under oath by material witnesses on the merits. Preference to this significant volume of documents will become unnecessary should the cession

issue be dispositive of the matter. Mr van der Nest SC, who appeared with Mr Limberis SC and Mr J.E Smit on behalf of the defendant, assured me that only a handful of documents would be relevant to the cession issue.

[7] I consequently ordered that the issue of damages be separated from all other issues (as both parties so agreed) because it appears convenient to do so and further that the cession issue (as defined in prayer 2 of the notice of motion) be separated from the remaining issues and that it be determined *in initio*.

[8] Following upon this ruling the plaintiff called two witnesses to deal with the cession issue. The second witness, the relevant official from the Master's Office, was not examined after the defendant admitted that all documents bearing the Master's stamp are true copies of the originals that emanated from the Master's office. Surprisingly, the witness was not asked regarding the contents of certain documents which were argued before me to have been incorrectly worded or that it contained mistakes. However, as a result, the defendant's approach taken regarding the appointment of the liquidator referred to later in the judgment, nothing turns on this failure.

[9] The only other witness that gave evidence was Mrs Keevy, a joint liquidator of the two companies, Central Lake and Summer Season. I refer to her as the liquidator as she was the person who dealt with the estates of the companies in liquidation on behalf of all the liquidators.

[10] Mrs Keevy's evidence centred broadly around the question of the liquidation of both Central Lake and Summer Season; her request for support to be appointed as provisional liquidator; the appointment of the provisional liquidators by the Master; the compliance with requirements such as bonds of

security and affidavits of non-interest; the notices that were given and the meetings of creditors which were held; the powers of attorney that were filed; the minutes of the meetings of creditors (which she did not attend); certain letters, advertisements, certificates and resolutions purportedly adopted at meetings; the sale and cession agreements of the claims by the companies in liquidation to the plaintiff.

[11] The above summary indicates that her evidence was largely presented in an attempt to show that the formalities were complied with from the date of liquidation up to and including the sale and cession of the claims upon which the plaintiff sues the defendant herein. It is not necessary to set out each and every fact which formed the basis of her evidence. The relevant facts are those which the defendant attacked and it will be convenient to summarise the relevant facts only when dealing with each of the defences raised by the defendant.

[12] The first issue concerns the claim brought by the plaintiff as cessionary of a claim which it is alleged vested in Central Lake. Although the documents placed before me regarding the appointment of the liquidator were confusing and although the Master's representative was not asked to clarify the confusion regarding the appointment of the provisional and final liquidators, the defendant approached the issue to be considered on the basis of the appointment being one as a final liquidator. It was argued that there was non-compliance with section 386(3)(a) of the Companies Act. Section 386(3)(a) reads as follows:

> '*(3) The liquidator of a company-*
>
> *(a) in a winding-up by the Court, with the authority granted by meetings of creditors and members or contributories or on the directions of the Master given under section 387;*
>
> *shall have the powers mentioned in subsection (4).*'

I need not set out the powers which are contained in subsection 4 as the issue in this matter is that the liquidator did not receive powers or authority from a meeting of creditors and members. It is common cause that the Master did not give directions under s 387 and the question of contributories did not arise. The facts leading to the liquidator entering into the sale and cession of rights are the following. It is common cause that Central Lake was wound up by the court. Thereafter the Government Gazette ('Gazette') of 16 October 2009 advertised a meeting for 28 October 2009 at 10h00 to be held before the Master in the South Gauteng High Court. Pursuant thereto, a second meeting was called in the Gazette of 26 February 2010. It is stated that the meeting will be held on 24 March 2010 at 10h00 before the Master of the High Court Pretoria. This was incorrect information which was published in the Gazette as the meeting was actually held on 31 March 2010 before the Master of the High Court Johannesburg. Mrs Keevy was puzzled by the incorrect advertisement and she accepted that the notice in the Gazette was wrong. It is trite that the liquidator is required to publish a notice of a meeting of creditors and members in both the Gazette and in one or more newspapers circulating in the district where the company in liquidation had its registered office or principal place of business. In this matter the newspaper advertisement for the second meeting of creditors, loosely translated, states that it was a notice of a second meeting of creditors and it further states that the second meeting of creditors will take place before the Master of the High Court Johannesburg on Friday 31 March 2010 at 10h00.

[13] The difficulties highlighted by Mr van der Nest are twofold. Firstly, the Gazette gives the wrong date and place for the meeting and the notice in the newspaper fails to call members to the meeting. Relying on *Griffin and Others v The Master and Another* 2006 (1) SA 187 (SCA), the defendant contended that, in the absence of a meeting of creditors and members, the liquidator could not have received any powers to conclude the sale and cession, which they purported to conclude pursuant to powers received at the second

meeting of creditors. The court in *Griffin* per Zulman JA after quoting s 386(3)(a) of the Companies Act said:

