62/95

CASE NO 610/93

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between

MILLMAN NO	APPELLANT
AND	
E F TWIGGS	1 st RESPONDENT
TUNA MARINE FOODS (PTY) LTD	2nd RESPONDENT

CORAM: HEFER, VIVIER, STEYN, F H GROSSKOPF et SCHUTZ JJA

HEARD: 12 MAY 1995

DELIVERED: 26 MAY 1995

J U D G M E N T

HEFER JA/

HEFER JA:

When a right is ceded with the avowed object of securing a debt the cession is regarded as a pledge of the right in question: dominium of the right remains with the cedent and vests upon his insolvency in his trustee who is under the common law entitled to administer it "in the interests of all the creditors, and with due regard to the special position of the pledgee". (Per Innes J in National Bank of South Africa Ltd v Cohen's Trustee 1911 AD 235 at 250.) These principles have recently been re-affirmed inter alia in Leyds NO v Noord-Westelike Koöperatiewe Landboumaatskappy Bpk en Andere 1985(2) SA 769(A), Bank of Lisbon and South Africa Ltd v The Master and Others 1987(1) SA 276(A) and Land- en Landboubank van Suid-Afrika v Die Meester en Andere 1991(2) SA 761(A).

In the present case a right was ceded as security for two separate debts - the one owing to the cessionary by the cedent and the other owing to him by an outsider. The parties are agreed that, upon the insolvency of the cedent, the cessionary is entitled to preferential treatment in regard to the cedent's own debt. The issue is whether he is entitled to similar treatment in regard to the outsider's debt.

When the cession was executed during March 1991

(1) Continental Foods (Pty) Ltd ("Continental") owed the present first respondent ("Twiggs") an amount of R200 000;

(2) Brian Harry Cohen ("Cohen") owed Twiggs an amount of R300 000; and

(3) Tuna Marine Foods (Pty) Ltd ("Tuna Marine") owed Continental an amount of R500 000.

These debts will hereinafter be referred to as "Continental's debt", "Cohen's debt", and "the ceded debt" respectively. They were all payable on 30 June 1992. The relevant part of the cession reads as follows:

> "1. Continental Foods hereby cedes, assigns and makes over to Twiggs in securitatem debiti all Continental Foods' right, title and interest in and to 2/5ths of the claim for the sum of five hundred thousand rand (R500 000,00) which is so payable by Tuna Marine to Continental Foods on 30 June 1992.
>
> 2. Continental Foods hereby cedes, assigns and makes over to Twiggs in securitatem debiti all Continental Foods' right, title and interest in and to 3/5ths of the claim for the sum of five hundred thousand rand (R500 000,00) which is so payable by Tuna Marine to Continental Foods on 30 June 1992.
>
> 3. Pursuant to and in implementation of clauses 1 and 2, it is agreed that the said cession, assignment and making over in

securitatem debiti are for the sum of five hundred thousand rand (R500 000,00)."

Continental was wound up by order of court during September 1991 on account of its inability to pay its debts. The appellant is the liquidator. Twiggs proved a claim for R200 000 in respect of Continental's debt which the appellant admitted as a secured claim by virtue of the security afforded by clause 1 of the cession. His disclaimer of Twiggs's right to similar treatment in relation to a further amount of R300 000 by virtue of clause 2 of the cession led to an application for a declaration of rights brought by Twiggs in the Cape Provincial Division. While the application was pending it came to Twiggs's knowledge that Tuna Marine had paid the entire ceded debt to the appellant. Precisely when this occurred does not emerge from the papers; nor has it been revealed how it came about that Tuna

Marine followed this course after it had been notified of the cession. Be that as it may, the order granted was one declaring that Twiggs was "entitled to payment ... of his claim of R300 000 on the footing that he has a secured claim". The appeal is directed at this order.

The court a quo's judgment has been reported sub nom Twiggs v Millman NO and Another in 1994(1) SA 458(C). As appears from 462B-C of the report the appellant challenged the validity of the cession in his opposing affidavit and in argument in that court. This line of defence has now been abandoned and the outcome of the appeal depends entirely on the effect of the cession. The sole issue at this stage is whether Twiggs is to be treated as a secured creditor in respect of the remaining R300 000 which the appellant has received, but of which (until a late stage of his counsel's

argument in this court, as will presently be seen) he denied Twiggs any share.

The case advanced in the appellant's opposing affidavit in regard to clause 2 of the cession is a simple one. It is to the effect that Twiggs is not a creditor of Continental because clause 2 merely secures Cohen's debt and creates no obligation towards Twiggs on Continental's part. This is also the main drift of his counsel's written heads of argument where great play is made of a concession in Twiggs's founding affidavit that he does not have a liquidated claim under clause 2 of the cession as contemplated in sec 44(1) of the Insolvency Act 24 of 1936 read with sec 366 of the Companies Act 61 of 1973. (Cf 462 G-J of the reported judgment where the concession is quoted.)

