

IN THE COURT OF APPEAL OF BOTSWANA

CIVIL APPEAL NO. 14 OF 1995
HIGH COURT CIVIL CASE NO. 366 OF 1992

In the matter of:

TSWELELO (PTY) LTD

APPELLANT

AND

INCO FUEL CENTRES (PTY) LTD

RESPONDENT

MR. ATTORNEY S. THAPELO FOR THE APPELLANT

MR. ATTORNEY B. WILLIAMS FOR THE RESPONDENT

J U D G M E N T

CORAM: J.H. STEYN JA
N. WYLIE JA
G.G. HOEXTER JA

HOEXTER JA:

This is an appeal against an order granted in garnishee proceedings by the High Court sitting at Francistown. The essential facts are the following. A company known as Green Industrial Enterprises Corporation (Pty) Ltd ("the garnishee") was the main contractor to the Mmadinare Water Supply Project. One of the garnishee's sub-contractors was a company known as Major Construction (Pty) Ltd ("the cedent"). Under its contract with the garnishee ("the contract") the cedent from time to time became entitled to receive payments for the work performed by it.

On 17 February 1993, and in the High Court, the respondent company obtained judgment by default in the sum of P466,571.70 ("the judgment debt") against the cedent. The judgment debt was not satisfied by the cedent.

The appellant company ("the cessionary") is a financial institution. On 26 October 1993, and at Francistown, the cedent and the cessionary each signed a memorandum of agreement ("the cession") to which the contract was appended. In the cession there was stated, inter alia, the following: -

"AND WHEREAS the Cedent has agreed to cede and transfer to the Cessionary all his/its rights, title and interest in and to the said contract for money lent and advanced to the Cedent by the Cessionary.

NOW THEREFORE IT IS AGREED AS FOLLOWS:

1. CESSION:

The Cedent does hereby cede and transfer to the Cessionary all his/its right, title and interest in and to the contract referred to in the recitals hereto with all accumulations and other benefits accrued or which may hereafter accrue in respect thereof."

On the same day the garnishee wrote a letter to the cessionary informing it that all payments due to the cedent would be made by the garnishee direct to the cessionary.

On 16 September 1994 the respondent in terms of Order 55 of the High Court Rules made an application in the High Court at

Francistown for a rule nisi calling upon the garnishee to show cause why all the debts owing or accruing or due from the garnishee to the cedent should not be attached to satisfy the judgment debt which was still due and unpaid; and for an order that the cedent should pay the costs of the garnishee proceedings. The garnishee elected not to show cause in response to the rule nisi, but the cessionary sought and obtained leave to be joined as a party to the garnishee proceedings. In support of its application for joinder the cessionary filed an affidavit by its branch manager at Francistown. I quote hereunder the relevant parts of paragraphs 2 and 3 of the said affidavit:-

- "2. On the 3rd November 1993 Major Construction [the cedent] obtained financial assistance from Tswelelo (Pty) Limited [the cessionary] in the sum of P200,000.00 for the execution of the work that Major construction is doing as Sub-Contractor to Green Industrial Enterprises (Pty) Limited [the garnishee] for the Mmadinare Water Supply Project. As security for the financial assistance to be granted Major Construction (Pty) Limited ceded its rights and interest with respect to the Sub-contract to Tswelelo (Pty) Limited ...
3. The total amount owing to Tswelelo (Pty) Ltd as at the 27th September 1994 is P574,702.32."

Argument on the opposed garnishee application described above was heard by COTRAN J who thereafter ruled in favour of the respondent and against the cessionary. In the course of his

judgment the learned Judge remarked of the cession:-

The agreement is a bare cession without a concomitant obligatory agreement. It affords no protection to the cessionary against the holder of a judgment."

Consequently the garnishee was ordered to withhold the sum of P46,571.70, together with 10% interest a tempore morae and costs both of the action and the garnishee proceedings, from monies due or becoming due to the cedent in respect of work on the Mmadinare Water Supply Project and pay the same to the respondent "which shall be sufficient to discharge it of any obligation due to Tswelelo (Pty) Ltd [the cessionary]". COTRAN J further ordered the respondent to pay the costs.

The cessionary appeals to this Court. It seeks the setting aside of the High Court's Order in favour of the respondent and it requests this Court to hold that the cessionary's rights prevail against the respondent's claim based on the judgment debt. In turn the respondent cross-appeals against COTRAN J's order that it should pay the costs of an application in which it was the successful party.

For the reasons which follow it seems to me, with respect, that the Court below misconceived the legal consequences of the

cession, and that the learned Judge erred in giving preference to the judgment debt.

Here one is concerned with a cession in securitatem debiti, that is to say, a cession given in order to secure a debt. Such a cession involves a pledge. A pledge is a contract whereby a debtor places property in the hands of his creditor as security for his debt. To constitute a pledge which will be valid and effective against other creditors of the pledgor there must be delivery, or what is legally equivalent to delivery, of the subject - matter of the pledge by the pledgor to the pledgee.

Movable property is pledged by physical delivery. An incorporeal right is not susceptible of physical delivery, and hence in such a case the pledgor must perform an act to show that he divests himself of that right and vests it in the pledgee. In the case of incorporeals the juristic act by which the pledgor places his property in the hands of the pledgee is a cession.

In the instant case the subject - matter of the pledge for the loan was the cedent's contractual rights under the contract between the cedent as sub-contractor and the garnishee as

contractor. It is trite that in general (and certainly so in the present case) contractual rights, like other forms of incorporeal property, are capable of transfer by cession. It was by this means that in the case under consideration the cedent placed his property in the hands of the cessionary.

In the law of cession a distinction has to be noticed between an absolute cession of rights, by which a cedent transfers his entire interest in a right, and a cession in securitatem debiti by which the dominium in the ceded right remains with the cedent. Relying upon this distinction Counsel for the respondent urged upon us that since the cessionary lacked actual ownership of the contractual rights ceded to him, his claim could not prevail over that of a judgment creditor of the pledgor.

The argument is unsound. It is true that in the instant case the cessionary is able to assert and enforce the ceded rights only as long as the cedent's loan remains unpaid. It is also true that the cessionary is legally obliged to make over to the cedent whatever the cessionary may recover in excess of the