> '*[6] It is clear that s 386(3) specifies in terms that a liquidator may only exercise the powers given (with certain exceptions which are not here relevant) if granted authority to do so. Furthermore, s 386(3)(a) specifies from whom this authority must be obtained; namely, in the case of a winding-up by the court, meetings of creditors and members or contributories or on the directions of the Master. It is not suggested that in this case there was any authority given by contributories or that there were directions from the Master.*
>
> *[7] The learned authors Blackman et al in their Commentary on the Companies Act (2002) vol 3 at 14 - 330 correctly state the position in these terms:*
>
> *"Section 386(3) provides that with the required authority the liquidator 'shall have the powers mentioned in ss (4)'. Thus it would seem that the grant of authority is not merely a condition for the exercise of those powers, but, is rather, a necessary condition for their existence. Where the liquidator requires such authority to exercise a particular power, other than the power to litigate [a situation not of application here], it is open to a third party to raise the question of the liquidator's lack of authority" '.*

The questions that arise are: Did the incorrect notice of the meeting as to the date and place and persons who were called to attend lead to that meeting being a non-event for failure to comply with s 386(3)(a) and the Companies Act and regulations, which require that a notice of meeting should be given in both the Gazette and a newspaper? Secondly, was the absence of notice to members fatal to the holding of the meeting? In *Griffin* at para [9], the court rejected the argument that the words '*creditors and members*' must be read disjunctively and not conjunctively. A collective meeting of creditors and members must be held. The conclusion was that the liquidator did not have the necessary authority as required by s 386(3)(a) read with 386(4) of the Companies Act, if a meeting of both the creditors and members was not held. The granting of authority is not merely a condition for the exercise of the liquidator's powers, but a necessary condition for their existence. Mr Potgieter attempted to meet the difficulties by arguing that in the *Griffin* matter the word '*members*' was specifically deleted whilst such was not the case in the matter of Central Lake. He further argued that the defects in the notices calling the meeting are covered by the provisions of s 157 of the Insolvency Act (which provision, it was common cause, would be applicable to the liquidation of Central Lake). It reads as follows:

> '*157. Formal defects.—(1) Nothing done under this Act shall be invalid by reason of a formal defect or irregularity, unless a substantial injustice has been thereby done, which in the opinion of the court cannot be remedied by any order of the court.*'

[14] I am, however, of the view that having regard to the facts of this matter that there was no meeting of creditors and members. Firstly, members were not called to a meeting in the advertisement published in the newspaper. Secondly, only creditors were called to the meeting which was so advertised. A creditors' meeting was advertised in the Gazette to be held on 24 March 2010 in Pretoria. No such meeting took place. In fact, a creditors' meeting was held on 31 March in Johannesburg. One Schickerling attended (on behalf of a creditor) but members were not present thereat. The minutes of the meeting also do not record that any members attended the meeting. This is not surprising as they were not called to attend the meeting on 31 March 2009 in Johannesburg.

[15] Section 157 of the Insolvency Act provides for cures of formal defects of acts performed under the Insolvency Act, provided that there has been no substantial injustice done as a result of such a formal defect. The question to be answered is: does the failure to call members to a meeting and the fact that the meeting of creditors was called at an incorrect time and place constitute such a formal defect? *Mars*, The Law of Insolvency in South Africa (8th edition by De la Rey) says at page 12:

> '*In deciding whether a defect is formal, the test is not whether the provisions of the statute are directory or peremptory, but rather whether the statute aims at some definite object and whether that object would be defeated by an omission to comply with the statute, or whether the defect is such that it could not possibly be capable in the circumstances of affecting the ultimate decision of the court. A defect is not formal if the rights of a creditor would in any way be affected.'*

(Footnotes omitted).

[16] In support of the statement that the defect is not formal if the rights of a creditor would in any way be affected the learned authors refer to, inter alia,

Ex parte Zafiropoulus 1932 TPD 229 at 233; *Ex parte Jhatam* 1958 (4) SA 33 (N); *Ex parte Ndlovu* 1981 (4) SA 303 (Z). In *Zafiropoulus* the court held that something which affected the rights of creditors could not be said to be in respect of a formal defect. In *Jhatam* at 34D, Milner J found that the lodging of documents at an incorrect office was not a formal defect but that the application was as a result thereof 'grossly defective'(at page 35C). In *Ndlovu* the test was set out as follows at page 304H:

> '*The test of whether a defect such as this is formal or substantive is not whether the statutory provision is directory or peremptory, but rather whether it aims at some definite object and whether, having regard to the particular facts, non-compliance therewith will result in the defeat of that object. See Ex parte Miller 1932 TPD 212 at 216; Ex parte Curry1965 (1) SA 392 (C) at 393A. In Ex parte Zafiropoulos 1932 TPD 229 at 233 and Ex parte Fakir1956 (4) SA 177 (C) at 179D the view was expressed that this type of defect cannot be said to be formal if it might cause prejudice to the creditors. That, to my mind, puts the same test in a simpler form*'.

[17] In *Ex parte Mandelstam* 1949 (3) SA 1210 (C) Horwitz J held that a failure to comply with the requirements of an Act could not be regarded as a formal defect and said at p1211:

> '*That being so, there is no statutory jurisdiction for the condonation of defects which do not fall within the last-mentioned section. And, in my apprehension, there is no justification under the Act for the exercise of any so-called right to condone a material defect which assumes the form of a non-compliance with an imperative provision of the statute, except, perhaps, on the principle of de minimis non curat lex principle which cannot be invoked in the present case*.'

