IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

CASE NO:

In the appeal of

INCLEDON (WELKOM) (PTY) LTD APPELLANT

and

QWAQWA DEVELOPMENT CORPORATION LTD RESPONDENT

Coram: HOEXTER, VAN HEERDEN et MILNE JJA; NICHOLAS et GOLDSTONE AJJA

Date heard: 23 August 1990

Date delivered: 7 September 1990

J U D G M E N T

GOLDSTONE AJA:

On 5 June 1987 the liquidator of Maree and Blignaut Meubelfabrikante (Edms) Bpk (the company) filed his second and final liquidation and distribution account. Encumbered asset account No 8 reflected the payment to the liquidator of an amount of R139 643 from the Board for the Decentralisation of Industry. That Board makes payment of concessions to persons who qualify therefor by establishing industries in the Black National States. The aforesaid amount related to the concessions which had been granted to the company by that Board and which will be referred to as "the concessions". After

deducting certain costs and expenses, the liquidator awarded the balance of R124 325.58 to Incledon (Welkom) (Pty) Ltd ("Incledon") in respect of Claim No 71. Qwaqwa Development Corporation Ltd ("QDC") objected to that award and claimed that the concessions should have been used for the payment, inter alia, of its own claims, Nos 5 and 7, in the amounts of R50 000 and R51 761.67 respectively. This objection was dismissed by both the liquidator and the Master of the Supreme Court in Bloemfontein. The QDC then applied to the Orange Free State Provincial Division for the review of the decision of the Master. That application succeeded with costs and the liquidator (who was the second respondent in the Court a quo) was ordered to frame the account in the terms sought by the QDC. With leave of the Court a quo Incledon now appeals to this Court against the judgment and order.

On 30 March 1983 the company became entitled to receive the

concessions. On 28 April 1983 it entered into a written agreement with the Corporation for Economic Development (the CED) in terms of which the company ceded to the CED the company's

> "right, title and interest in and to any concessions granted or to be granted to it by the Board for the Decentralisation of Industry as security for the fulfilment of its obligations in terms of any agreement entered into or which may be entered into by and between the Cedent and the Cessionary."

I shall refer to this cession as "the CED cession".

Also on 28 April 1983, the CED and the company entered into a written agreement of loan. In terms thereof the CED undertook to lend and advance to the company the amount of R60 000. It was to be repaid in 60 equal instalments of R1000 each,

commencing on the last day of the twelfth month following the date on which the amount was advanced to the company. It does not appear from the papers when the amount of the loan was advanced by the CED to the company or when and what repayments were made by the company. All that appears from the record is that in terms of the second and final liquidation account, dated 5 June 1987, the total claim of the CED was reflected in the amount of R63 883,98. Of that amount the sum of R37 977,05 was treated as a preferred or secured claim. A further preferent dividend in the account was reflected in the amount of R2415,61 making a total dividend of R40 392,66. The shortfall was reflected in the amount of R23 491,32. It appears from a letter addressed by the QDC's attorneys to the Master, dated 25 November 1987, that the security of the CED which was relied upon by it and recognised by the liquidator was the CED cession.

On 6 May 1983 the company entered into a second agreement of cession, this time with Incledon. It ceded

> "all claims of whatsoever nature and description and howsoever arising which I/we may now or at any time hereafter have against all and any persons, companies, corporations, firms, partnerships, associations, syndicates and other legal personae whomsoever and whatsoever... as continuing covering security for the due payment of every sum of money which may now or at any time hereafter be or become owing by me/us to the Creditor (Incledon) from whatsoever cause or causes arising and for the due performance of every other obligation howsoever arising which I/we may now be or become bound to perform in favour of the Creditor."

I shall refer to this cession as "the Incledon cession". It is upon this cession that Incledon relies for the preference claimed by it.

On 8 March 1985 the company executed a third cession, this one in favour of the QDC. In terms thereof it ceded to the QDC

> "enige and alle regte... wat Maree en Blignaut van die Desentralisasieraad in enige voormelde konsessie mag ontvang in die bedrag van R128 040.00."

I shall refer to this cession as "the QDC cession". It was to serve as security for the payment of moneys advanced or to be advanced by the QDC to the company. The QDC relies upon both the CED cession and the QDC cession for the preference claimed by it in respect of claims Nos 5 and 7.

The CED (formerly known as "The Black Investment Corporation of South Africa Limited") was incorporated in terms of section 22 of the Promotion of Economic Development of National States Act, 46 of 1968 ("the Act"). In terms of section 5A(1)(b) of the Act the State President was authorised, by proclamation in the Government Gazette, to disolve the CED and

> "regulate matters relating to the assets, liabilities, rights and obligations of the (CED)".

