50/92

Case No 133/90
E du Plooy

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

THE DIOCESE OF KLERKSDORP OF THE

ROMAN CATHOLIC CHURCH Appellant

and

THE SOUTHERN LIFE ASSOCIATION LIMITED Respondent

Coram: **HOEXTER, HEFER, SMALBERGER, MILNE et**

F H GROSSKOPF JJA.

Heard	Delivered
27 February 1992	30 March 1992

J U D G M E N T

F H GROSSKOPF JA:

The Master of the Supreme Court ("The Master") refused to sustain an objection by the appellant to the second liquidation and distribution account ("the account") relating to Interfund Finance (Pty) Limited (in liquidation). The appellant thereupon brought an application in the Witwatersrand Local Division in terms of section 407(4)(a) of the Companies Act 61 of 1973 for an order setting aside the Master's decision. The appellant maintained that the full proceeds of two insurance policies which had been issued by the respondent ("the Southern") in favour of Interfund Finance (Pty) Limited ("Interfund") should have been awarded to the appellant, and it sought an order directing the Master to amend the account accordingly. The Master was cited as the first respondent in the court

a quo, the liquidator of Interfund ("the liquidator") as the second respondent, and the Southern as the third respondent. The Master and the liquidator abided the decision of the court, but the Southern opposed the relief sought by the appellant. The court a quo (Goldblatt AJ) dismissed the application. Leave to appeal was refused by the court a quo, but granted by this court.

The appellant failed to comply with the rules of the Appellate Division with regard to the prosecution of its appeal. The appellant's notice of appeal was not filed timeously with the registrar of this court, while the record of the appeal was not lodged with the registrar within the period prescribed by the rules. As a result of its failure to lodge the appeal record timeously, the appellant was deemed to have withdrawn its appeal. (AD Rule 5(4A)(b)). The appellant was accordingly obliged to bring an application for the

condonation of the late lodging of the notice of appeal and the record of appeal, as well as for an order reinstating the appeal. The outcome of such application is dependent upon whether or not the appeal has a reasonable prospect of success. An enquiry into the merits of the appeal is therefore necessary.

On 7 March 1985 the appellant lent and advanced a sum of R500 000 to Interfund. The loan agreement provided for the loan to be secured by bank guarantee, but the loan in fact remained unsecured until 10 April 1985 when Interfund ceded to the appellant its rights under an insurance policy ("the first policy"). The first policy was issued by the Southern. It was described as a "Mastersave 5 X 5 policy". Its commencement date was 1 April 1985. In terms of the first policy Interfund, as holder thereof, was to pay an annual premium of R500 000 for five successive years. The first policy would have matured ten years from its

commencement date, or on the prior death of the surviving life assured. The lives assured under the first policy were those of one Schendel and one Fritzler, both directors of Interfund, but Interfund was the "owner and beneficiary" of the first policy. Upon payment of the first annual premium the first policy acquired a "cash value", and Interfund immediately became entitled to apply for a "cash loan" against the security of the first policy.

Interfund paid the first annual premium of R500 000 to the Southern on 2 April 1985; and shortly thereafter the Southern gave Interfund a cheque for the sum of R300 000 as a loan under the first policy. The Southern maintained that before handing over its R300 000 loan cheque it required Interfund first to sign a printed form headed "Acknowledgement of Loan on Policy" ("the first acknowledgement of loan").

It was submitted by the appellant that material

terms of the agreement, as set forth in the first acknowledgement of loan, had been left blank, and that it was therefore inchoate and unenforceable. When Interfund signed the first acknowledgement of loan the blank spaces on the form had probably not yet been filled in, but since this was an agreement which was not by law required to be in writing, it was binding upon Interfund in the absence of fraud or error in connection with the subsequent recording of the terms. (**National and Grindlays Bank Ltd v Yelverton** 1972(4) SA 114 (R) at 118 A-D; ***Fourlamel (Pty) Ltd v Maddison*** 1977(1) SA 333 (A) at 342 A). Some of the terms were never recorded. The spaces provided on the form for the amount of the loan, the applicable rate of interest and the date of signature have been left blank. There is, however, no dispute about the amount of the loan or the rate of interest. The date of signature of the first acknowledgement of loan cannot be determined with