In *Ex parte Marais and Two Others* 1957 (3) SA 311(W) the decision of *Mandelstam* was followed.

[18] Omission to give proper notice of surrender has been held not to be a formal defect - see *Ex Parte Van der Merwe* 1963 (1) SA 268 (O) at 271F. See also *Ex parte Nel* 1947 (4) SA 439 (T).

[19] In my view the failure to call members to a meeting must of necessity cause prejudice to such members who were not advised of the meeting to be held on 31 March 2010 in Johannesburg. It is as if no notice was given at all.

Members have rights which they may exercise at such meetings and the denial of the exercise of those rights to attend and vote at a meeting is clearly prejudicial to them. The object of calling them to a meeting and securing their attendance has been defeated. The notice in the Gazette which calls creditors to a wrong venue on an incorrect date would similarly be prejudicial to the creditors who were entitled to attend a meeting of creditors and exercise their rights thereat.

[20] The notices which called the meeting at the wrong time and place and which failed to call the members to attend are, in my view, so defective that they should be regarded as *pro non scripto*. The defects are fatal and not purely formal.

[21] Having come to the conclusion that no valid second meeting was held where at the liquidators could validly receive powers, the liquidators did not lawfully acquire authority contemplated in s 386(3)(a) as read with s 383(4) of the Companies Act. The liquidators consequently lacked powers to conclude the sale and cession of the Central Lake claim to the plaintiff.

[22] The effect is that the claim of the plaintiff, based on the sale and cession from the liquidators of Central Lake, who received no powers to sell or cede such a claim, is bad in law.

[23] The defendant's further defences are applicable to both claims ceded by Central Lake and Summer Season. The cessions in both instances were concluded as follows:

> '*1.1 the cedents have claims against First Rand Bank Limited ("FRB") arising out of breach by FRB of agreements with the cedents and/or arising out of misrepresentations made by FRB to the cedents ("the claims");*

> *2.1 …the cedents hereby cede, transfer and make over to the cessionary the cedents' rights title and interest in and to the said claims.'*

The cessions themselves, as well as the pleadings in this matter, make it plain that the claims ceded to the plaintiff arise out of the alleged breach by the defendant of the loan agreements.

[24] A defence was pleaded as follows:

> '*Without derogating from the generality of the aforegoing denial, the defendant specifically denies that the rights of performance and claims of Summer Season Trading 49 (Pty) Ltd ("Summer Season") and Central Lake Trading 256 (Pty) Ltd ("Central Lake") which the plaintiff attempts to enforce, were capable of being ceded, particularly having regard to clause 15 of the written agreements, annexes "SS3", "SS4" and "CL2" to the plaintiff's particulars of claim, in circumstances where the defendant did not give its prior written consent to any cession.*'

The plaintiff did not replicate to this allegation nor does it allege in the particulars of claim that it indeed obtained such consent. Mr Potgieter did not argue that actual consent had been obtained and, in my view, having regard to the plaintiff's argument that consent was not necessary, it became common cause that the defendant did not consent to the cession of the claims, whether in writing or otherwise. Clause 15 of the development loan agreement provides:

> '*You shall neither cede any of your rights nor assign any of your obligations under this agreement without our prior written consent*'.

[25] It is the defendant's contention that the rights under the agreement were, despite the *pactum de non cedendo,* sought to be ceded by the liquidators without the defendant's consent and thus bad in law as the rights were incapable of being ceded by the liquidator to the plaintiff without such prior written consent.

[26] A further issue raised by Mr Potgieter was that, whatever the wording of the *pactum de non cedendo,* the claims instituted by the plaintiff are not claims under the contract. For this proposition Mr Potgieter relied on *Imprefed*

(Pty) Ltd v National Transport Commissioner 1990 (3) SA 324 (T). Although the court there held that damages for breach of contract was not the same as a claim under the contract for remuneration and that it constituted a new cause of action, it did not hold, as submitted by Mr Potgieter, that the claim for damages was not a claim under the contract. *Imprefed* dealt with different causes of actions arising at different times and the nature of the causes of action. Botha J did not pertinently deal with the question whether a claim for damages as a result of the breach of the contract arose under the contract or not. Indeed the words used in the judgment and particularly at p33B-C, in my view, by implication accept that such a claim for damages is a claim '*under the contract*'. When pressed to indicate where in *Imprefed* it was so held, Mr Potgieter changed his assertion that it was so held to an argument that it was impliedly so held. There is no merit in this argument. In *CGU Insurance Limited v Rumdel Construction (Pty) Ltd* 2004 (2) SA 622 (SCA) at para 10 the Supreme Court of Appeal held as follows:

> '*The defendant also placed reliance on the judgments in Imprefed (Pty) Ltd v National Transport Commission and Evins v Shield Insurance Co Ltd. I believe that both cases are distinguishable on the facts and do not assist the plaintiff. In the Imprefed (Pty) Ltd case the Court held that a claim for payment of an amount due under a contract was different from a claim for damages based upon breach of contract so that pursuance of the one debt did not interrupt the running of prescription on the other. The nature of the other debt was different. So also in Evins' case which held that a claim for compensation for bodily injury sustained by the plaintiff was not substantially the same as her claim for damages for loss of support following the wrongful killing of her breadwinner, with the result that a summons claiming one did not interrupt the running of prescription on the other.*'

