170/91

CASE NO. 189/90

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

HIPPO QUARRIES (TRANSVAAL) (PTY) LIMITED Appellant

and

KEITH EARDLEY Respondent

CORAM:	JOUBERT, NESTADT, NIENABER JJA et PREISS, KRIEGLER AJJA
DATE HEARD:	12 NOVEMBER 1991
DATE DELIVERED:	28 NOVEMBER 1991

J U D G M E N T

NIENABER JA:

The issue is whether a document, ostensibly the cession of a trading debt from one associated company to another, was in truth a cession or a sham.

Hippo Quarries (Pty) Ltd ("Hippo") and Hippo Quarries (Transvaal)(Pty) Ltd (now the appellant and the plaintiff in the court below) are subsidiaries of the same holding company. At all material times the plaintiff has been dormant though not defunct. Hippo, on the other hand, has been trading actively. Its business consisted, in the words of a former director of both companies, Allen Jones, "of manufacturing and supplying aggregates to the construction and other civil industries." Rietfontein Sand and Stone (Pty) Ltd ("Rietfontein") bought, sold and transported building materials. It was a customer of Hippo. Its directors were Keith Eardley and his wife Sandra Margot Eardley. Keith Eardley was the defendant in the court below and is the present respondent. I shall refer to him as the defendant.

On 7 May 1984 the defendant signed a printed form in which he bound himself as surety and co-principal debtor for the payment of the debts of Rietfontein. The suretyship, surprisingly, was not in favour of Hippo, the company with which Rietfontein was trading, but in favour of the plaintiff

> "...for the due payment on demand by the debtor of all and any monies which the debtor may now or from time to time hereafter owe to the creditor from whatsoever cause and howsoever arising and whether as principal debtor, guarantor, or otherwise, and whether severally or jointly or trading alone or in partnership or under any other name, as well as for the due and punctual performance and discharge by the debtor of his obligations under any and all contracts or agreements now or hereafter entered into by the debtor with the creditor."

On 24 September 1986 the defendant completed and signed a further document, termed "Application for Credit" on behalf of Rietfontein, clause 20.10 of which reads as follows:

> "In the event of the customer being a company, the person whose signature appears on the contract as representing the company, hereby specifically binds himself as surety and co-principal debtor for payment of all monies which may now or in the future be due and owing by the customer to the company."

On this occasion the document was executed in favour of "Constone Reef (Pty) Ltd, trading as 'Hippo Quarries'". Constone Reef (Pty) Ltd had by then changed its name to Hippo Quarries (Pty) Ltd ie Hippo.

The position, then, was that by 1987 the plaintiff and Hippo each held a deed of suretyship in which the defendant assumed liability for the future indebtedness of Rietfontein, howsoever arising.

Such indebtedness arose during 1987. Hippo sold and supplied goods to Rietfontein to the value of R71 257,14.

On 19 May 1987 Rietfontein was placed in final liquidation.

On 27 May 1987 Hippo instituted action against Rietfontein, as debtor, and the defendant, as surety, for payment of the amount of R71 257,14. The action against the defendant was based on the suretyship agreement which the defendant had signed on 4 May 1984. When it eventually dawned on Hippo that that suretyship was not drawn in its favour but in favour of the plaintiff, the action was withdrawn with

a tender of costs. It was then resolved, on legal advice, and after a review of the options open to them, that the plaintiff rather than Hippo would take the initiative in recovering Rietfontein's debt from the defendant; and that to enable the plaintiff to do so Hippo would cede its claim against Rietfontein to the plaintiff "for collection".

This happened on 14 October 1987. The cession read as follows:

> "CESSION
> HIPPO QUARRIES (PROPRIETARY) LIMITED hereby cedes, assigns and makes over to HIPPO QUARRIES (TRANSVAAL) (PROPRIETARY) LIMITED all its rights, title and interests in and to its claim against Rietfontein Sand and Stone (Proprietary) Limited in the sum of R71 257.14.
> Being in respect of goods sold and delivered by HIPPO QUARRIES (PROPRIETARY) LIMITED during 1987."

Jones, to whom reference was made earlier, signed the document on behalf of both cedent and cessionary. Rietfontein and the defendant were duly advised of the cession.

