REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISON, POLOKWANE)

CASE NO: 387/2016

Reportable: Yes

Of interest to other judges: Yes

Revised.

27/9/2016

In the matter between:

LIBERTY GROUP LIMITED **APPELLANT**

and

JOHANNES THEOBALT HATTINGH VAN NIEKERK **RESPONDENT**

JUDGMENT

M.G.PHATUDI J

[1] INTRODUCTION:

1.1. This is an application for summary judgment launched by the Applicant against the Respondent seeking payment of the amount of R470 000, 00 and interest thereon. The Applicant is the Plaintiff and the Respondent the

Defendant in the main action. The application is opposed. The facts giving rise to the application are, *in* short, the following:-

[2] The Applicant (Plaintiff) instituted an action against the Respondent (Defendant) for payment of an amount of R470 000, 00, and 9% interest thereon a *temporae morae* to date of payment. The Applicant's claim is one based on unjustified enrichment it being alleged that the Applicant ***bona fide*** and erroneously paid to the Respondent an amount of R470 000, 00 which according to the Applicant, was not due and payable to the Respondent.

[3] It appears that the Respondent *was* at all material times the owner of a Guaranteed Reviewable Lifestyle Insurance Policy issued and underwritten by the Applicant. The guaranteed benefit payable in terms of the policy upon the occurrence of the insured event was an amount of R1 808 263.00. The life insured was in terms of the policy on one Mrs H.J.LT. Van Niekerk born on […] October 1920.

[4] On 13 June 2013,the Respondent in terms of a written deed of *Cession,* ceded to Daniel Johannes Hendrik Van Niekerk (" the Cessionary") his right to a portion of the benefit of the policy in the amount of R470 000, 00. It is alleged that the cession was in the form of a security for a debt that the Respondent owed to the cessionary. The Respondent contends that the Cession concluded was in its nature a cession *in securitatem debiti*[1]*.*

[5] The insured, Mrs *Van* Nekerk, died on 18 August 2015 as result of which the benefit under the policy became due and payable. Subsequent to her passing on, the applicant paid the full amount of the policy (R1 808 263, 00) to the Respondent. (Johannnes Van Niekerk). It is alleged that payment was made ***bona fide*** and in error believed to be payable to the Respondent On 25 September 2015, the Applicant also paid to the Cessionary (Daniel Johannes Van Niekerk) an amount of R470 000,00.

[1] P12, Para: 15 and Pp 45-48, index bundle.

[6] At the time of the deceased's death, (life assured) the Cession was still in force, the same not been cancelled or terminated. To that extent the applicant contends that the Respondent had been unjustifiably enriched at the expense of the Applicant in the amount of R470 000, 00 *sine causa.* It is thus undue payment that gave rise to the present proceedings. The action is defended, hence the application for summary judgment is sought against the Respondent.

[7] The crisp question that calls for consideration is for the court to determine the nature of the Cession agreement concluded, and the form it acquired to determine whether the Respondent has established a ***bona fide*** defence to the action[2]. One need not, therefore, probe into the underlying merits of the dispute.

[8] A copy of the Cession form is attached to the particulars of claim marked as Annexure "B"[3]. It describes the nature of the Cession as -

"Die regte op die polis word as sekuriteit van derde party oorgedra".

As already indicated the owner of the policy is the Respondent herein. The Cession further qualifies the purpose of its transfer as:-

Aanvullend:

"tydelike oordrag van die eienaarskap as sekuriteit vir ·n skuld". The figure of R470 000, 00 has been inserted in a hand written form. It follows that the intention of the cedent was not to transfer its rights under the policy for "Volkome en permanente oordrag van eienaarskap"'.

[9] A closer examination of the policy under consideration confirms that the Respondent is the owner of the insurance policy. The cedent ceded the rights and/or obligations under the policy to the Cessionary (Daniel Van Niekerk) as *"Securiteit aan 'n derde party oorgedra".* Such cession and what it purports to convey is that it

---

[2] See Breitenbach v Frat S.A. (Edms) BPK 1976 (2) SA 226 (T) & Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A) at 426.

[3] Cessien form/Sessie Vorm, P22 Indexed Bundle

would be temporary security for a debt that the defendant owed the cessionary.

[10] At issue is what form of security did the parties intended to cede to have had an impact on the benefits due under the life insurance policy.

[11] It was submitted on behalf of the Applicant that the Respondent and the Cessionary allegedly agreed that there would be an out and out Cession of the rights to the Cessionary limited to the amount of R470 000,00. Upon the debt becoming extinguished, so the submission went, the right that was ceded to the cessionary reverts to the Respondent. Accordingly, the express terms of the Cession militates against the view contended by the Respondent to the effect that it was no more than a pledge of right. This submission is not supported by the contents of the Cession itself. It would require probative evidence at the trial.

