LL Case No 470/1988

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

DENSAM (PROPRIETARY) LIMITED Appellant

and

CYWILNAT (PROPRIETARY) LIMITED Respondent

CORAM: BOTHA, EKSTEEN, F.H. GROSSKOPF JJA,
FRIEDMAN et NIENABER AJJA

HEARD: 23 AUGUST 1990

DELIVERED: 28 SEPTEMBER 1990

JUDGMENT

BOTHA JA:-

The litigation giving rise to this appeal commenced with an ex parte application brought by the respondent ("Cywilnat") against the appellant ("Densam") in the Witwatersrand Local Division on 16 August 1988. The application came before LEVY AJ, who granted a rule nisi against Densam in accordance with the prayer contained in Cywilnat's notice of motion. The rule called upon Densam to show cause on 23 August 1988 why an order should not be granted with the following provisions:

1. interdicting Densam from collecting any moneys owing to it by its debtors;
2. directing Densam to hand to Cywilnat forthwith all moneys and/or cheques upon receipt of same from the debtors of Densam;
3. directing Densam to deliver to Cywilnat full and complete schedules setting out the names and addresses and amounts owing by Densam's debtors on the last day of July 1988;

4. directing Densam to allow Cywilnat to inspect all Densam's ledgers, invoices, delivery books and other books of account and records for the purpose of extracting therefrom and ascertaining the amounts owing by Densam's debtors and allowing Cywilnat to make copies of any such documents;

5. directing Densam to make available and produce to Cywilnat all its books and records relating to any of its debtors;

6. directing Densam to pay the costs of the application.

The provisions of the rule mentioned in paragraphs 1 and 2 above were ordered to operate as interim orders having immediate effect.

The relevant facts deposed to in the affidavits filed in support of Cywilnat's application will be detailed in due course. At this stage, for the purpose of outlining the course of the litigation in

the Local Division, it needs to be mentioned only that Cywilnat relied inter alia on the following allegations: Densam was indebted to the Trust Bank of Africa Limited ("the Bank") in respect of an amount of money lent and advanced by the Bank to Densam on overdraft; the Bank held certain securities in respect of Densam's indebtedness to it; those securities included a cession by Densam to the Bank of the former's claims against all its debtors, such cession being incorporated in a document headed "Cession of Debtors" (annexure "N5" in the application papers); the Bank had ceded to Cywilnat its claim against Densam for payment of the amount of the overdraft; and the Bank had also ceded and transferred to Cywilnat its rights against Densam flowing from the latter's "Cession of Debtors" in favour of the Bank. The relief sought by Cywilnat against Densam was founded on the terms of the contract embodied in the "Cession of Debtors".

After service upon it of the rule nisi and

the papers comprising the application, Densam filed answering affidavits in which it opposed the relief claimed by Cywilnat on a number of grounds. On the return day of the rule it was extended, in order to allow Cywilnat to file replying affidavits, to 30 August 1988. The matter then came before WEYERS J. After hearing argument WEYERS J made an order, on 1 September 1988, in terms of which, inter alia, the matter was "referred for the hearing of oral evidence, at a time to be arranged with the Registrar", on a number of specified issues, and the rule was extended to 20 September 1988. In so far as it is relevant for the purposes of this appeal, that part of the order specifying the issues on which evidence was to be heard, reads as follows:

> "1.1 whether Trust Bank was entitled to sell/cede its claim against the Respondent" (i e Densam) "as well as the securities referred to in Annexures "N3", "N4", "N5" and "N6";
>
> 1.2 if so:
>
> 1.2.1 what was sold/ceded and to

whom?

1.3 .....

1.4 .....

1.5 .....

1.6 who owns the claim if there was a sale and/or cession?

1.7 ....."

Pursuant to the order made by WEYERS J, the matter was set down for hearing on 19 September 1988, before GOLDSTEIN J. At the commencement of the proceedings on that day, before any evidence was led, counsel then appearing for Densam addressed an argument to the Court, by way of what was referred to as a point in limine. It was contended that the Bank's claim against Densam was not cedable. After hearing argument, GOLDSTEIN J delivered a judgment which he concluded by dismissing the point in limine. Thereafter the evidence was heard of a number of witnesses. Eventually, on 28 September 1988, GOLDSTEIN J delivered a further judgment, at the end of which he made an order as follows:

"1. The rule is confirmed.

2. Paragraphs 1.1 to 1.5 of the order are to operate until applicant's claim against respondent in the sum of R71 125,69 has been satisfied."

It is this order against which Densam now appeals to this Court, leave to do so having been granted by the learned Judge a quo.

In argument before us counsel for Densam relied on four grounds in support of the appeal, as follows:

A. The Bank's claim against Densam for the repayment of the amount of the loan was not cedable;

B. The security held by the Bank in the form of the cession by Densam to the Bank of Densam's claims against its debtors was not cedable;

C. The Bank's cession to Cywilnat of its claim against Densam related to a part only of the latter's debt to the Bank and was accordingly invalid;

D. Cywilnat, when it took cession of the Bank's claim against Densam, did so as an agent acting on behalf of other persons and was not entitled to enforce the claim in its own name.