absolute certainty, but it seems highly unlikely that the Southern would have parted with the R300 000 loan cheque before Interfund had placed its signature on the first acknowledgement of loan. The evidence is that Interfund was in fact informed that the loan would only be made against signature of the first acknowledgement of loan. The R300 000 loan cheque was not placed before the court a quo, but the evidence points to the conclusion that it was probably issued and handed over to Interfund by not later than 3 April 1985. In my opinion it is in any event inconceivable that the first acknowledgement of loan had not been signed by 10 April 1985 when Interfund ceded its rights under the first policy to the appellant.

The first acknowledgement of loan recorded that Interfund had ceded all its rights under the first policy to the Southern as security for the repayment of the loan. As pointed out above this cession was probably concluded on 3 April 1985, but certainly prior in time to

Interfund's cession of 10 April 1985 to the appellant. It is common cause that the Southern also retained possession of the first policy once it had been processed. Delivery to the cessionary of a written instrument evidencing the ceded right is required for the proper completion of a cession, and it is of particular relevance in determining the rights of competing cessionaries of the same right of action. (Jeffery v Pollak and Freemantle 1938 AD 1 at 22; Labuschagne v Denny 1963(3) SA 538 (A) at 543H-544B; Trust Bank of Africa Ltd v Standard Bank of South Africa Ltd 1968(3) SA 166 (A) at 184H-186B; but see Scott The Law of Cession 2ed (1991) 27 et sqq.)

On 12 April 1985 the appellant and Interfund concluded a second loan agreement in terms whereof the appellant lent and advanced a further sum of R350 000 to Interfund. The second loan agreement provided for security in the form of a guarantee by a bank or other

acceptable financial institution. It is the appellant's case that it was once again "prevailed upon", on some unspecified date, to accept a cession of Interfund's rights under an insurance policy ("the second policy") as security for the loan. The second policy was again issued by the Southern with commencement date 1 April 1985. Its terms were the same as those of the first policy, but the annual premium was now R350 000. On 16 April 1985 Interfund handed to the Southern its application for the second policy, together with a cheque for R350 000 and a further acknowledgement of loan on policy ("the second acknowledgement of loan") signed by it in blank. The second acknowledgement of loan was dated 16 April 1985. Interfund signed a further document, also dated 16 April 1985, in terms whereof it ceded its rights under the second policy to the appellant. There is a duplicate original of such cession bearing the same date. Both the original and the

duplicate original were retained by the Southern, and it is common cause that they were never forwarded to the appellant. The appellant contended that the rights under the second policy had been ceded to it on 16 April 1985 in terms of the cession document, yet there is nothing to show that by then the appellant had already agreed to accept such a cession by Interfund as proper security for the loan.

The second acknowledgement of loan recording a cession to the Southern was likewise dated 16 April 1985. It was handed to the Southern in anticipation of the issuing of the second policy. There is no allegation in the papers that the document recording a cession in favour of the appellant had been signed by then, or that it was handed to the Southern on the same occasion. It is unlikely that the Southern would have allowed a cession to the appellant before securing its own rights. For what it is worth, the second acknowledgement of loan

also contained a declaration by Interfund to the effect that there had been no prior cession to any other person. The fact that the Southern retained possession of the instrument evidencing the ceded right (the second policy) showed that it had the better right. In my judgment the second cession in favour of the Southern was prior in time to the second cession in favour of the appellant.

The question was raised whether it was at all necessary for the Southern to rely on the two cessions in its favour, seeing that it had the right in terms of both the first and the second policy, and the first and second acknowledgement of loan, to deduct the amount of the loan from the proceeds of the policy in priority to any other claim. The provisions of the two acknowledgements of loan are identical in this respect. Both provided that:

> " By the termination of this Policy, howsoever arising, any indebtedness to the Southern of whatsoever nature and which is then due and payable arising hereunder or otherwise under the said Policy shall be a first charge against any monies or other benefit payable by the

> Southern in terms of the said Policy and shall be deducted from such monies or other benefit." (My emphasis.)