The plaintiff thereupon instituted the present action against the defendant in the

Witwatersrand Local Division. It relied on two causes of action: firstly, on the suretyship which the defendant completed in its favour and which, so it was alleged, was activated by the cession of the claim; alternatively, on clause 20.10 of the document the defendant completed in Hippo's favour and the benefit of which, so it was alleged, passed to the plaintiff conjointly with the cession of the claim.

Both causes of action failed. The court a quo (M J Strydom J) held that no true cession was intended and that the so-called cession was a mere pretext to enable the plaintiff to recover a debt on behalf of Hippo which Hippo itself was unable to recover. The plaintiff's claim was accordingly dismissed with costs. An application for leave to appeal to this court was, however, granted. Hence this appeal.

Jones was called by the plaintiff. He was the only witness to give evidence on either side. He testified as follows:

> "And what would be the position should you be successful in this action, where would that money go? --- The money would go into Hippo Quarries Transvaal, which would then pay off

> its inter company account with Hippo Quarries (Pty) Limited.
>
> So it will just, the money will eventually end up with Hippo Quarries? --- It would flow through indeed, yes.
>
> So that Hippo Transvaal is nothing but a conduit to get the money back to Hippo Quarries (Pty) Limited? ---
> That is correct."

And again:

> "And you will see that it says it was noted that Hippo Quarries (Pty) Limited had supplied certain crushed aggregate to Rietfontein Sand and Stone (Pty) Limited for a consideration of R71 275,14 and then (2) it says that Hippo wished to cede this debt to the company, in other words to Hippo Transvaal for collection?--- Ja.
>
> Is that correct? --- That is correct.
>
> Is that indeed what was decided, I see that you signed at the bottom there? --- Ja.
>
> Once again, Mr Jones, this confirms what you told me yesterday that this was a cession purely to enable Hippo Transvaal to collect the debt owing to Hippo, is that correct? ---
> That is correct."

These passages, so it was held, demonstrated that Hippo's right of action against Rietfontein never vested in the plaintiff; the plaintiff's function was simply to collect the debt on Hippo's behalf, and, in the words of the court below,

> "...that the transaction's real character had been concealed and that it had been disguised to resemble a cession instead so that Hippo Quarries (Pty) Limited, using plaintiff as its instrument, might sue defendant and recover from him, on its behalf, the amount of R71 257,14."

That finding in effect disposed of both causes of action: the first, based on the suretyship executed in favour of the plaintiff, because debt and suretyship, failing cession, had never been grasped in one hand; and the alternative cause of action, based on clause 20.10, because debt and suretyship, failing cession, had never passed to the plaintiff.

The cession was thus an essential link in the plaintiff's case against the defendant. The plaintiff had to prove its authenticity. It did so by producing an apparently regular and valid written cession. The evidentiary burden thereupon shifted to the defendant to show that the document in reality was not what it seemed to be. (**Skjelbreds Rederi A/S and Others** v **Hartless (Pty) Ltd** 1982 (2) SA 710 (A) at 733E-G.)

Cession, it is trite, is a particular method of transferring a right. The transfer is effected by means of agreement. The agreement consists of a

concurrence between the cedent's **animus transferendi** of the right and the cessionary's corresponding **animus acquirendi**. If a complete surrender of the right is not intended the transaction, however it is dressed up, is not an out-and-out cession. The aim is to discover the true intention of the parties to the disputed cession. That enquiry, like any enquiry into intention, is a purely factual one. If found to be feigned the simulation is disregarded.

Counsel for the defendant, in support of the judgment **a quo**, listed a number of factors which, in their cumulative effect, so it was submitted, showed that it was never intended that Hippo's right of action against Rietfontein should vest in the plaintiff; that the so-called cession was, in the words of Nicholas J in **Mannesmann Engineering and Tubes (Pty) Ltd v LTA Construction Ltd** 1972 (3) SA 773 (W) at 775E merely "...a cloak under cover of which the plaintiff would institute action against the defendant"; and that the written cession, though not a deliberate fabrication, was accordingly not a true reflection of the parties' real intention and should not be treated as if it were.

The factors enumerated by counsel were: the plaintiff is not a trading company - it would not therefore in the normal course of events have taken cession of a claim; the plaintiff and Hippo are sister companies both represented by Jones; the debt itself was worthless and there was no prospect or intention of recovering anything from Rietfontein; the plaintiff gave no consideration for the cession; Hippo was responsible for financing the litigation; and finally, perhaps most significantly, the plaintiff obtained no beneficial interest in the outcome of the litigation and hence in the ceded claim, since whatever it recovered from the defendant would be credited to Hippo.