Counsel's contentions under A and B above were based on facts which are not in dispute. In setting out the relevant facts, as they appear from the affidavits filed on behalf of Cywilnat, I shall assume for the moment that the whole of the Bank's claim against Densam had been ceded to Cywilnat, leaving for later consideration the contention to the contrary under C above.

Densam was a customer of the Bank in respect of a cheque account which was operated at the Bank's Main Street branch in Johannesburg. Prior to July 1988 the Bank had granted overdraft facilities to Densam, with a limit of R70 000,00. On 29 July 1988 the account was overdrawn in an amount of R71 125,69. On

that day the Bank, represented by the manager of its Main Street branch, Mr Nelson, and Cywilnat, represented by its attorney, Mr Frack, entered into an agreement in terms of which Cywilnat purchased from the Bank, for a sum of R70 000,00, the Bank's claim against Densam for repayment by the latter of the amount owing by it on the overdrawn account. The agreement was reduced to writing and signed on behalf of the parties to it. The document is headed "Cession of Claim", and it reads as follows:

"1. PARTIES

1.1 THE TRUSTBANK OF AFRICA LIMITED
(hereinafter referred to as the Bank)
of 88 Main Street JOHANNESBURG

1.2 CYWILNAT (PTY) LTD
("Cywilnat")
of 14th Floor Kelhof 112 Pritchard Street JOHANNESBURG.

2. RECITAL

2.1 Densam (Pty) Ltd t/a Herb's Motors ("Densam") is indebted to the Bank in the sum of R70 000 ("the claim"). The Bank holds as security the guarantees of SAMUEL

LEVINRAD and E J NEEDHAM and book debts belonging to Densam ("the security").

2.2 The Bank has agreed to cede and assign the claim to Cywilnat together with the Bank's said security upon such conditions as set out below.

3. AGREEMENT

3.1 The Bank hereby cedes, assigns, transfers and makes over to Cywilnat the claim against Densam together with the security as aforesaid.

3.2 As a consideration for the cession and assignment of the aforesaid claim and security, Cywilnat shall pay to the Bank the sum of R70 000, payable in cash or an acceptable bank guaranteed cheque.

3.3 Payment of the sum of R70 000 shall be made by Cywilnat on the signing hereof against which the Bank delivers to Cywilnat the security together with a certificate of balance.

3.4 This Cession is given without any recourse to the Bank and the Bank gives no warranties of whatsoever nature in this regard.

SIGNED AT JOHANNESBURG ON THIS THE 29TH DAY OF JULY 1988."

The agreement of cession was entered into

without Densam's consent. In fact, Densam had not been consulted about the cession and became aware of it only upon receipt of a letter of demand from Cywilnat some three days later. The circumstances which gave rise to the cession may be summarized as follows. Cywilnat was a company which was ordinarily used by the firm of attorneys in which Frack was a partner, for taking cession of claims from clients of the firm who did not wish to institute legal proceedings in their own names. In this instance, Frack was acting on behalf of two brothers, Michael Levinrad and Maxim Levinrad, who had become involved in a dispute with a third brother, Samuel Levinrad. The dispute arose out of a complicated series of business transactions of the three brothers, relating to a number of companies in which they held interests. It is not necessary to unravel the details. Suffice it to say that Samuel Levinrad had caused Densam to advance money to a company, "CCTV", in which the three brothers had been joint

shareholders; Densam's claim against CCTV for repayment of the loan had been ceded to the Bank as security for its indebtedness on the overdraft; the Bank had threatened to enforce the claim; and if the claim were to be enforced, Michael and Maxim Levinrad stood to lose a substantial amount of money. Frack advised his clients to obtain a cession from the Bank of its claim against Densam, together with the securities held by the Bank; by acquiring control over Densam's claim against CCTV, the enforcement of it could be averted. Michael and Maxim Levinrad were prepared to act on Frack's advice, but not "in the family name"; so it was decided that Cywilnat would be used as a vehicle for obtaining cession of the Bank's claim and the securities. Frack approached the Bank's manager, Nelson, and offered to buy the claim and the securities for R70 000,00. At that stage the Bank had become dissatisfied with the manner in which Densam's account was being conducted (the overdraft limit had

been exceeded and several cheques had been dishonoured) and the Bank wanted to recover the money it had advanced to Densam. In those circumstances, according to the evidence given by Nelson, it was normal banking practice for the Bank "to try and get rid of the account", and the Bank was "fortunate to get the R70 000,00 from Cywilnat". The Bank accordingly accepted the offer conveyed to it by Frack, and thus the cession came into being.

Pursuant to the cession, Frack, acting on behalf of Cywilnat, paid the sum of R70 000,00 to the Bank (the money had been made available by Michael and Maxim Levinrad). At the same time the Bank delivered to Frack the securities held by it, which included the "Cession of Debtors" mentioned above. This is referred to in paragraph 2.1 of the cession (quoted above) as the "book debts belonging to Densam". In argument counsel referred to the document, as well as the legal relationship embodied in it, as "the cession of book

debts". The phrase is legally inept, of course, but for convenience I shall follow suit. The relevant portions of the document read as follows:

> "1. We, the undersigned DENSAM (PTY) LTD, T/AS HERBS MOTORS of COR. GOCH & JEPPE STS., NEWTOWN, JHB herein represented by MR. SAMUEL LEVINRAD a director of the company duly authorised thereto under and by virtue of a resolution passed by the directors of the company on ----- a certified copy of which resolution is hereunto annexed, do hereby cede and pledge to THE TRUST BANK OF AFRICA LIMITED, its order or assigns (hereinafter referred to as the Bank) all our rights, title and interest in and to all debts due to us from whatsoever cause arising and more particularly and without detracting from the generality of the aforegoing, the existing debtors reflected in annexure "A" hereto. These debts are ceded to the Bank as security for each and every amount which we are at present indebted to the Bank or may in future become indebted to the Bank whether as borrower or as surety and whether alone or jointly with others or from whatsoever cause arising and notwithstanding any fluctuation in the amount or even temporary extinction thereof as well as for the due and proper performance of all other obligations which we have or may hereafter incur in favour of the Bank.

All our debtors, both present and future, including those reflected in annexure 'A' hereto are hereafter referred to as 'our said debtors'.

2. We hereby acknowlege, bind ourselves, agree and undertake to the Bank -

(a) That if so required by the Bank, we will by not later than the 15th day of each month or on such other dates as the Bank may indicate, deliver to the Bank full and complete schedules setting out the names and addresses and amounts owing by our said debtors on the last day of the preceding month, but the failure by us to deliver such schedules or the omission therefrom of any information in regard to any such debtor/s or the supply of any incorrect information shall not affect the rights of the Bank under this Cession.

(b) That all monies which we may after the date hereof collect from our said debtors shall be so collected and received by us as agents for and on behalf of the Bank and we undertake to cease to collect and receive any such payments from our said debtors from the date that the Bank will notify us and/or our said debtors that the Bank will in future themselves collect the monies owing by our said debtors and ceded hereunder.

(c) That the Bank shall at any time

hereafter be entitled to give notice of this Cession to all or any of our said debtors and to institute action against any of our said debtors for amounts owing by them and from date of such notice we will cease collection of any monies from our said debtors and shall, if so required by the Bank, cede or endorse in favour of the Bank and deliver to the Bank all acknowledgements of debt, bills of exchange, promissory notes, and other negotiable instruments and all other documents then and thereafter held by us in respect of any amounts payable by our said debtors.

(d) That the Bank shall be entitled at all times through their nominee/s to inspect all our debtor's ledgers, invoices, delivery books and other books of account and records for the purpose of extracting therefrom and ascertaining the amounts owing by our said debtors and to make copies of any such documents.

(e) That we will at all times make available and produce to the nominee/s of the Bank or in any Court all our books and records insofar as they are relevant to any legal proceedings which may be instituted by the Bank, against any of our said debtors.

.....

7. For the purpose of enabling the Bank to exercise their rights under this Cession, we hereby irrevocably nominate, constitute and appoint the Bank with power of substitution to be our Agents with full and unlimited power to sign all such documents and to do all such acts, matters and things as the Bank in its discretion may deem necessary to give due and proper effect to the terms of this Cession.

.....

11. We further agree that the amount of our indebtedness to the Bank at any time (including interest, costs and the rate of interest) shall be determined and proved by a certificate signed by any Director, General Manager, Secretary, Branch Manager or Accountant of the Bank. It shall not be necessary to prove the appointment of the person signing any such certificate, and such certificate shall be binding on us and shall be conclusive proof of the amount of the indebtedness of the Principal Debtor and shall be valid as a liquid document against us in any competent Court for the purpose of obtaining provisional sentence or summary judgment against us thereon."

On 1 August 1988 Frack caused a letter of

demand to be delivered to Densam, in which Densam was notified that Cywilnat had taken cession of the Bank's claim against it, together with the securities held by the Bank, and that Cywilnat intended to enforce forthwith the rights it had acquired in terms of the cession of book debts. Densam responded quickly. On 3 August 1988 its attorney addressed a letter to Frack, in which it was made plain that Densam would resist all claims made by Cywilnat. This led to the launching by Cywilnat of the ex parte application mentioned at the outset of this judgment.

I turn to a consideration of the contentions advanced on behalf of Densam, as summarized above.

With regard to the contention under A above, the crucial submission made by counsel for Densam was formulated in his written heads of argument as follows:

> "The character of the contract between a banker and its customer is so personal in nature that the element described as delectus personae is present, rendering any claim which the banker might have against its

> customer not cedable without the consent of the customer."

In support of his argument counsel relied, in the first place, on the decision in G S George Consultants and Investments (Pty) Ltd and Others v Datasys (Pty) Ltd 1988 (3) SA 726 (W). In that case STEGMANN J was called upon to consider the validity of a cession of a banker's claim against its customer for repayment of the amount of an overdraft. The learned Judge came to the conclusion (at 737 E-F) that

> ".....in the absence of agreement to the contrary, the contract of a banker and customer obliges the banker to guard information relating to his customer's business with the banker as confidential, subject to various exceptions, none of which is presently relevant; that such duty of secrecy imparts the element of delectus personae into the contract; and that the banker's claims against his customers are accordingly not cedable without the consent of the customer."

