Case no 40594 IN THE

SUPREME COURT OF SOUTH AFRICA APPELLATE DIVISION

In the matter between

FIRST NATIONAL BANK OF SA LTD	Appellant
and	
MW LYNN NO	1st Respondent
GB PERRY NO	2nd Respondent
LE SPENDIFF NO	3rd Respondent
TS EVANS NO	4th Respondent
GT GRAHAM NO	5th Respondent
THE MASTER OF THE SUPREME COURT	6th Respondent

CORAM: JOUBERT, NESTADT, VAN DEN HEEVER, OLIVIER JJA et VAN COLLER AJA

HEARD: 19 September 1995

DELIVERED: 30 November 1995

JUDGMENT

JOUBERT JA:

On 31 December 1984 Natal Earthworks (Pty) Ltd ("the contractor"), as cedent,

executed a deed of cession ("the cession") in favour of Barclays National Bank Ltd subsequently known as First National Bank of Southern Africa Ltd, ("the Bank"), as cessionary. Thereafter, but prior to 10 June 1991, the contractor entered into a construction contract ("the contract") with the Government of Ouaqua ("the employer") for the construction of a certain public road which comprised two different sections, viz. Route 5 (inclusive of a bridge on Route 6) and the rest of Route 6. On 10 June 1991 the contractor was placed in provisional liquidation and finally wound up on 26 July 1991. The first five respondents are the joint liquidators of the contractor in liquidation. I shall refer to them collectively as "the joint liquidators" and individually by name. A dispute has arisen between the Bank and the joint liquidators as to who is entitled to payment of the balance of the retention monies under the contract. The joint liquidators launched an application in the Natal Provincial Division against the Bank as respondent for a declaratory order that upon a proper construction of the cession no security was conferred on the Bank in respect of retention monies certified in terms of the contract for payment by the employer subsequent to 10 June 1991. On 15 December 1993 BROOME DJP granted the application with costs. With leave of the Court a quo the

Bank now appeals to this Court. The Master (the 6th respondent) abides the decision of this Court.

I turn to consider the cession, dated 31 December 1984, which is headed "Cession of Book Debts." Relevant terms are the following ... "hereby cede, assign, transfer and make over to and in favour of Barclays National Bank Limited (hereinafter referred to as "the Bank") all our right title and interest in and to all and any monies and amounts which may now [be] or which may hereafter become due and owing to us by any person whomsoever as security for the fulfilment of all obligations undertaken by us to the Bank and as security for the payment of all monies now and from time to time hereafter owing by us to the Bank for any cause of debt whatsoever.

This cession shall remain of full force and effect and be irrevocable so long as there are monies owing by us to the Bank.

In order to give effect to the Cession herein contained, we hereby nominate, constitute and appoint the Bank irrevocably and in rem suam to be our Attorneys and Agents, with full power and authority for us and in our name or in its own name to demand, sue for, recover and receive all debts or sums of money whatsoever which now

or hereafter may become due, owing, payable or belonging to us.……

We do hereby confirm and agree that for so long as this Cession shall remain in existence we shall conduct our bank account or bank accounts solely at the Bank, that we shall not open or conduct any other account in any other Banking institution whatsoever and that we will not further encumber the said book debts either by factoring or ceding our residual rights therein or in any other way, without the prior written

consent of the Bank being first had and obtained……

……". (My underlining).

Quite obviously the cession is expressed in very wide terms. The intention of the parties to the cession, i.e. the contractor as cedent and the Bank as cessionary, is clear. The main object of making the cession was to provide the Bank with security (in securitatem debiti) in respect of the contractor's bank account with it. The cession was intended to form a continuing security for an indefinite period. The security was wide enough to embrace all debts, both present and future, which were due and payable, or might become due and payable to the contractor by its debtors. It was never intended

by the parties to the cession to limit the security of the Bank solely to debts due and payable when the cession was executed since such a limitation would have severely restricted the practical effectiveness of the security.

A debt is what is due from an obligation. Consult The Oxford English Dictionary. 2nd ed., 1989, Vol 4 s.v "due" as an adjective: "That is owing or payable, as an enforceable obligation or debt" and s.v. "debt" as a noun: "1. That which is owed or due; anything (as money, goods or service) which one person is under obligation to pay or render to another".

In Whatmore v Murray 1908 TS 969 at p970 INNES CJ construed a "debt due" as follows: "It seems to me that for a debt to be due there must be a liquidated money obligation presently claimable by the debtor, for which an action could presently be brought against the garnishee. If such an obligation exists, then, to my mind, a debt is due." See also Deloitte Haskins & Sells Consultants (Pty) Ltd v Bowthorpe Hellerman Deutsch Pty Ltd 1991 (1) SA 525 (A) at p532 G-H: "Section 12 (1) of the Prescription Act 68 of 1969 provides that 'prescription shall commence to run as soon

as the debt is due'. This means that there has to be a debt immediately claimable by

the creditor or, stated in another way, that there has to be a debt in respect of which the debtor is under an obligation to perform immediately." (My underlining).