Counsel for the defendant did not contend that there was any subterfuge or dishonesty about the transaction between Hippo and the plaintiff. They were sister companies. The one was possessed of a claim against Rietfontein and the other of a suretyship binding the defendant. The express purpose of the exercise was to tie the one to the other so that the sum owed by Rietfontein could be recovered from the

defendant. The cession was the knot. There was nothing improper about that purpose. It was a legitimate means to a legitimate end. There is, as was stressed by Didcott J in **Bird v Lawclaims (Pty) Ltd** 1976 (4) SA 726 (D) at 729F-G a

> "...crucial distinction between transactions honestly arranged as authentic means to particular ends and those which have been dishonestly feigned..."

That the plaintiff was a dormant company is a neutral factor; if it demonstrates anything at all, it is that the wrong suretyship printed form was used, no doubt due to a clerical error, when the defendant was asked to guarantee the debts of Rietfontein and was given the plaintiff's form instead of Hippo's. That the plaintiff and Hippo were sister companies made it easier for them to redress the error. It also explains why no consideration was given for the cession, why Jones signed on behalf of both parties and why Hippo became liable for the costs of the litigation. This was in terms of a management agreement between Hippo and all the other companies in the group, including the plaintiff, whereby the expenses of all the companies

were borne by Hippo. There was nothing sinister about it.

As for the point that the plaintiff gained no direct benefit from the cession, counsel sought to derive support from two reported cases in particular, namely **Kotsopoulos v Bilardi** 1970 (2) SA 391 (C) and **Skjelbreds Rederi A/S v Hartless (Pty) Ltd supra.**

In **Kotsopoulos v Bilardi supra,** Corbett J, in contrasting a cession of a right to monies and an irrevocable mandate to collect them, said (at 399A-C):

> "...the essential enquiry is whether the mandate granted to Walter Goldberg Trust amounted, or was equivalent to, a cession of the right to the moneys payable in terms of the Bilardi agreement; or whether it was merely a mandate irrevocable in the sense that revocation thereof might expose the principals (the plaintiff and Theodorus Kotsopoulos) to an action for damages. As I understand the authorities, this is really a question of intention but the hallmark of a mandate amounting to a cession is that it should give the agent an interest not merely in the exercise of his authority but in the very thing vested in, or entrusted to, him by his principal (**Ward v Barrett, N.O. and Another, supra** at p.738). This type of mandate is sometimes spoken of as a power of attorney 'coupled with an interest' or 'a power given as security'".

Counsel for the defendant sought to extract a principle from this dictum viz that a transaction can only have been intended as a cession if the supposed cessionary secured an additional interest or advantage for himself, beyond the mere vesting of the right in him. It was for that reason that counsel submitted that the decision in **McLachlan v Wienand** 1913 TPD 191 was wrong and the one in **Marsh v Van Vliet's Collection Agency** 1945 TPD 24 was right.

In **McLachlan's** case a creditor, Wienand, obtained cession from three other creditors of their claims against a common debtor, McLachlan, to enable him to enforce all four claims in a single action. No consideration passed for the cessions, the understanding between all the parties being that Wienand would account to each of the others for a proportionate share of any proceeds he happened to recover from McLachlan. This was held to be above board and valid. Mason J said, at 195:

> "In the present case there can be no real question but that the object of all parties was a perfectly honest and legitimate one namely to minimise expense and save time and trouble. And as that object could only be carried out by making the plaintiff the owner

> of these claims, why should not effect be given to the documents of cession in accordance with their tenor and the intention of the parties. The plaintiff became **dominus** of the claims and the money recovered; the cedents had an action in **personam** against him for a distribution of what he recovered."

In **Marsh v Van Vliet's Collection Agency supra** the plaintiff, who carried on the business of debt collecting, took cession of a claim from a professional man against his patient. They agreed that the cessionary would account to the cedent for 75% of all monies he was able, at his own cost, to recover from the debtor. This was held to be a valid cession.

It was because the cessionary was entitled to retain part of the proceeds that counsel contended that the latter transaction was intended to be a true cession whereas the earlier one in **McLachlan's** case was not. And what was true for **McLachlan's** case, so it was submitted, is true for this one.