In terms of that section of the Act, on 12 June 1987 Proclamation R93 was published in Government Gazette No 10765. Paragraphs (a), (b), (c) and (e) thereof are now relevant and read as follows:

> "(a) the Corporation for Economic Development, Limited

shall be dissolved with effect from 1 July 1987 (the fixed date);

(b) the assets, liabilities, rights and obligations of the Corporation for Economic Development, Limited shall pass or be deemed to have passed to the bodies, corporations or development corporations mentioned in Schedule 1, subject to the conditions agreed upon between the bodies, corporations or development corporations and the Corporation for Economic Development, Limited, or under cessions accepted by any of the bodies, corporations or development corporations: Provided that shares held by the Corporation for Economic Development, Limited in a development corporation established in respect of a self-governing territory, shall pass to the South African Development Trust;

(c) a reference to the Corporation for Economic Development, Limited in any agreement, legal document, licence, permit, permission, certificate or other document shall be deemed to be a reference to the body, corporation or development corporation to which the assets, liabilities, rights and obligations of the Corporation for Economic Development, Limited have passed in terms of paragraph (b);

(e) the Minister of Education and Development Aid or any other person authorised by him for that purpose may, at any time after the fixed date, sign any document or perform any other act relating to the passing of the assets, liabilities, rights or obligations referred to in paragraph (b) in the place of the Corporation for Economic Development, Limited."

The QDC is one of the development corporations referred to in Schedule 1 to the proclamation.

Counsel debated the meaning and effect of these provisions of the proclamation. In the view which I take in this appeal it is not necessary to express a firm view in this regard. I shall assume, in favour of the QDC, that the effect of the provisions was to transfer to it, on 1 July 1987, ipso iure, all of the assets and rights of the CED which, by informal agreement during 1983, had been administered by it. During that year the Government decided to decentralise the activities of the CED and it arranged for regional development corporations to take over those activities. One of those regional corporations was the QDC. In effect the QDC acted in Qwaqwa as if the relevant rights and obligations of the CED had been transferred to it. Concessions from the Board for the

Decentralisation of Industry which had been ceded to the CED were collected by the QDC after 1 November 1983. Those amounts included the concessions which had been ceded to the CED in terms of the CED cession. For this reason the learned Judge a quo came to the conclusion that the respondent was entitled to a preference in respect of its claims Nos 5 and 7 on the strength of the CED cession. I do not agree with that conclusion.

It is true that if one substitutes the name of the QDC for the name of the CED in the CED cession the literal consequence is that the concessions become security for the fulfilment of obligations in terms of any agreement between "the Cedent and the Cessionary", ie. the company and the QDC. On a less literal interpretation the effect of the Proclamation upon the CED cession was that it became effective as a security in favour of the QDC in respect only of amounts which were

which became owing by the company in terms of its original obligations to the CED. The literal interpretation would be very far-reaching indeed and would have imposed a most prejudicial obligation upon the company without its consent. The Proclamation should not be interpreted so as to prejudice third parties in the absence of clear and unambiguous language compelling that consequence. The proclamation is reasonably and logically capable of being read as having the less far-reaching effect and that is the way in which, in my judgment, it should be understood.

In any event, in my opinion, the proclamation, published after the date of liquidation of the company, did not affect the rights of creditors as at the date of liquidation, ie. 17 April 1985. The effect of the liquidation was to establish a concursus creditorum and

> "... nothing can thereafter be allowed to be done by any

of the creditors to alter the rights of the other creditors."

Per Lord de Villiers CJ in Walker v Syfret N.O 1911 AD 141 at 160. In the same case, Innes JA, after stating that a sequestration order crystallises the insolvent's position, went on to say:

> 'the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order."

See Ward v Barrett NO and Another 1963 (2) SA 546 (A) at 552

C - G. As between the estate and the creditors and as between the creditors inter se their relationship becomes fixed and their rights and obligations become vested and complete.

There is a presumption in our law that legislative provisions do not interfere with completed transactions or vested rights. In Curtis v Johannesburg Municipality 1906 TS 308 at 311, Innes CJ said:

> "The legislature is virtually omnipotent, but the courts will not find that it intended so inequitable a result as the destruction of existing rights unless forced to do so by language so clear as to admit of no other construction."

In Steyn, Die Uitleg van Wette, 4ed at 85, with regard to the presumption against retrospectivity one reads the following:

"Hierdie vermoede bring mee dat ook waar 'n wet retrospektief is, sy terugwerking nie verder erken word as wat die duidelike bedoeling van die wetgewer gaan nie. By die vasstelling van die mate waarin 'n wet retrospektief is, word 'n strenge uitleg gevolg. In R v Ah Koon 1927 TPD 969 word bepaal dat 'a Court will not give greater retrospective operation to an Act than its language renders necessary', terwyl in Njobe v Njobe & Dube NO 1950 4 SA 545 (C) 552 in verband met 'n terugwerkende proklamasie gesê word: 'If, because of its inept wording, the Proclamation leaves in doubt the nature and extent of its retrospective effect, then so much of the previously existing legal position as is not clearly and unambiguously affected by the amending Proclamation, must be treated as unaffected thereby.'"