In terms of the deed of cession the contractor ceded as security to the Bank "all our right title and interest in and to all . . . monies . . . which may now [be] or which may hereafter become due and owing to us by any person whomsoever". The word "monies" is according to the deed of cession synonymous with "debts or sums of money whatsoever which now or hereafter may become due, owing, payable or belonging to us." The creditor's right of action is the correlative of the debtor's debt. The debts arising from the indebtedness of the contractor's debtors could either be debts presently due and owing on execution of the deed of cession or future debts becoming due and payable thereafter .

Cession is a particular method of transferring rights in a movable incorporeal thing in the same manner in which delivery (traditio) transfers rights in a movable corporeal thing. It is in substance an act of transfer ("oordragshandeling") by means of which the transfer of a right (translatio juris) from the cedent to the cessionary is achieved. The transfer is accomplished by means of an agreement of transfer

("oordragsooreenkoms") between the cedent and the cessionary arising out of a justa causa from which the former's intention to transfer the right (animus transferendi) and the letter's intention to become the holder of the right (animus acquirendi) appears or can be inferred. It is an agreement to divest the cedent of the right and to vest it in the cessionary. Moreover, the agreement of transfer can coincide with, or be preceded by a justa causa which can be an obligatory agreement, also called an obligationary agreement, ("verbintenisskeppende ooreenkoms") such as, a contract of sale, exchange or donation. See Johnson v Incorporated General Insurances Ltd 1983 (1) SA 318 (A) at p331 G. Even an agreement to provide security by means of a cession in securitatem debiti is in itself adequate justa causa for the cession. See De Wet & Van Wyk, Die Suid-Afrikaanse Kontraktereg en Handelsreg, vol 1, 5th ed, p420: "As 'n causa noodsaaklik is vir die cessie, dan is die afspraak dat dit in securitatem debiti geskied, tog seker genoegsame causa daarvoor . ...". In LAWSA, vol 2 (First Reissue), 1993, s.v. Cession para 229 the constituent elements of cession are enumerated as follows:

" (a) it is an act of transfer; (b) the subject matter of the transfer is a right; and

(c) the transfer is effected by agreement between the cedent and the cessionary".

The legal principles which are relevant to the subject matter of a cession may, for purposes of this appeal, be stated as follows:

1 Logically speaking a non-existent right of action or a non-existent debt can never in law be transferred as the subject matter of a cession. Van Bynkershoek (1673-1743) Vol 3 Observationes Tumultuariae 2448.

2 Where the subject matter of the cession has been described simpliciter in the obligatory agreement as the cedent's accrued right or as a debt presently due and payable (debitum purum) its transfer can be accomplished according to the agreement to transfer in such manner that the cedent divests himself of it and vests it in the cessionary. Compare Gomezius (a 16th century Spanish jurist) in his Commentariorum Variarumque Resolutionum Juris Civilis, 1572, tomus 2 cap 11 n 28: Item etiam, quod si creditor cessit alteri per contractum iura sibi competentia contra ilium, quod in tali cessione non veniunt debita sub conditione, vel in diem, sed tantum debitum purum, ita expresse notat Bald in D 31.46 & ibi Ioan. de Imola.

3 The parties may agree in the obligatory agreement to cede and transfer to the cessionary a future or contingent right of action (spes futurae actionis), or a future or conditional debt (debitum conditionale, debitum futurum) as and when it comes into existence and accrues or becomes due and payable whereupon it will be transferred to the cessionary. If it never comes into existence it will amount to a non-existent right of action or a non-existent debt which cannot qualify as the subject matter of a cession according to 1 supra. De Wet & Van Wyk, op.cit., p254:

"Dit beteken egter nie dat mens 'n 'vorderingsreg', wat nog nie bestaan nie, maar wat in die toekoms mag ontstaan, of 'n vorderingsreg, waaroor 'n mens nog nie beskik nie, kan cedeer nie. Hiermee wil ek nie te kenne gee dat mens jou nie regsgeldig kan verbind om 'n vorderingsreg, wat jy in die toekoms mag verwerf, aan 'n ander oor te dra nie. So 'n ooreenkoms is wel geldig, maar dit maak die ander nog nie cessionaris nie. Hy word eers cessionaris indien die vorderingsreg, nadat dit ontstaan het of verwerf is. aan hom gecedeer is." (My underlining)

The following portion of the passage in cap 5 para 4 of the Commentarius de Actionum Cessione. 1623, by Sande (1558-1638) has been the cause of some confusion in our case law: "Nec tantum actio, sed etiam futurae actionis spes utiliter transfertur, Cod 8.53 (54).3. Futurae actionis spes est in stipulatione aut contractu conditionali. Nam in his

nondum res, sed spes tantum nostra est, eaque ipsa spes cedi potest, quemadmodum &

spes, sive res futura promitti, vendi, oppignerari potest, D20.1.15pr, D18.4.17, 19 Inst

3.15.4 ..." (My underlining). The above portion of the said passage is translated as

follows by Dr Anders in his Cession of Actions. 1906: (p59)

"Not only an action, but even the expectation of a future action may be advantageously transferred, Cod 8.53 (54)3. The expectation of a future action is comprised in conditional stipulations or agreements. For here the subject-matter has not yet accrued to us, but we have only the hope thereof, and that very hope may be ceded just as an expectation or a thing that will come into existence may form the subject of a promise, sale or pledge." (My underlining).