The first part of the learned Judge's conclusion, viz the finding that an obligation rests on the banker as against the customer to maintain

confidentiality and secrecy, followed upon a discussion in the judgment at 734 H - 736 H of the nature of the contractual relationship between a banker and a customer. From an analysis of the discussion it appears that the learned Judge found that in the contract between banker and customer there exists a "tacit or implied term of secrecy" (at 736 F/G), arising "as a matter of law, or as representing the tacit consensus of the parties" (at 734 I), but that such term was "not an absolute provision", there being circumstances in which a banker may be relieved of the duty of secrecy (at 736 G); and that for both these findings the learned Judge relied mainly on the English case of Tournier v National Provincial and Union Bank of England (1924) 1 KB 461 (CA) (at 735 B-D and 736 G/H). In this Court counsel for Densam was content to support the findings of the learned Judge that I have mentioned, on the basis of Tournier's case supra and the more recent case in which Tournier's case was

reaffirmed, Barclays Bank Plc (Trading as Barclaycard) v Taylor (1989) 1 WLR 1066 (CA). Counsel for Cywilnat, however, argued that in our law, unlike as in the English law, there was no duty of secrecy as between banker and customer, and that our law demanded of a banker no more than (as counsel put it) to act in good faith and not fraudulently. In the view I take of the present case there is no need to embark upon a consideration of the juristic nature of the contract between banker and customer, nor upon an investigation as to whether the banker owes the customer a duty of confidentiality or secrecy, and, if so, what its origin or limits may be. For the purposes of deciding this appeal I shall simply assume in favour of Densam (but, I must make it plain, without deciding) that the Bank was contractually obliged to it to maintain secrecy and confidentiality about its affairs, in accordance with the decision in Tournier's case supra.

With that assumption in mind, I revert to the

judgment of STEGMANN J in the George Consultants case supra. Having referred to Tournier's case in the context of circumstances which relieve a banker of the duty of secrecy owed to its customer, the learned Judge (at 736 G-H) said that in the case before him there was no suggestion that any such circumstance was present. On that score GOLDSTEIN J in the Court a quo in the present case considered that STEGMANN J had erred. It will be recalled that when the matter came before GOLDSTEIN J on 19 September 1988 for the hearing of evidence, counsel for Densam argued in limine that the Bank's claim was not cedable, and that GOLDSTEIN J delivered a judgment in which he dismissed the point in limine. That judgment has been reported: see Cywilnat (Pty) Ltd v Densam (Pty) Ltd 1989 (3) SA 59 (W). As appears from the reported judgment at 59 I - 60 B GOLDSTEIN J referred to the four categories of cases enumerated by BANKES LJ in Tournier's case supra (at 473) in which the general rule as to secrecy is

relaxed, the third of which is "where the interests of the bank require disclosure", and he held that such circumstance did exist in the George Consultants case, on the ground that

> "the bank wished to dispose of its claim, and thus had an interest to disclose it to the proposed cedent [sic: cessionary] of such claim."

GOLDSTEIN J said further (at 60 B):

> "If a bank wishes to sue its customer, it may do so thus revealing the amount of the overdraft to the world. I cannot see why the interposition of a cessionary should change the principle."

In this Court counsel for Densam submitted that it was wrong to extend the concept of "the interests of the bank" to a case where the bank wished to dispose of its claim by means of a cession; since the element of confidentiality pervaded the whole of the relationship between the bank and its customer, so it was argued, the relaxation of the duty of secrecy in this context should be confined to cases where the bank itself

sought directly to enforce its claim. I do not agree. In Tournier's case supra at 481 SCRUTTON LJ stated the principle thus:

> "I think it is clear that the bank may disclose the customer's account and affairs to an extent reasonable and proper for its own protection, as in collecting or suing for an overdraft."

(See also per ATKIN LJ at 486). In my view, generally speaking, it is reasonable and proper for a bank to further its own interests in regard to "collecting an overdraft", by ceding its claim to a third party. To that extent I agree with the views expressed by GOLDSTEIN J, as mentioned above. It is conceivable, however, that a bank may want to cede its claim for an ulterior purpose, unrelated to the furtherance of its own interests, as was suggested by counsel for Densam; and it is to be noted that it does not appear from the judgment in the George Consultants case why, or under what circumstances, the bank there had ceded the claims with which STEGMANN J was concerned. It seems to me

that GOLDSTEIN J assumed that the bank had ceded its claims in order to promote its own interests. I am inclined to think that his assumption was justified: the mere fact that a bank has ceded its claim would raise a prima facie inference, if nothing appeared pointing in a contrary direction, that the bank had decided to dispose of its claim in order to realize and to liquidate it, in its own interests. But for the purposes of the present case there is no need to pursue this point any further. Here the facts are clear. I referred earlier to the evidence given by Nelson, the Bank's manager. That evidence was given after GOLDSTEIN J had delivered his judgment on the so-called point in limine, but of course in this appeal we must take that evidence into account. On that evidence the Bank wished to "get rid of" the claim against Densam for its own benefit, and it decided to accept Cywilnat's offer to take cession of the claim, because it considered itself "fortunate" to receive virtually

the entire amount of the claim, in consideration for the cession. Consequently the application of the principles laid down in Tournier's case supra to the facts of the present case leads to the conclusion that the Bank was not precluded from ceding its claim against Densam to Cywilnat, and the decision in the George Consultants case supra cannot avail Densam.