[27] No mention is made in *CGU Insurance* of the fact that the claim for damages is not a claim under the contract. There are two reasons why such a claim is indeed a claim under the contract. One is the basic right of an aggrieved party to choose which of his remedies to enforce if his contracting party is in breach of his contractual obligations and the second reason is found in precedent. The basic right is found in every textbook that deals with the Law of Contract. I quote for example Christie, the Law of Contract in South Africa (6th edition at page 543):

> '*The remedies available for a breach, or in some cases, a threatened breach of contract are five in number: Specific performance, interdict, declaration of rights,*

> *cancellation, damages. The first three may be regarded as methods of enforcement and the last two recompenses for non-performance. As will be seen, the choice between these remedies rest primarily with the injured party, the plaintiff, who may choose more than one of them, either in the alternative or together, subject to the overriding principles that he must train inconsistent remedies and he must not be overcompensated*.'

[28] These remedies are available to a contracting party only and a third party has no interest therein, save where rights under the contract may be lawfully ceded or assigned to such third party. The claim which a contracting party may wish to pursue against a defaulting party is a fundamental right under the contract. Without the contract it would not have arisen. It would in my view be wholly artificial to contend that the transfer of a claim for damages arising out of a breach of agreement involves no transfer of rights under the agreement. The right to sue, which the plaintiff contends was transferred to it by way of cession, is a right under the agreement to claim damages.

[29] Arising out of an acceptance of the defendant's alleged repudiation of the loan agreement, the plaintiff pleads that Summer Season accepted the repudiation and cancelled the agreement. As described by Christie (*The Law of Contract in South Africa*, *supra*, at pp 561-562), cancellation terminates the primary obligations of the contract there and then, but not retrospectively. Further, termination of primary obligations does not terminate secondary obligations, such as the obligation to pay damages for breach, or the obligation to abide by an arbitration clause in the contract. Just as these secondary obligations remain, so too does the right to enforce them, which is a personal right under the contract, capable of cession (absent a *pactum de non cedendo*).

[30] The Appellate Division dealt with this principle as follows in *Attridgeville Town Council and Another v Livanos t/a Livanos Brothers* (1992 1 SA 296 AD at 303I – 304E) where the question of the survival of an arbitration clause in repudiated and terminated agreements arose. Smalberger JA said as follows:

'*Did the arbitration clause survive the termination of agreements?*

Livanos claims that the Appellants repudiated the agreements by calling for tenders for work already allocated to him in terms thereof. The Appellants in turn claim that Livanos repudiated the agreements by ceasing operations and abandoning the site. Each claims to have accepted the other's repudiation, thereby resiling from the agreements. Arising from the situation, Mr Zeiss contended that irrespective of which party had justifiably repudiated, the parties were ad idem that the agreements has come to an end. The legal relationship between them had accordingly been dissolved, and the arbitration clause had fallen away. The resulting situation, so it was argued, is analogous to one where a contract containing an agreement to arbitrate is terminated by mutual consent. It is common cause to speak of the termination of a contract by one party's acceptance of the other party's repudiation thereof. One needs, however, to define with greater precision what, juristically, this encompasses. By repudiation, in the sense in which the word is used in the present matter, is meant the evincing of a clear intention by one party, by his acts or conduct, not to perform his obligations under a contract acknowledged to be binding. (Culverwell and Another v Brown 1990 (1) SA 7 (A) at 14 B-E.) Such conduct constitutes a breach of contract in anticipando. This leaves the opposite party with a choice of keeping such a contract alive and enforcing it, or if cancelling it by "accepting" the repudiation. If he chooses the latter course, he manifests an intention not to accept further performance under the contract in question from the party in default. At the same time he manifests an intention not to further perform his own obligation under the contract thereby resiling from it. By so doing he puts an end (in case of a contract that is executory) to the primary obligations of the parties to perform in terms of the contract. Certain secondary obligations, for example, the duty to compensate for damages arising from the wrongful repudiation, however, remain.'

[31] That the right to claim damages is itself a right under the contract, and it survives termination after acceptance of repudiation.

[32] This was also held in *Capespan (Pty) Ltd v Any Name 451 (Pty) Ltd* 2008 (4) SA 510 (C) at 521H where Thring J said:

'*Does the fact that what has been ceded to the respondent is the claims for damages of Chance Brothers and Club Champion make a difference? I do not think so. The claims are contractual in nature. They arise from alleged breaches by the appellant of its obligations under the marketing agreements. Generally speaking, a claim for damages for breach of contract is, in my view, a right "under" the contract concerned. Without the contract, the claim cannot exist. The claim flows from the alleged breach of the contract and therefore arises "under" the contract.*'

[33] I am in agreement with these views and find that the claims which the plaintiff wishes to pursue are such claims for damages which arise under the agreements of loan. Once that is so, a second issue arises i.e. could the

liquidators sell and cede the claims for damages despite the *pactum de non cedendo*? It has authoratively been held in *Capespan* that a purported cession in breach of a *pactum de non cedendo* is invalid and is of no force and effect (see *Capespan* at 521J). This is also in line with the principle that no one can cede more rights to another than the rights which vest in the cedent. Thring J, after a careful analysis of the law, concluded in *Capespan* at 519A-C:

> '*However, in the case of the second pactum, that which relates to a right which was created ab initio as a non-transferable right, the pactum is valid and enforceable against the world because the right is simply inherently incapable of being transferred by anyone; and a cession of such a right contrary to the pactum will be putative, and of no force or effect, even if it is a so-called 'involuntary' cession; in other words, it will bind even a trustee in insolvency or a liquidator of the creditor. I hasten to add that I do not use the term 'insolvency cession' to include the vesting of an insolvent's assets in his trustee, which takes place, not by an act of cession, but automatically, by operation of law, as was mentioned in Paiges' case (loc cit): the term as I understand it refers now to an attempt by a trustee or liquidator to transfer the right concerned, by means of cession, to a third party.*'

[34] Mr Potgieter argued that the *pactum de non cedendo* contained in the agreements under consideration is distinguishable from the clause considered in *Capespan*. It was found that the clause in *Capespan* was couched in wide terms and that the prohibition was not directed at any particular person or party and the limitation was regarding its ambit of the interests and rights concerned rather than regulating the conduct of a particular person (see *Capespan* at 591H). Because clause 15 contains the word '*you*', it was argued that the prohibition was not as wide as the one in *Capespan* and its ambit is limited to the holder of the rights i.e. Central Lake and Summer Season and not applicable to its liquidator. I do not agree. No one can cede more rights than the rights which that party holds and it will defeat the object of the *pactum de non cedendo* if the party can circumvent the prohibition contracted for by ceding a claim. The claims in the matter under consideration are claims that fall into the category which, by means of the *pactum* itself was created *ab initio* as non-transferable rights and which are '*enforceable against the world because the right is simply inherently incapable of being transferred to anyone*'. (See *Capespan* at 519A-B).

[35] The use of the word '*you*' does not limit the ambit of the prohibition. The prohibition in *Capespan* at p 12E was as follows:

> *'Save as herein expressly otherwise provided, neither this Agreement nor any part share or interest therein nor any rights or obligations hereunder may be ceded, assigned, or otherwise transferred without the prior written consent of the other party.'*

In my view, the reference to '*you*' or the '*the other party*' is immaterial and does not affect the non-transferability of the rights. Thring J said in *Capespan* at 521G:

> '*There can be no question here that the pacta could possibly have related to pre-existing rights: as I have said, the rights and interests whose cession was prohibited by the pacta were created in the marketing agreements themselves, and, because of the inclusion of the pacta, they were in my judgment created as non-transferable rights and interests ab initio.*'

If that is so, the right so created cannot be transferable purely because the other contracting party was referred to in the *pactum* clause.

[36] Mr Potgieter attacked the *Capespan* matter as being wrong in law and being based on the learning of Scott (Scott, The Law of Cession, 2nd edition) who, it was argued, later retracted her earlier views which Thring J applied. I need say little more about this argument save to refer to the instructive article by professor Scott in 2008 (4) TSAR 776 and specifically at 782 where she states:

> '*The effect of the agreement (pactum de non cedendo) is that the rights remain non-transferable both during attachment and insolvency. The curator of the insolvent estate is bound by the prohibition (he may claim but he may not cede)*'.
>
> (My translation).

[37] The argument that courts have held, that a *pactum de non cedendo* was not a bar to a cession in leases upon sequestration or liquidation, misses the fact that the legislature specifically amended the common law by introducing legislation in the form of s 37(5) of the Insolvency Act to make an

exception in the case of leases. The line of cases relied upon by Mr Potgieter to justify the argument that a cession upon insolvency is valid, all deal with leases, which is specifically provided for in s 37(5) of the Insolvency Act. They are not applicable to the facts in this matter.

What was accepted in *Capespan* at 515B is the following remarks from Scott, supra at 214:

> '*In relation to a right which is created as a non-transferable right, a pactum de non cedendo is valid as the principle of freedom of contract is paramount here and therefore the requirement that the debtor should have an interest in the agreement is unnecessary. A cession contrary to such an agreement is of no force and effect even in the event of involuntary cessions, as the nature of the right is such that it is not transferable.*'

[38] I have not been persuaded that the judgment in *Capespan* is wrong and I intend following it.

[39] Mr Potgieter further argued that the cessions took place and that they are a done thing. Such a cession may be in breach of the *pactum de non cedendo* but nevertheless occurred and remedies may be available against the liquidators for acting in breach of the *pacta*. I do not agree. In *Trust Bank of South Africa Ltd v Standard Bank of South Africa Ltd* 1968 (3) SA 166 (A) at 189 D-G, Botha JA stated:

> *'…where the right is created with a restriction against alienation, and the restriction is contained in the very agreement recording the right, for in such a case the right itself is limited by the stipulation against alienation and can be relied upon by the debtor for whose benefit the stipulation was made. (Paiges v Van Ryn Gold Mines Estates Ltd, 1920 AD 600 at pp 615 and 617.)'*

[40] Thring J referred to Scott's commentary on the *Trust Bank* case in the Law of Cession (2nd edition at 212 to 214), and quoted Scott as follows:

> *'To my mind the position in South African Law at the moment in regard to a pactum de non cedendo is as follows: An agreement restricting the cedeability of existing rights is invalid unless the restriction is in the interest of the person in whose favour it has been made. If the restricting agreement is part and parcel of the agreement creating the right, such and agreement is also invalid, even if the cedent has no*

interest in the restraint. In both cases, however, the effect of the pactum de non cedendo is that a cession contrary to the restraint is of no force and effect and does not result in the claim for damages for breach of contract.