I disagree. The **dictum** in **Kotsopoulos v Bilardi supra** does not support counsel's reading of it. That **dictum** simply means that a transaction will not be a cession if, according to its tenor, the right which

the agent is to administer or enforce does not vest in him.

A cession, otherwise valid, is in my view not assailable on the sole ground that the cessionary was to collect the debt for the ultimate benefit of the cedent. The present situation is of course a little more complex. Here the cession was effected not merely for collection purposes but to convert an unsecured claim in the hands of one creditor into a secured claim in the hands of another. Does it matter? That question must be reconsidered in the light of the second case cited by counsel for the defendant, **Skjelbreds Rederi A/S v Hartless (Pty) Ltd supra.**

In **Skjelbreds'** case one **peregrinus** (the creditor) ceded its claim against another **peregrinus** (the debtor) to an **incola.** This was to enable the **incola** to do what the **peregrinus** creditor was in law incapable of doing, namely, to attach an asset of the **peregrinus** debtor **ad fundandam jurisdictionem.** As in the present case it was agreed, though not disclosed in the document of cession, that the cessionary would account to the cedent for anything it managed to

recover from the debtor. This court held that the transaction was not a genuine cession because the parties in truth intended the **incola** to be a mandatory or nominee (and hence not a cessionary) of the **peregrinus** creditor to enforce the claim against the **peregrinus** debtor on the former's behalf. The attachment was accordingly set aside.

There are similarities between **Skjelbreds'** case and the current one. There, too, the cession was intended to serve a secondary purpose for the ultimate benefit of the cedent; no consideration was given for it; and the cessionary was under a duty to account to the cedent for any proceeds recovered as a result thereof.

But there are also significant differences. Perhaps the most glaring one is this: in that case the ostensible cession was devised to circumvent a legal impediment or disability - a **peregrinus** is disqualified in law from attaching the property of another **peregrinus ad fundandam jurisdictionem.** (**Ewing McDonald & Co Ltd v M & M Products Co** 1991 (1) SA 252 (A) at 258J-259A.) In the present case there was no

legal disability. The cession was devised to capture Hippo's debtor in the net of the plaintiff's suretyship. In **Skjelbreds'** case the cession was designed to achieve what, as a matter of law, the cedent was unable to attain, ie attachment; here the cession was designed to achieve what, as a matter of fact, the cedent was incapable of doing ie resorting to someone else's suretyship. That this difference coloured this court's assessment of the parties' intention in **Skjelbreds'** case (cf 734A-B) also appears from its observations on the two Transvaal cases mentioned earlier, **McLachlan v Wienand supra**, and **Marsh v Van Vliet's Collection Agency supra**. At 736G it was said:

> "I find nothing in the judgments in these cases which supports the view that an agent is entitled to enforce a claim when his principal is, as a matter of law, not entitled to do so, but, if anything is indeed said therein which is capable of supporting such a view, then I find myself unable to agree with it."

And again, at 737 C-D:

> "...these cases cannot be regarded as authority for the proposition that an agent can enforce a claim when his principal is not

in law entitled to do so."

(I do not read these remarks, incidentally, as overruling these cases. Rather the contrary.) Another consideration which reinforced this court's impression that the cession in **Skjelbreds'** case was conceived as a ruse

> "...to escape some disability which otherwise the law would impose"

(per Innes J in **Zandberg v Van Zyl** 1910 AD 302 at 309), was that the parties to the cession deliberately and designedly refrained from mentioning the duty to account both in the cession document and in the founding affidavit in support of the application for attachment (at 734F-735C).

These factors are, of course, all absent in the present case. In my view **Skjelbreds'** case is clearly distinguishable from the present one on the facts and to the extent that the enquiry into the intention of the parties to the cession is a purely factual one the reasoning and the remarks of this court in **Skjelbreds'** case must be confined to cases in which its facts are substantially duplicated.