There is a further, and more important, aspect of the judgment of STEGMANN J in the George Consultants case supra which calls for consideration. In the second part of the passage at 737 E-F, which has been quoted above, the learned Judge stated as his conclusion that the duty of secrecy which a banker owes its customer imports the element of delectus personae into the contract. In my judgment, with respect to the learned Judge, this conclusion of his is wrong in law. In the discussion of it which follows, I am proceeding still on the assumption (without deciding) that a banker owes its customer a duty of secrecy and

confidentiality, as held by STEGMANN J, in accordance with Tournier's case supra, but for present purposes I disregard the so-called exceptions to the general rule as laid down in that case.

Earlier in his judgment STEGMANN J said the following (at 736 I/J - 737 B):

> "In my judgment, whenever parties conclude a contract in terms of which either owes the other a duty to guard the secrecy of confidential information, the character of the contract, and in particular the performance of the obligation to maintain confidentiality, is ipso facto so personal in nature that the element described as delectus personae is present. It is unthinkable that a businessman, or even a private individual such as a housewife, would both entrust confidential information relating to his or her financial position and dealings to a banker (or anyone else) on terms obliging the latter to guard the privacy thereof, and at the same time remain indifferent to the identity of the person entrusted with that duty of secrecy."

It is clear, I think, that the learned Judge in effect based his view with regard to the element of delectus personae only on the banker's obligation to maintain

confidentiality; the nature of the customer's obligation to pay the amount of the banker's claim was not mentioned. This approach I consider to be contrary to principle and authority. The question whether a claim (that is, a right flowing from a contract) is not cedable because the contract involves a delectus personae, falls to be answered with reference, not to the nature of the cedent's obligation vis-à-vis the debtor, which remains unaffected by the cession, but to the nature of the debtor's obligation vis-à-vis the cedent, which is the counterpart of the cedent's right, the subject-matter of the transfer comprising the cession. The point can be demonstrated by means of the lecture-room example of a contract between master and servant, which involves the rendering of personal services by the servant to his master: the master may not cede his right (or claim) to receive the services from the servant to a third party, without the servant's consent, because of the nature of the

latter's obligation to render the services; but at common law the servant may freely cede to a third party his right (or claim) to be remunerated for his services, because of the nature of the master's corresponding obligation to pay for them, and despite the nature of the servant's obligation to render them. In Eastern Rand Exploration Co Ltd v Nel and Others 1903 TS 42 at 53 INNES CJ stated the principle of our law as follows:

> "Now, speaking generally, the question of whether one of two contracting parties can by cession of his interest, establish a cessionary in his place without the consent of the other contracting party depends upon whether or not the contract is so personal in its character that it can make any reasonable or substantial difference to the other party whether the cedent or the cessionary is entitled to enforce it. Subject to certain exceptions founded upon the above principle rights of action may, by our law, be freely ceded."

When the learned CHIEF JUSTICE referred to the contract being personal in its character, it is clear, in my view, that he had in mind the obligation of the debtor ("the other party"), for it is only in relation to the

performance of that obligation that it can make any difference to the debtor whether it is the cedent or the cessionary who is entitled to enforce the contract. Applying the principle to the facts of the present case, Densam's obligation to the Bank was to pay the amount of the overdraft; it could make no difference at all to Densam whether it was the Bank or Cywilnat who exercised the right to enforce payment. Accordingly the Bank's claim against Densam was cedable. (As to the concept of delectus personae in the context of the cedability of rights generally, see further Cullinan v Pistorius 3 ORC 33 at 38; Friedlander v De Aar Municipality 1944 AD 79 at 93; Hersch v Nel 1948 (3) SA 686 (A) at 698-9; and Dettmann v Goldfain and Another 1975 (3) SA 385 (A) at 394 H - 395 F.)

Counsel for Densam argued that the Bank's obligation to preserve confidentiality and Densam's obligation to pay the overdraft were so closely linked

together that they could not be separated. I do not agree. In Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A) VAN HEERDEN JA, in a minority judgment, at 31 F - 33 G, considered the cedability of a medical doctor's claims against patients to whom he had rendered professional services, for payment of his fees. (This topic was not dealt with in the judgment of the majority of the Court.) The learned Judge rejected a contention that such claims were not cedable because of the confidential relationship between a doctor and his patient. In the course of his reasoning (at 32 D-G) VAN HEERDEN JA voiced doubts about the correctness of the decision of STEGMANN J in the George Consultants case supra on the point now under discussion, but found it unnecessary to express a definite opinion on the question. He did, however, express his disagreement (at 32 G-I) with the generalized dictum of STEGMANN J at 736 I - 737 A of his judgment (quoted above), on the ground that a contractual obligation of confidentiality

was not necessarily breached by the cession of a claim arising out of the contract. I respectfully agree with the remarks of VAN HEERDEN JA in that regard. It seems to me, however, that it is of more fundamental importance to the decision in the present case, to have regard to VAN HEERDEN JA's general statement of the law with regard to the cedability of contractual rights, and to his application of that statement to the facts with which he was concerned. As to the former, he said (at 31 G-H):

> "Dit is natuurlik erkende reg dat hoewel vorderingsregte in die reël vryelik oordraagbaar is, dit nie die geval is nie indien 'n sessie van so 'n reg 'n wesentlik ander verpligting vir die skuldenaar sal meebring, of, anders gestel, indien die skuldverhouding na aard 'n delectus personae behels."