The correct approach should be the following:

A clear distinction should be drawn between a pactum de non cedendo in relation to existing rights, and one in relation to a right which is created as a non-transferable right. In relation to existing rights, the views of Sande and Voet should be followed in regard to both the validity and the effect of a pactum de non cedendo. In other words, as such an agreement is contrary to the basic law of property that res in commercio should not be withdrawn from commercial dealings, a good reason is required, or, as the courts interpret it, the person in whose favour the restraint is operating should have an interest in the agreement. The effect of such an agreement is that it is binding only on the parties to the agreement and a breach thereof results in a claim for damages - the right, however, passes to the cessionary.

In relation to a right which is created as a non-transferable right, a pactum de non cedendo is valid as the principle of freedom of contract is paramount here and therefore the requirement that the debtor should have an interest in the agreement is unnecessary. A cession contrary to such an agreement is of no force and effect even in the event of involuntary cessions, as the nature of the right is such that it is not transferable.'

[41] Thring J agreed with the views of Scott and in particular those stated in the final paragraph of the quote above (*Capespan* at 515C). Thring J pointed out that his conclusion is in line with a series of authorities, including Appellate Division and Supreme Court of Appeal authorities (*Capespan* at 515D-G).

[42] In *Capespan,* it was, in addition, pointed out that there is support to be found for Scott's view in decisions of provincial and local divisions of the High Court. Among other, Thring J referred to *Italtrafo SpA v Electricity Supply Commission* 1978 (2) SA 705 (W), a decision of this division, where King AJ held:

'In any event, in Trust Bank of Africa Ltd v Standard Bank of South Africa Ltd1968 (3) SA 166 (A), it was held that, where the restriction against the transfer of rights formed part of the contract in question, the person claiming to be the cessionary could not acquire the cedent's rights without the debtor's consent. Any rights obtained by the person claiming to be the cessionary would be subject to such restraint. The Appellate Division seems to have departed from the test of material and reasonable interest laid down in Paiges ' case. As I have already found as a matter of probability that the restraint against cession formed part of the contract in respect of the transformer bearing serial number 14624, the cession is not a valid one.'

[43] Thring J referred, with approval, to the decision of *Vawda v Vawda & Others* 1980 (2) SA 341 (T), a decision of the full bench of the Transvaal Provincial Division relating to the sale of immovable property where a *pactum de non cedendo* prohibited the purchaser from transferring any rights in the property without the seller's written consent. *Vawda* at 346 A-B said:

> *'On the question of the pactum de non cedendo, Mr Heher's contention loses sight of the fact that clause 11, which contains the pactum, is a stipulation in the agreement of sale of property. Under the agreement of sale the first respondent was the creditor of certain rights. In order to determine the extent of those rights, one has to look at the entire agreement of sale. Clause 11 which contains a pactum limits those rights. As it was put by De Villiers JA in Paiges v Van Ryn Gold Mines Estates Ltd (supra at 617), the stipulation against cession is part and parcel of the agreement creating the right, and the right is limited by the stipulation. This principle is referred to by Botha JA in Trust Bank of Africa Ltd v Standard Bank of South Africa Ltd1968 (3) SA 166 (A) at 189. Mr Heher, in effect, argues the appeal as if the pactum de non cedendo in clause 11 existed separately from the agreement of sale.'*

[44] After referring to a range of authorities in support of Scott's analysis, including Appellate Division and Supreme Court of Appeal authorities, Thring J referred to the contrary judgment of Olivier J (sitting alone) in *Lithins v Laeveldse Kooperasie Bpk & Another* 1989 (3) SA 891 (T), at 895 H-I where it was stated:

> *' I think it can safely be deduced from these cases that there is a general principle in our law to the effect that the pactum de non cedendo does not bind the trustee or liquidator in insolvency, unless it appears in a lease, in which case s 37(5) of the Insolvency Act applies, or unless it appears from the pactum that it would also be applicable in the case of insolvency'.*

And further at 897 C-D:

> *'In my view, the principle of the non-applicability of the pactum de non cedendo extends to all cases where a trustee or liquidator in insolvency sells and cedes a claim in his discretion, irrespective of whether he had other options of dealing with the claim.'*

[45] *Capespan* differed from the judgment in *Lithins*. Thring J pointed out that the Learned Judge failed to draw the distinction which Scott says should be drawn between *pactum de non cedendo* in relation to existing rights, on the one hand, and *pacta* in relation to rights which have been created *ab initio* as non-transferable rights, on the other. Thring J referred to the fact that, at

the time of the *Lithins* judgment, there was authority in the Appellate Division that, as regards the latter type of right, a trustee in insolvency or a liquidator will be bound by a *pactum de non cedendo*. The Appellate Division authority that Thring J referred to was the *Paiges* case, the *Trust Bank* case, and *MTK Saagmeule (Pty) Ltd v Killyman Estates (Pty) Ltd* 1980 (3) SA 1 (A). Thring J pointed out that Olivier J in *Lithins* made no reference to any of these three decisions. Thring J accordingly did not agree with the statements in *Lithins* and was of the view that in the passages of *Lithins* quoted above; the law was too widely stated. I am in agreement with the reasoning in *Capespan*.