Clause 5 of both the first and second policy contained a similar provision:

> **"Indebtedness**
> Any indebtedness to the Company in respect of this policy will be a first charge against the proceeds of this policy and the Owner shall be deemed to have ceded, assigned, transferred and made over the policy as security to the Company for such loan and/or any interest in respect thereof."

The meaning of the term "first charge" was considered in Irwin v Davies 1937 CPD 442, and Davis J came to the following conclusion at 447:

> "What is the meaning in the words in the Deed of Sale: 'To be a first charge on and paid out of the book debts?' In my opinion they mean that the book debts are in some way to be so bound that the £200 is to come out of them in priority to any other debts; they are in effect to be mortgaged for that amount. (If, as would appear, this could only validly be done by means of a cession; in that case a cession would be necessary.)"

A similar meaning should in my opinion be ascribed to the words "first charge" where they appear in the above-quoted passages from the two policies and acknowledgements of loan. In terms of the provisions set out in those passages the loan was to be a first charge against the proceeds of the particular policy, with the result that the claim of the Southern had priority to any other claim. Interfund's right to claim the full proceeds in terms of the two policies was accordingly curtailed to the extent that the Southern had a right, in priority to all other claims,to deduct the amount of the loan as well as interest from the proceeds of the particular policy. It should, however, be borne in mind that the loan could not be deducted until such time as it became due and payable. When Interfund ceded its right under each of the policies to the appellant, the

latter could not acquire any better right; its right remained subject to the right of the Southern to set off the amount of the loan once it became due and payable. In terms of both the first and second acknowledgement of loan the capital amount of the loan did not become due and payable by Interfund to the Southern until the happening of the earliest of three events mentioned in each of the acknowledgements of loan. None of those events had taken place by 1 July 1985 when Interfund was placed under provisional liquidation. (The final order of liquidation was dated 1 October 1985.) The effect of the winding-up order was to establish a concursus creditorum (Walker v Syfret, NO 1911 AD 141 at 160, 166). Thereafter there could be no set-off unless there existed, at the date of the order, mutuality between the respective claims; or reciprocity of debts as it is also called. (National Bank of South Africa Ltd v Cohen's Trustee 1911 AD 235 at 249, 254; Richter NO v

Riverside Estates (Pty) Ltd 1946 OPD 209 at 223-224; Thorne and Another, NNO v The Government 1973(4) SA 42 (T) at 45F-G; The Government v Thorne and Another, NNO 1974(2) SA 1 (A) at 9 E-F.) In the present case there was no mutuality between the respective claims of the Southern and Interfund prior to liquidation inasmuch as neither the loan nor the policy had become due and payable as at the date of the winding-up order. (Richter's case, supra, at 223-224; Thorne's case in the provincial division, supra, at 45G-H.) In order to realise Interfund's assets the liquidator elected to surrender the two policies. In consequence thereof the surrender values of the policies became payable, which in turn caused the respective loans under the policies to become due and payable.

As a result of Interfund's liquidation the Southern could no longer rely on its right of set-off, but had to fall back on its security. In respect of both

loans it held a cession securing the debt of Interfund. Each cession gave the Southern the right to receive from the proceeds of the particular policy the amount which Interfund then owed the Southern in terms of its loan agreement. As the Southern held the prior cession in each instance, its claim had to be paid out of the proceeds of the respective policies in priority to that of the appellant.

The appellant contended that the Southern and Interfund never contemplated a cession "in the real sense of the word", inasmuch as Interfund's debt was already regarded as a "first charge" against the proceeds of the particular policy. I do not agree. It has been pointed out above that the right of the Southern to deduct Interfund's loan debt from the proceeds of the policy as a first charge in priority to others, could no longer be exercised once Interfund had been placed in liquidation. It was presumably for that very eventuality that the

Southern required security recognised by the Insolvency Act 24 of 1936, and such security could only be effected by a cession in securitatem debiti.