Applying the law to the facts, VAN HEERDEN JA said (at 31 I - 32 A):

> "Dit is egter duidelik, meen ek, dat hierdie uitsondering op die algemene reël nie in die onderhawige geval toepassing kan vind nie. Vir 'n pasiënt kan dit geen verskil maak of hy die rekening vir sy geneesheer se dienste aan

> hom of iemand anders moet betaal nie. Wat sy prestasie betref, bly sy verpligting dus dieselfde of hy nou ook al betaling moet maak aan die geneesheer of iemand aan wie die geneesheer sy vorderingsreg op betaling gesedeer het. Daar kan gevolglik geen sprake wees dat 'n sessie 'n wesentlik ander verpligting op hom plaas nie."

With respect, I fully agree, and in my view the above-quoted remarks apply with equal force to the contractual relationship between a banker and its customer. On that footing, the George Consultants case supra was wrongly decided, and it cannot avail Densam in the present case.

Moving away from the notion of confidentiality, counsel for Densam submitted that a very personal relationship existed between a banker and its customer. Counsel spent some time in painting a glowing picture of a bank as a reputable institution of a special kind, with a character and personality all of its own, particularly when exercising a sympathetic, patient and wise discretion in the matter of calling up

overdrafts, and so forth. (In passing: there was no evidence on record to support counsel's eulogy.) All this, assuming it to be correct, cannot advance Densam's case, for in the end it turned out that this was but another way of arguing that the contract was "so personal in character" that the banker was not allowed to cede its rights under it. As I have already attempted to show, the notion of "the contract" being personal in this context cannot be divorced from a consideration of the nature of the obligation resting upon the debtor. The mere fact that the cedent creditor may possess outstanding qualities of forbearance and the like, as opposed to the cessionary, is irrelevant in law, at least in relation to the concept of delectus personae. In this connection it was suggested to counsel in the course of his argument that he might be confusing the non-cedability of a claim by reason of the nature of the obligation of the debtor, with the non-cedability of a claim by reason of

a tacit agreement not to cede (pactum de non cedendo). Thereupon counsel was pleased to advance an alternative argument, viz that the Bank had tacitly undertaken not to cede its claim against Densam. But this avenue of escape was not open. An agreement between a banker and its customer that the former will not cede its claim against the latter cannot be implied in the contract between them as a matter of law; if there is no express agreement to that effect it can be found to exist only by way of tacit consensus between the parties, which is to be inferred from all the relevant surrounding circumstances. Such a tacit agreement must be alleged and proved like any other tacit agreement, or tacit term of a contract. In the present case, however, it was at no stage foreshadowed, either in the affidavits filed on Densam's behalf, or in the evidence heard before GOLDSTEIN J, that Densam would seek to rely on the existence of an alleged tacit agreement not to cede. Had it been intimated on Densam's behalf that

it would rely on a tacit agreement, I have little doubt that it would have been sought on behalf of Cywilnat to counter such a case by means of appropriate evidence. As it stands, the evidence on record in any event does not justify the finding of such a tacit agreement.

For all these reasons the contention on behalf of Densam under A above is rejected.

I turn to the contention under B above, viz that the Bank's rights against Densam, flowing from Densam's cession of its book debts to the Bank, were not cedable. Counsel for Densam argued in support of this contention, on a number of grounds. In the view I take of the contention (as will appear presently), there is no need to do more than to paraphrase briefly counsel's submissions, as follows: the rights afforded to the Bank in terms of the cession of book debts were so personal in character that they could not have been validly transferred to Cywilnat, without Densam's consent, in accordance with the principle laid down in

the Eastern Rand Exploration Co case supra; in every contract of the kind embodied in the cession of book debts, there must always be implied, as a matter of law, a pactum de non cedendo; the cession of book debts was one in securitatem debiti, Densam retained a reversionary interest in the rights ceded, in accordance with the decision in Bank of Lisbon and South Africa Ltd v The Master and Others 1987 (1) SA 276 (A), and such interest could not be transferred without Densam's consent; the cession of book debts constituted a pledge, which was not cedable (Deutschman v Mpeta 1917 CPD 79; Oertel N O v Brink 1972 (3) SA 669 (W) at 675 G - H); and, generally, the matter is covered by the reasoning of STEGMANN J in that part of his judgment in the George Consultants case supra in which he discussed the cession and pledge of shares, with which he was concerned in that case (at 739 D - 740 H).

In my judgment, all of the above submissions

are untenable, in the face of the wording of the cession of book debts. The relevant part of it is the following:

> "We, the undersigned DENSAM (PTY) LTD ..... do hereby cede and pledge to THE TRUST BANK OF AFRICA LTD, its order or assigns ..... all our rights, title and interest in and to all debts due to us from whatsoever cause arising ....."

In my opinion the meaning of the words "its order or assigns" is plain: the Bank is expressly authorised to make over and transfer its rights in terms of the deed to a third party. The transfer of the Bank's rights to a third party by means of a cession is clearly contemplated. Densam has, in advance, expressly consented to a cession of the Bank's rights. That being so, there is simply no room for allowing any of counsel's submissions.