It is obvious that the matter cannot be disposed of on this narrow basis which entirely

ignores Twiggs's rights as pledgee. By the act of cession the right to receive payment from Tuna Marine was pledged to him as effectively as if a corporeal movable asset of the company had been delivered to him in pledge. (Smith v Farrelly's Trustee 1904 TS 949 at 955-956; Guman and Another v Latib 1965(4) SA 715(A) at 721G - 722B; Oertel, NO v Brink 1972(3) SA 669(W) at 674D-E; Muller NO v Trust Bank of Africa Ltd and Another 1981(2) SA 117 (N) at 125C-F.) That he thus acquired a ius in re aliena, equally effective against creditors as against the owner in respect of both debts, is beyond dispute. (Wille & Millin: Mercantile Law of South Africa (18th ed) 345; Van der Merwe: Sakereg (2nd ed) 650-651, 660, 662; Britz NO v Sniegocki and Others 1989(4) SA 372 (D & CLD) at 376H-377A; Oertel, NO v Brink supra at 674H; Land- en Landboubank van Suid-Afrika v Die Meester en Andere supra at 771E-F.) For this very reason the

appellant rightly admitted the claim for R200 000 to proof as a secured claim by virtue of clause 1 of the cession and, as far as the rights which they conferred are concerned, there is no distinction between the two clauses; as appellant's counsel readily conceded, property may validly be pledged to secure an obligation of someone other than the pledgor (Voet 13.7.2., 20.1.8. 20.4.2. and the other writers cited in Wille's Mortgage and Pledge (3rd ed by Scott and Scott) 7; Van der Merwe op cit 654). There are accordingly no conceivable logical or legal grounds for applying the established principles to the one but not to the other.

In seeking to resist what thus appears to be an obvious conclusion appellant's counsel urged upon us the provisions of sec 391 of the Companies Act, on the one hand, and the concession that Twiggs is not a creditor as contemplated in sec 44 of the

Insolvency Act, on the other. In sec 391 a liquidator is charged with the duty to recover and reduce into his possession all the assets of the company in liquidation. This, appellant's counsel submitted, entitled the appellant to receive payment from Tuna Marine in spite of the cession and to apply the money so received as part of the free residue towards the payment of concurrent claims, thereby entirely excluding Twiggs because he is not a creditor as contemplated in sec 44.

For this submission to be sustained we need to be persuaded that, in the absence of any express provision, it is a necessary implication from the relevant provisions of the two Acts, not only that a pledgee in Twiggs's position is obliged to surrender the object of his pledge, but also that the advantage accruing to such a pledgee is in effect to be forfeited for the eventual benefit of concurrent

creditors. I am by no means convinced that such a pledgee is indeed obliged to surrender the object of his pledge; but, even if he is, what we have been urged to do, is to deprive the pledgee of his lawful rights and to grant to concurrent creditors a benefit to which they are not entitled. I cannot find any justification for, or any indication of an intention to achieve such a startling result in either Act. Apart from the presumption against the forfeiture of rights which generally affects the interpretation of statutes, one finds, in respect of property pledged to secure the cedent's own debt, provisions (such as secs 19(1), 19(3)(a) and 83 of the Insolvency Act read with sec 366 of the Companies Act) plainly preserving the rights of the pledgee and in fact extending them so that he may himself realize the pledged property before the second meeting of creditors. Moreover, until that meeting he is not

obliged to surrender it to the trustee (Wells NO v Molin and Another 1965(4) SA 480(T) at 483B-C; Soane v Lyle NO 1980(3) SA 183 (D & CLD) at 186G-187A). And even where he does surrender it his security is not lost; he remains entitled to treatment as a secured creditor. Bearing in mind the extent of the protection thus afforded to the pledgee in respect of the insolvent cedent's own debt and the absence of any logical or legal grounds for differentiation mentioned earlier, I find it inconceivable that it could ever have been intended that he is to be treated differently, in respect of an outsider's debt, to the extent that his rights are to be forfeited.

Realizing the inherent weakness of his contention appellant's counsel later adopted a different stance by conceding a pledgee in such a case a right to share in the proceeds of the assets

as a concurrent creditor. For this submission he suggested no logical foundation and offered by way of authority only the decision in Cooper NO en Andere v Die Meester en 'n Ander 1992(3) SA 60(A). That decision does not assist him. The list of preferences in secs 96 to 102 of the Insolvency Act which this court found to be exhaustive (see 82G-I and 85F-G) were expressly stated to be applicable to the free residue and has no bearing on the proceeds of encumbered assets. (See the discussion at 80G-82F.)

How does Twiggs's concession that he is not a creditor as contemplated in sec 44 of the Insolvency Act affect the situation? In my view it does not affect his claim to preferential treatment at all. Admittedly he cannot claim such treatment by virtue of the provisions of sec 83 unless he has a claim capable of proof under sec 44, and admittedly

he does not have such a claim. But his right to preferential treatment does not derive from sec 83; it derives from the common law. What the appellant has overlooked, is that the law of insolvency has not been codified entirely. As was pointed out in Fairlie v Raubenheimer 1935 AD 135 at 146

> "...[ons] insolvensie wet maak geen inbreuk op die Gemenereg nie insover die Gemenereg bestaanbaar is met die voorsieninge van die insolvensie wet. As dus die statuut oor iets swyg of twyfelagtig is, moet ons ons toevlug na die Gemenereg neem."

HOLMES JA's dictum in his minority judgment in Cornelissen NO v Universal Caravan Sales (Pty) Ltd 1971(3) SA 158(A) at 170B-C which the majority did not disavow, is to same effect, namely:

> "... (I)t has been well recognised for a century that the Insolvency Acts in this country have not ousted the relevant common law unless the latter is inconsistent with the statute..."

(See also Fey NO and Whiteford NO v Serfontein and Another 1993(2) SA 605(A) at 613B-F.) The present situation is one of those not covered by the Insolvency Act. A resort to the common law is accordingly justified.

In my view the court a quo's conclusion that Twiggs is entitled to be treated as a secured creditor is correct.

The appeal is dismissed with costs, including the costs of two counsel.

J J F HEFER JA.

VIVIER JA)
STEYN JA) Concur
F H GROSSKOPF JA)
SCHUTZ JA)