I return to the facts of this case. Jones was not cross-examined about the implications of the arrangement between Hippo and the plaintiff - about whether the plaintiff was entitled to compromise the claim, about whether the claim would have vested in its estate in the event of the plaintiff's liquidation, and about other similar matters that could have pointed to the true intention of the parties to the cession. Those are matters that should have been explored by the defendant if he wished to override the evidentiary burden which rested on him. All that remained in his favour was the single circumstance that Jones agreed with the proposition put to him that the plaintiff was "nothing but a conduit". He made that concession because the whole idea was to employ the plaintiff's suretyship for Hippo's benefit. Hippo could of course have proceeded against the defendant in terms of clause 20.10 of the 1986 "application for credit". But that would have meant discarding the 1984 suretyship as a potential cause of action. The only way in which the latter suretyship could have been exploited was if Hippo ceded its debt against Rietfontein to the

plaintiff. In that manner both suretyships could be harnessed against the defendant.

Notwithstanding the submission of counsel for the defendant, which he advanced at a late stage in his argument, that the arrangement between Hippo and the plaintiff was **contra bonos mores**, there was nothing illegal or devious about either the purpose of, or the method employed by the parties to the cession. To cede the claim because the cessionary, for whatever legitimate reason, was better poised to collect it than the cedent was not intrinsically wrong. Motive and purpose differ from intention. If the purpose of the parties is unlawful, immoral or against public policy the transaction will be ineffectual even if the intention to cede is genuine. That is a principle of law. Conversely, if their intention to cede is not genuine because the real purpose of the parties is something other than cession, their ostensible transaction will likewise be ineffectual. That is because the law disregards simulation. But where, as here, the purpose is legitimate and the intention is genuine, such intention, all other things being equal,

will be implemented.

That Hippo and the plaintiff, as sister companies, were not at arm's length, that no consideration passed between them for the cession, and that it was understood between them that any amount recovered by the plaintiff from the defendant would eventually be channelled to Hippo, do not, therefore, render the dealings between the parties suspect and do not detract from the legitimacy of their exercise.

Two separate transactions are involved, firstly, the obligationary agreement (in terms of which Hippo would cede the claim to the plaintiff and the plaintiff would account to Hippo), and, secondly, the cession proper. (Cf **Johnson v Incorporated General Insurances Ltd** 1983 (1) SA 318 (A) at 331G-H.) What the court **a quo** in effect did was to merge these two legal acts, separate in time and nature, into a single composite transaction which it then categorized as a disguised mandate to collect the debt. Mandate and cession are distinct legal concepts: in the one case the mandatory, if an agent, acts in the name and on behalf of his principal in enforcing the right; he

obtains no interest in the right itself. In the other case the cedent is succeeded by the cessionary as the holder of the right; and the cedent retains no interest in the right itself. The end result may be the same in that the proceeds are remitted to "the principal", but in nature and structure the two types of transaction differ fundamentally. They may of course be interlinked - where the mandator, for instance, cedes his right of action to the mandatory to enable the latter to enforce the debt **qua** cessionary. (Cf **Marsh v Van Vliet's Collection Agency supra**, at 30-31.) As it was expressed by Didcott J in **Bird v Lawclaims (Pty) Ltd supra**, at 730C,

> "...the relationship between agent and principal does not necessarily exclude, but may co-exist with and overlap, the association between cessionary and cedent."

In my view none of the considerations mentioned by counsel for the defendant refutes Jones' explanation that the parties to it genuinely intended a cession, since that was the only means by which the Hippo group could capitalize on the 1984 suretyship which the defendant executed in favour of one of the

group. Agency was never contemplated because it would have been wholly ineffectual. It would have been ineffectual because a mere mandate to act as agent would not have created the debtor-creditor relationship between the plaintiff and Rietfontein on the strength of which the suretyship could be invoked. Notionally both routes were available to them: but the one, cession, was feasible and the other, agency, was not. Consequently there would have been no purpose for Hippo and the plaintiff to have contemplated agency which was to be camouflaged as cession.

In my view the defendant failed to discharge the evidentiary burden of showing that the transaction was not intended to be a cession. It follows that the plaintiff should have succeeded on its main cause of action. That being so there is no need to dwell on the alternative cause of action.

The following order is made:

1. The appeal succeeds with costs.
2. The order of the court **a quo** is set aside. The following order is substituted:

Judgment is granted in favour of the plaintiff in the terms sought by it in its summons:

(a) Payment of the sum of R71 257,14;

(b) Interest thereon at the rate of 12% per annum **a tempore morae** from date of judgment to date of payment;

(c) Costs of suit.

P M NIENABER JA

JOUBERT JA)
NESTADT JA) CONCUR
PREISS AJA)
KRIEGLER AJA)