Counsel nevertheless sought to argue to the contrary, by ascribing a restricted meaning to the words "its order or assigns". Those words, counsel

said, were intended to bear only on a delegation by the Bank of its rights and obligations under the contract, which could be effected only with the consent of Densam. The argument ignores entirely the tenor and effect of the cession of book debts: it conferred only rights on the Bank, not obligations. Moreover, if counsel's intepretation were correct, the words in question would serve no purpose at all; they would constitute an exercise in futility, which the parties could not have intended. But, once again, counsel sought solace in the judgment of STEGMANN J in the George Consultants case supra. In that case customers of a bank had ceded and pledged shares to the bank and "its successors and assigns", as security for overdrafts. The learned Judge said the following (at 738 J - 739 C/D):

> "In the opening words of the deed ----- the grantee of the rights is described as 'the bank, its successors and assigns'. The parties clearly contemplated that the bank might have successors and that the rights

> under the deeds would pass to such successors; and also that the rights under the deed could pass by virtue of assignment.
>
> Although, in a particular context, the terms 'assignment' and 'cession' may sometimes be used interchangeably, the distinction between them is ordinarily quite clear. Assignment relates to the transfer to a third party of obligations, as well as of rights, existing between two or more parties, and it requires the concurrence and co-operation of all the parties concerned. Cession, on the other hand, relates to the transfer to a third party of rights alone and it does not necessarily require the concurrence or co-operation of anyone other than the holder of the rights (the cedent) and the third party to whom the rights are transferred (the cessionary).
>
> I find nothing in the deed of cession and pledge to indicate that the applicants agreed therein that the bank's rights arising out of such deed were to be cedable against the will of the applicants."

With respect, I am unable to accept the reasoning of the learned Judge. No doubt the word "assignment" is often used to denote a transmission of both rights and obligations, in contradistinction to "cession", which signifies a transfer of rights only, but to interpret the word "assigns" in the deed under consideration in

that sense would be tantamount to regarding the word as pro non scripto and thus to doing violence to the intention of the parties. Moreover, the learned Judge's conclusion seems to me, with respect, to run counter to the accepted commercial usage of the word "assigns" in a contract of the kind under consideration, as also to well-established and clear authority on the point. In the Eastern Rand Exploration Co case supra INNES CJ said (at 53 - 54):

> "In the present case it is not necessary to decide the general question whether a prospecting contract with an option to purchase, and with no provision as to assignment, can or cannot be freely ceded, because the contract between Lowenstein and the owners of the farm is one in which the parties agree mutually to contract not only for themselves, but for their 'order, successors, heirs or assigns.' In face of these words which occur at the very outset of the document, it is impossible to maintain the contention that the consent of the owners was required before Lowenstein could cede and assign his rights. And that being so, there is no need to decide, upon the facts whether or not the Nels were notified that the contract had been made over to the Company; because if the cession was valid without the

> express consent of the owners of the land, no notice of such cession could be necessary ....."

In Friedlander v De Aar Municipality supra GREENBERG JA (at 93), having stated the principle that prima facie all contractual rights can be transmitted, subject to certain exceptions, went on to remark, with reference to the contract there under consideration, that

> "..... the clause by its use of the words 'their heirs, executors or assigns' makes the conclusion even more certain ..... that the right was transmissible ....."

In Pizani and Another v First Consolidated Holdings (Pty) Ltd 1979 (1) SA 69 (A) the appellants had entered into deeds of suretyship in respect of a principal debtor's obligations in terms of certain leases, and the creditor under the leases had ceded its rights in terms thereof to the respondent. MILLER JA said, at 76 D and 79 C:

> "..... the appellants bound themselves as sureties not only to the named creditor but also to its 'successors or assigns'. Unless there were contrary indications elsewhere in

> the deeds (which there are not), the words 'successors or assigns' would include any cessionary of the creditor's rights under the leases."
>
> "..... there are ..... explicit provisions in the deeds of suretyship to the effect that the sureties were bound to the creditor's successors and assigns and it was clearly contemplated that rights under the leases could be ceded."

Consequently the decision in the George Consultants case supra on the point under consideration must be overruled, and the contention on Densam's behalf under B above must be rejected.

I proceed to deal with the contention under C above, viz that the Bank's purported cession to Cywilnat of its claim against Densam was invalid, on the ground that in fact only a part of the claim was ceded. The contention was based on the wording of clause 3.1 read with clause 2.1 of the cession: clause 3.1 provides that the Bank cedes "the claim" against Densam to Cywilnat, but in clause 2.1 the expression "the claim" was in effect, so it was argued,

defined with specific reference to an indebtedness of Densam to the Bank "in the sum of R70 000", with the result that the cession applied, according to its express terms, only to a part, being R70 000,00, of the actual amount of the claim at the time of the cession, which was R71 125,69.