[12] It is trite that a party relying on a Cession must allege and prove the existence of the contract of Cession in terms of which a personal right against a debtor is transferred from the Cedent (creditor) to a new creditor, in this case, the Cessionary[4]. Usually the *causa* of a cession is divesting of the cedent of his/her rights against the debtor.

[13]. Furthermore, a cessionary who holds a cess on in security of a deb1is not entitled to recover directly from the debtor, until such time as the debtor is in default_ The cession leaves the cedent with a reversionary right

[14]. In the present instance, the Respondent contends that the nature of the cession was one for security of a debt as opposed to an "out and out cession". This was always been the intention of the parties when they reached the cession agreement.

[15] In Millman v Twiggs and Another[5], Heter JA stated that-

[4] Lief NO v Dettman 1964 2 ALL SA 448(A), 1964(2) SA 252 (A)

"*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 with his trustee, who is under the common law entitled to administrator it "in the best interest of all creditors, and with due regard to the special position of the pledgee".*

The aforegoing principle was formulated by Innes JA in National Bank of South Africa v Cohen's Trustee 1911 AD 235 at 250, and reaffirmed in such recent cases as Bank of Lisbon and South Africa Ltd v The Master and Others 1978(1)SA 276(A).

[16] In Grobler v Oosthuizen[6], Brand JA had occasion to deal with the nature of and distinguished an outright cession as opposed to a cession *in securitatem debiti.*

[17] In the present instance, it appears that on a proper analysis of the transaction as a whole, the cession was made with the purpose of securing a debt owed by the cedent to the cessionary. On a reading of the papers before court there is no evidence suggesting that the cession made was an *"'out and out cession*".

[18] The true character of the cession therefore depends on the intention of the parties. The intent on of the parties appears under the heading "*Polisbesonderhede" in* which it is apparent from the policy form that.it was acquired as *"Sekuriteit vir 'n skuld".* It goes without saying that the construction of the cession is one for security for a debt The effect of a security for a debt is that the principal debt is pledged" to the cessionary while the cedent retains what has variously been described as the *"bare dominium"* or a reversionary interest in the claim against the principal debtor.

[19] It is trite that ceded right in all its aspects is vested in the cessionary. After the cession *in securitatem debit,* the cedent, has no direct interest in the principal debt and is left only with a personal right against the cessionary by virtue of the *poctum fiduciae,* to claim re-cession after the secured debt has been discharged.

---

[5] 1995(3) SA 674(AD) at 676 H-I

[20] Furthermore once the principal debt had automatically reverted to the cedent, either because it had been discharged, collection of the principal debt by the erstwhile cessionary must be for the. account of the erstwhile cedent for the recovery of which the latter then has a claim against the former.

[21] Turning to the· facts in this application, the Respondent contended that the transaction amounts to a *cession in securitatem debiti* otherwise known as a pledge, which must be distinguished from a fiduciary security cession or an *'"out and out cession".*

[22] For the purposes of a claim for summary Judgment, it is not apparent that applicant rests its claim on the debt owing to Van Niekerk: that it has become owing, due and payable or that the pledge has become matured.

[23] The cession was clearly intended to be one of security for a debt in favour of the Respondent, the cessionary, Mr. D J H Van Niekerk. The weight of authorities indicate that such a cession for a debt is, by and large, accepted as a pledge of the right in question and that the *dominium* of the right vests with the cedent at all material times. Ownership of the entire policy remained with Respondent Consequently, the Applicant had no sound reason to have paid the R470 000, 00 to the cessionary.

[24] There is no credible reason advanced by the Applicant as to why it chose to pay out the amount claimed to the cessionary as the nature of the security was for a temporary basis to secure Respondent's indebtedness to the cessionary. This created a contractual relationship between the cessionary and the Respondent Once fun payment has been discharged to the Respondent, the pledged security lapsed.

[25] On a semblance of the dispute herein it is my considered *view* that the Respondent has a ***bona fide*** defence to answer the claim. For the reasons set out

---

[6] 2009(5) SA 500 at 505 C-D (SCA)

above, I arrived at the following conclusion;

ORDER:

1. The application for summary Judgment is dismissed with costs
2. The Respondent is granted leave to defend the action.

_____

M.G PHATUDI
JUDGE OF THE HIGH COURT
LIMPOPO DIVISION, POLOKWANE

REPRESENTATIONS:

1. Applicant /Plaintiff:	Adv J.F.Steyn
Instructed by:	Gerings Attoneys Highlands North, Johannesburg
2. Respondent·s Counsel:	Adv M.Bressler
Instructed by:	Morne Coetzee Attorneys C/O De Bruin Oberftozer Attorneys:Polokwane
Date heard:	01 August 2016
Date of Judgment	27 September 2016