[46] Any right transferred in contravention of a *pactum de non cedendo* would result in a putative transaction per Kemp AJ in *African Dynamics (Eastern Cape) (Pty) Ltd v MEC for Education, Eastern Cape Province and Others* (352/2007, 583/2007, 768/2007) [2010] ZAECBHC 12 (13 September 2010) at para 6. The rights are incapable of being ceded and the purported cessions of the Central Lake and Summer Season claims against the defendant to the plaintiff by the liquidators were invalid and are of no force and effect. See *Capespan* at 521J.

[47] Consequently, the claims instituted by the plaintiff as cessionary against the defendant have no basis in law.

[48] For all the aforesaid reasons the '*cession issue*' is determined in favour of the defendant and the plaintiff's claims cannot succeed.

[49] A final argument by Mr van der Nest was that even if the liquidator validly received powers to act, such powers are circumscribed in the resolutions purportedly passed at the second meeting of creditors. The resolutions provide for a number of general powers including:

> *'the joint liquidators be and are hereby authorised to collect any outstanding debts due the company in liquidation, and for the purpose thereof to sell or compound any of these debts some and or on such terms and conditions as they in their sole discretion may deem fit or to abandon any claim they in their sole discretion may deem appropriate and that all legal costs so incurred shall be costs of the estate'*

and

> '*the joint liquidators be and are herein authorised to dispose of the immovable and movable assets of the company by public auction, private treaty or public tender and that the mode of sale for any one or more of the assets shall be determined by the joint liquidators and that all costs incurred in relation thereto be costs in the administration*'.

[50] These resolutions are the empowering authority of the liquidator. They authorise the liquidator to '*sell…any of these debts…'* or to dispose thereof and that the mode of the sale of such assets shall be determined by the liquidator. On the assumption that a claim for damages would indeed be an outstanding debt or a movable asset, Mr van der Nest argued that the conduct of the liquidator, by attempting to sell and cede the claims, falls short of that which the liquidator was authorised and empowered to do i.e. to effect a sale.

[51] The liquidator, in the cession and sale of the damages claims, agreed that the price for the claims would be:

> '*3. We confirm that in consideration for the sale of the claims the cessionary shall pay to the cedents from any net proceeds of the claims an amount equal to:*
>
> *3.1 The total of the proven claims plus interest thereon in the estates of the cedents; and*
>
> *3.2 The total of all administration costs, including Master and Liquidators' fees.*
>
> *4. In the event of the claim against FRB does not realise sufficient proceeds of the amounts to cover the consideration in paragraph 3 above, then the cessionary shall pay one third of the net proceeds of the claim to the cedents.*
>
> *5. It is understood and agreed that the cedents do not warrant the validity of the said claims and shall not be liable to the cessionary in respect of any fees, costs or charges that may be sustained by the cessionary in the event of the said claims proving irrecoverable, partially or in full.'*

[52] In this respect, the defendant's counsel argued that the interpretation of the resolution becomes necessary. The approach to issues of interpretation is succinctly set out by Joubert JA in *Coopers & Lybrand and Others v Bryant* 1995 (3) SA 761 (A) at 767E to 768E:

> '*According to the 'golden rule' of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument… The mode of construction should never be to interpret the particular word or phrase in isolation (in vacuum) by itself… The correct approach to the application of the 'golden*

rule' of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:
(1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract…;
(2) to the background circumstances which explain the genesis and purpose of the contract, ie to matters probably present to the minds of the parties when they contracted…;
(3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions.'

[53] Resolution 7 falls to be interpreted against its statutory background and in the light of the facts set out above. If this is done, it was argued, that resolution 7 does not purport to confer any power on Central Lake liquidators of the kind contemplated in Section 386(i) but rather that it echoes and confer upon them the power 'to sell' provided for in Section 386(h) of the Act. Indeed it is a direction to the liquidators to dispose of assets by public auction, private treaty or public lender, leaving it to the liquidators to determine which 'mode of sale' to use.

[54] It was further argued that this must be so, if regard is had to the fact that the primary duty of a liquidator is to take possession of the assets of a company and to apply them in satisfaction of the costs of winding-up, the claims of the creditors and to distribute the balance among those entitled thereto (s 391). If that asset is a right of action the liquidator must either sell it or litigate (with the assistance of a sponsor if necessary and if so authorised) (cf s 386(4)(a) and resolution 3). See *Price Waterhouse Coopers Inc & Others v National Potato Co-Operative Ltd* 2004 (6) SA 66 (SCA).

[55] That resolution 7 was understood by the liquidators and the plaintiff to confer a power to sell is reflected in their choice of wording in referring to the cessions as 'sales' in the very documents which constitute the cessions. See AJ Kerr: The Law of Sale and Lease (3rd edition) p 29 and following. If a liquidator indeed had the power to sell the claims it did not have the power to enter into some other contract not described in the resolution.