This contention was not raised nor foreshadowed on behalf of Densam in any of the affidavits filed for it in the application. In the affidavits originally filed on behalf of Cywilnat in support of the application, it relied on a "certificate of balance" issued under clause 3.3 of the cession, which reflected the amount due as being some R72 000,00. In its answering affidavits Densam contested the correctness of the certificate, the case put forward on its behalf being that no money at all was owing by it to the Bank at the time of the cession. In its replying affidavits the deponents for Cywilnat explained that the figure given in the certificate had

been mistakenly calculated, and the calculation of the correct amount of Densam's indebtedness was set out. Against this background, when WEYERS J on 1 September 1988 referred the matter for the hearing of oral evidence, inter alia on the question: "what was sold/ceded .....?", his order could not have been intended to cover the contention now under consideration. Had it been raised in the affidavits, it is very likely that the evidence adduced before GOLDSTEIN J would have taken a different course. At worst for Cywilnat, however, Densam cannot be heard to complain if Cywilnat now seeks to rely on the evidence which was heard by GOLDSTEIN J, for the purposes of meeting the contention advanced on Densam's behalf. And in my view the evidence on record is clearly sufficient to put paid to the contention, for the reasons which follow.

In my opinion the cession does not reflect a clear intention of the parties to it that it would

apply only to R70 000,00 of a larger debt, as counsel for Densam argued. On the contrary, if such had been the intention, one would certainly have expected clause 2.1 to read quite differently. As it stands, the clause emphasizes the existence of a debt, not the amount of it; and if clause 2.1 is read together with clause 3.1, the overall impression is strong that it was intended to cede the whole claim of the Bank against Densam, and not part of it only. The reference to "the sum of R70 000" in clause 2.1 seems to me to be merely descriptive, rather than definitive. Moreover, there are two strong pointers to an intention that the whole of the debt was to be comprised in the cession: first, the security held by the Bank (sc for the whole of the debt) was ceded together with the Bank's claim (clause 3.1); and, secondly, the Bank was to deliver a certificate of balance together with the security (clause 3.3). These provisions are not compatible with the idea of ceding a part of the Bank's claim only.

Counsel for Cywilnat argued that by mere interpretation of the cession as a whole one is driven to the conclusion that the whole of the Bank's claim was ceded. I do not find it necessary to express a firm view on that argument, for, at best for Densam, I am satisfied that there is either sufficient uncertainty about the meaning the parties intended the words of the document to bear so as to let in evidence of the circmstances surrounding the conclusion of the contract, or an ambiguity in the words used, as applied to the facts, which lets in evidence of the negotiations between the parties, preceding the conclusion of the contract. On either basis we are entitled to have regard to the evidence on record.

Both Frack and Nelson gave relevant evidence in this regard. I do not propose to go into their evidence in any detail. Suffice it to say that it emerges clearly from their evidence that both of them were aware of the following surrounding circumstances:

Densam's overdraft facility was limited to R70 000,00, but it was being exceeded from time to time; Densam was unable to repay the amount of the overdraft; and the Bank wished to put an end to the overdraft. On the day before the cession was signed, Frack sent a draft of the agreement that he had prepared to Nelson, under cover of a letter in which he said:

> "Our client has made provision for only R70 000 and we trust that the purchase consideration can therefore be limited to this amount.
> .....
> We confirm that our client has R70 000 available to purchase the claim immediately."

In my view, such uncertainty or ambiguity as there may be in the cession must be resolved against the contention advanced on behalf of Densam.

Counsel for Densam sought to avert the effect of the evidence of Frack and Nelson by relying on the fact that, after the Bank had received payment of R70 000,00 from Frack, that amount had simply been credited to Densam's account with the Bank, by way of

an ordinary deposit, thus leaving the difference between that amount and the sum of R71 125,69 as a debit on the account, which Densam continued to operate thereafter. There is no substance in this point. Nelson said in his evidence that the entry in the account had been made by a clerk of the Bank, and under cross-examination it was never put to him pertinently that the Bank had retained any claim against Densam in respect of the debit balance which was allowed to remain on the account. The tenor of Nelson's evidence was that the accounting entry was a mistake, and that was not refuted.

The contention on behalf of Densam under C above is accordingly rejected.

Finally, I turn to the contention under D above, which can be disposed of very briefly. It was argued that Cywilnat was acting as agent on behalf of Michael and Maxim Levinrad when it acquired the Bank's claim against Densam and that Cywilnat was accordingly

not entitled to enforce the claim in its own name. There is no merit in this contention: the conclusion of law sought to be drawn from the fact stated is a non sequitur. Shortly after the cession had been signed, Cywilnat, acting through Frack, on the one hand, and Michael and Maxim Levinrad, on the other, entered into a written agreement in which it was recorded that Cywilnat had purchased from the Bank Densam's claims against its debtors, that the Levinrads had advanced R70 000,00 to Cywilnat for that purpose, and that the Levinrads were the beneficial owners of the claims, and it was agreed that Cywilnat would act as nominee for the Levinrads in proposed litigation against Densam, on certain terms set out in the document. There was no suggestion in the affidavits, or in evidence, or in argument, that Cywilnat, through Frack, had purported to act as agent in the name of the Levinrads vis-à-vis the Bank, through Nelson, at the time when the cession was agreed upon. As far as the Bank was concerned,

Cywilnat entered into the cession as a principal, in its own name. There is no principle of law by which Densam can preclude Cywilnat from enforcing the claim in its own name. This contention is also rejected.

In the result, the appeal is dismissed with costs.

A.S. BOTHA JA

EKSTEEN JA

F.H. GROSSKOPF JA

FRIEDMAN AJA

NIENABER AJA

CONCUR