See, too: Adampol (Pty) Ltd v Administrator, Transvaal 1989 (3) SA 800 (A) at 807 F - 808 I and 809 G - J.

The proclamation does not in express terms purport to affect completed transactions or vested rights and I can find no reason for giving it that effect. In this regard there would be no warrant, for example, for reversing the very awards made in favour of the CED and deeming them to have been made in favour of the QDC. No doubt, payment thereof was made by the liquidator some considerable time prior to the proclamation. For these reasons, the provisions of the proclamation cannot assist the QDC.

The learned Judge held, further, that the CED cession was an out-and-out cession and that, therefore, on the date of the Incledon cession there was nothing left to cede to Incledon.

This finding was not supported before this Court by counsel for the QDC, and correctly so. In express terms, the CED cession was one in securitatem debiti. For some years there was confusion concerning the precise nature and legal effect of such a cession. Much has been written on that subject and I shall not burden this judgment with a reference to those writings. Suffice it to say that in three considered judgments of this Court, in recent years, it was held that a consequence of a cession of an incorporeal right in securitatem debiti is that ownership of the right remains vested in the cedent: Leyds NO v Noord-Westelike Kooperatiewe Landboumaatskappy Bpk en Andere 1985 (2) SA 769 (A) at 780 A - G; Marais en Andere NNO v Ruskin NO 1985 (4) SA 659 (A) at 669 I - 670 A; and Bank of Lisbon and South Africa Ltd v The Master and Others 1987 (1) SA 276 (A) at 291 H - 294 F. When the company executed the CED cession, it thus retained the ownership of its rights against the Board for the Decentralisation of Industry

in respect of the concessions. That ownership, as appears from the authorities, consists in a reversionary interest which entitles the owner (cedent) to claim the re-cession of the rights upon payment of the indebtedness. That personal right of action against the cessionary has a value and is capable of cession: Bank of Lisbon and South Africa Ltd v The Master and Others (supra) at 294 G - H.

In clause 10 of the Incledon cession there is express reference to the reversionary right. One reads there that:

> "10. I/We, warrant to the Creditor that I/We have not ceded to anyone else all or any of the amounts which are now or will hereafter become owing to me/us by my/our debtors and I/we agree, without prejudice to anything hereinbefore contained, that should it nevertheless transpire that I/we have

> at any time ceded or otherwise disposed of the right, title and interest in and to any of the debts which will from time to time be the subject of this cession, then this pledge and cession shall operate as a cession of all my/our remaining right, title and interest in and to such debts, including all my/our rights of action whatsoever against any prior cessionary, pledgee or other holder of such debts for the time being."

Why only portion of the CED's claim against the company was treated as preferent does not emerge from the record. However, once its claims were admitted by the liquidator and its preference under the CED cession recognised and given effect, the reversionary right of Incledon under the Incledon cession became effective and was correctly so regarded by the liquidator.

Finally, it is necessary to consider the submission on behalf of the QDC that the Incledon cession fell to be rectified because it was not intended by the parties thereto to apply to the concessions. Apart from the fact that this argument was not advanced in the Court a quo, in my opinion, there is no factual basis to support it.

Mr Heyns, the officer of Incledon who negotiated the Incledon cession stated in his affidavit that:

> "Whilst it may be correct that I did not specifically require a cession of Decentralisation benefits of concessions (sic), the existence of this source of income was known and appreciated by me."

Mr Heyns referred to the fact that a standard form of cession was used by Incledon. In his evidence during an enquiry held

in terms of the provisions of the Insolvency Act, Heyns said that he was prepared to take a second cession of the concessions. I assume he meant that Incledon was prepared to rank after the CED in respect of the concessions. In my opinion the provisions of clause 10 of the Incledon cession are not inconsistent with such an intention. On behalf of the QDC there is the evidence of Mr Blignaut, who was one of the signatories of the cession. He stated that the Incledon cession was intended to cover only trade debts and was not intended to include the concessions. However, there was a second signatory on behalf of the company, one Maree, and there was no evidence from him placed before the Court a quo. The onus of proving that the written cession by reason of a common error did not reflect the true intention of the parties thereto rested upon the QDC. At best for it there was a substantial and material dispute of fact. There was no suggestion made in the Court a quo or before this Court that there should

be a reference of the matter to evidence. The onus of proof which rested upon the QDC was clearly not discharged by it.

It follows that the liquidator properly dealt with the matter upon the basis that Incledon ranked after the CED and prior to the QDC in respect of the security afforded by the cessions of the right of the company to the concessions. Accordingly, the appeal must succeed. The following order is made:

1. The appeal is upheld with costs.

2. The order of the Court a quo is set aside and replaced by an order dismissing the application with costs, including the costs occasioned by the employment of two counsel.

R J GOLDSTONE

HOEXTER JA)
VAN HEERDEN JA) CONCUR
MILNE JA)
NICHOLAS AJA)