[56] But '*…if the parties seek to disguise a donation as a sale the law will hold the transaction to be a donation, the position is similar if some other contract is sought to be disguised as a sale*'. See Kerr *supra,* at 30 and the authorities referred to in footnotes 12 and 13. Mr van der Nest argued that the liquidators entered into a sponsorship agreement with the plaintiff in terms whereof the plaintiff would sponsor a court action for the liquidators. The plaintiff would then only be liable to pay the liquidators an amount should they obtain any judgment. In these circumstances, it was argued, that there was no sale which could be authorised by the resolution. The resolution does not authorise the liquidators to enter into such a sponsorship or innominate agreement.

[57] The wording of the resolution is such that the plaintiff will not be required to pay anything to the liquidator if the claims are unsuccessful. Clause 5 of the cession and sale agreement makes that clear. The argument by Mr van der Nest was couched as follows:

> '*Despite this classification of the cessions as "sales" they are not sales. For a transaction to be "a sale" there must be an agreement as to a price which is certain or immediately ascertainable and it must be in money or partly in money. Thus for example it is sale for "whatever money you have in the bank" or "for as much as is in the chest" provided that some money is found "in the bank" or "in the chest". If not, the essence of sale is lacking.*'

He relied on the following authorities for this proposition: Voet: Commentary on the Pandects (Gane's translation) 18:1:23; Pothier: Contract of Sale Cushing 17/30; 14 -16/23-29; Norman's: Law of Purchase & Sale in South Africa' (5th edition) Zulman & Kairinos 41- 46/4.1- 4.5 especially at 43/4.3.2 & 4.3.3; Mackeurtan: Sale of Goods in South Africa' (5th edition) 15/2.3.3.

[58] In *Provincial Administration v Pessen* 1925 (TPD) 415 at 422 to 425 the court had to determine whether an agreement was a sale or some other transaction under which ownership passed for the purpose of a taxing ordinance. The agreement was a cession of a mineral lease in return for which the cessionary agreed to pay the cedent 20% of the profits which might accrue from any subsequent disposal by the cessionary of the lease and to refund the cedent the money he spent to acquire the lease. Mr van der Nest

argued that in the result the Court found at 423 that it was not a sale but some other transaction.

[59] However, I do not agree with the argument that there is no price because *'the chest may be bare*'. Whether the agreement is indeed a sale may only be established once the claims are finalised. If an amount is realised, the price is easily ascertainable. I am of the view that such a sale falls into the same category as a sale where the price is left to be determined by a third party.

> '*Such a sale is one subject to a suspensive condition that the third party actually fixes the price if he declines or is unable to do so there is no sale (Heymann's Estate v Featherstone 1930 EDL 105; Faatz v Estate Maiwald 1933 SWA 73; South African Land and Exploration Co Ltd v Union Government 1936 TPD 174; CM Asbestos Co (Pty) Ltd v King Chrysotyle Asbestos Mines (Pty) Ltd and Others 1953 (3) SA 431 (W).'*

See Norman's Law of Purchase and Sale in South Africa (5th Edition) by Zulman and Kairinos at page 43 para 4.3.5.

[60] From this it is clear that even if the third party fixes some price at some distant future date there is indeed a sale. The argument attacking the sale is consequently premature and cannot be sustained. The passage relied upon by the defendant in *Pessen, supra* is a passage where the learned judge set out different views that were expressed on the subject matter of the discussion. On page 424 Curlewis J, however, said:

> '*It is true that the right might never be realised because the condition might not be fulfilled, but as Savigny points out in the passage quoted by Bristowe, J., in Guinsberg v Scholtz and Others (1903, T.S 737 at p.762): "On the contrary it would be wrong to rank among mere expectations rights which cannot yet be exercised because they are coupled with a condition or a term. These are really rights, since even in the case of a condition the fulfilment is drawn back." It is true that he adds: "The difference is that in a mere expectation the result depends on the free will of a stranger which is not the case with the condition or the dies", and that in the present case Graumann may not be able to sell at all, or not at a profit; but the fact remains that the defendant's right to a share of the profits can only be defeated on the non-fulfilment of the condition that Graumann re-sells at a profit.*'

Tindall J said at 428:

> *'Another passage in the Digest [19.1.13.24) states that if the buyer and seller of certain properties agree that if the purchaser or his heir shall sell the same for a higher price, they shall hand over to the seller one half of the profit, and if the purchaser's heir does sell them for a higher price, the seller can recover his half of the profit by bringing an action on sale.'*

[61] For these reasons the argument that the cession and sale fail because the price was not fixed, must fail.

[62] Save for the argument regarding the question whether the liquidators entered into a valid sale, the remainder of the defences referred to herein are sustained and the plaintiff is non-suited.

[63] The parties were in agreement that the costs of two counsel should be awarded, whatever the outcome of the matter.

[64] In the circumstances the plaintiffs' claims are dismissed with costs, such costs to include the costs of two counsel and which costs include the costs reserved regarding the separation application, which costs are similarly awarded to the defendant on the basis of employment of two counsel.

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WEPENER J

JUDGE OF THE HIGH COURT

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