It was further contended on behalf of the appellant that if the parties had indeed intended to cede Interfund's rights under the policy to the Southern, such transfer of rights would have led to a merger, since the Southern would thereby have become its own creditor. It should be borne in mind, however, that the Southern already had the right to treat each loan as a "first charge" against the proceeds of the particular policy, and that the cession, therefore, was required only to provide security in the event of Interfund's liquidation. It was a cession in securitatem debiti and it was not intended to give the Southern the right forthwith to claim payment of the proceeds of the policy from itself so as to bring about a confusio or merger. In my opinion the cession could not at that stage result in a merger

since there was not yet any obligation on the part of the Southern (as debtor) to pay the proceeds of the policy, and the Southern (as creditor) had no right to claim payment thereof until such time as it became due and payable. (Trust Bank of Africa Ltd v Standard Bank of South Africa Ltd, supra, at 183H-184E.)

The appellant also contended that legally there was a duty on the Southern to disclose its prior cession when it wrote to the appellant confirming the cession in the latter's favour. The first letter in this regard was dated 11 April 1985. It related to the cession of Interfund's rights under the first policy to the appellant, and was couched in the following terms:

"CONTRACT NUMBER: 5696696

> Our Actuarial Department has confirmed a guaranteed loan facility on the abovementioned contract of R800 000 on 1st May 1987 subject to the following:
>
> 1. The contract must be unencumbered.
> 2. The conditions of the contract must be adhered to.

> I also confirm that this contract has been duly ceded to your Diocese by Interfund Finance (Pty) Ltd."

The second letter to the appellant was dated 16 April 1985. It confirmed that Interfund's rights under the second policy were "in the process of being ceded" to the appellant. Otherwise its terms were similar to those of the first letter. The appellant submitted that these letters contained negligent misrepresentations on the part of the Southern. (This is in fact a cause of action relied upon by the appellant in a pending action against the Southern.) The appellant further attempted to invoke the doctrine of estoppel. The difficulty in this regard is that these aspects were never pertinently raised on the papers in the application. The Southern, therefore, did not have the opportunity of answering the appellant's allegations in this connection. In my opinion it would be unfair to

allow the appellant to introduce these matters for the first time on appeal.

The appellant asked in the alternative that the matter be referred to the court a quo for the hearing of oral evidence. The appellant did in fact apply to the court a quo to refer the matter for the hearing of oral evidence, as appears from the following observations of the court a quo:

> "A further attack on the third respondent's [the Southern's] security was that, because of the incompleteness of the documents evidencing the cession, there had to be doubt as to whether such cession took place, and that I should accordingly refer the matter for the hearing of oral evidence so that the evidence of the third respondent could be tested by cross-examination."

The learned judge came to the conclusion that there was no real dispute of fact and he consequently refused the appellant's application in this connection . If there are reasonable grounds for doubting the genuineness of

the cessions relied upon by the Southern then the appellant is entitled to have the matter referred for the hearing of oral evidence, or at least for the Southern's deponents to be cross-examined. (**Moosa Bros. & Sons (Pty) Ltd v Rajah** 1975(4) SA 87(D) at 92A-93H; **Khumalo v Director-General of Co-operation and Development and Others** 1991(1) SA 158(A) at 167D-168C.) In my view, however, there are no reasonable grounds for doubting the authenticity of the two acknowledgements of loan which gave rise to the cessions. The overwhelming probabilities are against any notion that the acknowledgements of loan were false documents.

It was submitted on behalf of the appellant in this court that the proposed oral evidence should also deal with the question whether the Southern indeed held the prior cessions. Once it is accepted that Interfund in fact ceded its rights under the two policies to the Southern, it follows that the Southern's cessions in any

event ranked preferent to that of the appellant, since the Southern throughout retained possession of the two policies evidencing the rights which had been ceded. In the circumstances I am not persuaded that there are sufficient grounds to send the matter back to the court a quo for the hearing of oral evidence.

In my judgment the appeal has no reasonable prospect of success. The application for condonation and reinstatement of the appeal is accordingly dismissed with costs, such costs to include the costs of appeal and those of two counsel.

F H GROSSKOPF JA

HOEXTER JA
HEFER JA
SMALBERGER JA
MILNE JA Concur