The authors De Wet & Van Wyk loc.cit. by stressing the underlined words of Sande maintain at p254 that it is clear "dat sy futurae actionis spes nie 'n verwagting van 'n vorderingsreg is nie, maar 'n voorwaardelike vorderingsreg." This construction by them, read in the context of their elucidating commentary in footnote 18, would appear to be sound and acceptable, viz. that Sande is dealing with a conditional right and not a mere spes (expectation) of a right as yet non-existent.

I now turn to consider the position of retention money under the contract between the contractor and the employer. It is not disputed that the contract price was R23 146 474-70 which, according to the definition of "contract price" in Clause 1 (g)

of the General Conditions of Contract 1982 ("the General Conditions") which were incorporated in the contract, was subject to such additions thereto or deductions therefrom as may be made from time to time under the provisions hereinafter contained." Final payment was deferred and would become determined and due on completion of the work.

The relevant provisions of Clause 62 (1) of the General Conditions of Contract read as follows:

"Certificate and payment

62 (1) The Contractor shall be paid monthly on the certificate of the Engineer the amount due to him in respect of

(a) the estimated contract value of the permanent work executed up to the end of the previous month and in addition such amount as the Engineer may consider fair and reasonable for any Temporary Works or other special items for which separate amounts are provided in the Schedule of Quantities, subject to a retention of the percentage named in the Tender [5%] until the amount retained shall reach the 'Limit of Retention Money' named in the Tender (hereinafter called 'retention money*)

."

It appears from Clause 62 (1) (a) that provision was made for monthly progress payments by the employer to the contractor based on monthly interim certificates issued by the engineer as prepayments or advances on the eventual final contract sum. The

interim certificates were to represent only an approximate and proportional value of the work done and material on site at a specific date. Moreover, the amount certified was provisional and remained subject to adjustment and readjustment by the engineer in subsequent certificates.

Clause 62 (1) (a) also provides for a deduction of 5% as retention money from the monthly progress payments. "The retention money is retained by the employer as security for the due performance of the contract by the contractor and as a fund to be drawn upon either to complete the work or to rectify defects should the contractor fail to do so." (Halbury's Laws of England. 4th ed. vol 4 (2) (re-issue) para 448).

According to the contract the maintenance period was for twelve months. In terms of Clauses 48 (1) and 49 (1) (a) the maintenance period is to commence from the date of the certificate of completion in respect of the works. The engineer is empowered to extend the maintenance period. Clause 62 (2) stipulates the manner of payment of the retention money as follows:

"Where maintenance is specified, one half of the retention money shall become due and shall be paid to the Contractor when the Engineer shall have issued a Certificate of Completion in terms of Sub-Clause 48 (1) hereof and the other half when the Engineer shall have certified payment thereof within 14 days of the expiration of the Period of

Maintenance notwithstanding that at such time there may be outstanding claims by the Contractor against the Employer, provided always that if at such time there shall remain to be executed by the Contractor any works ordered during such period pursuant to Clauses 49 and 50 hereof, the Employer shall be entitled to withhold payment until the completion of such works of the second half of the retention money or so much thereof as shall in the opinion of the Engineer represent the cost of the work so remaining to be executed . . . ".

The issue of a final certificate by the engineer to the employer records the

completion of the contract. In this regard Clause 64 (1) provides as follows:

"The Contract shall not be considered as completed until a Final Certificate shall have been signed by the Engineer and delivered to the Employer stating that the Works have been completed and (where specified) maintained to his satisfaction. The Final Certificate shall be given by the Engineer within 14 days of completion of the entire Works or the expiration of the Period of Maintenance or latest Period of Maintenance, as the case may be, or as soon thereafter as any works ordered during such period pursuant to Clauses 49 and 50 hereof shall have been completed to the satisfaction of the Engineer, and full effect shall be given to this Clause notwithstanding any previous entry on the Works or the taking possession, working or using thereof or any part thereof by the Employer. Provided always that the issue of the Final Certificate shall not be a condition precedent to payment to the Contractor of the second half of the retention money in accordance with Clause 62 hereof."

In the present matter the accepted crucial events relating to the retention monies may be tabulated as

follows: 1 At a site meeting on 6 June 1990 the contractor formally requested the employer

to accept Route 5 with the bridge on Route 6 as completed. The engineer

conducted a site inspection and recorded on a "snag list" certain minor remedial tasks and operations to be completed by 11 July 1990. On 6 June 1990 the engineer issued progress certificate 16 in which the release of 50% of the retention monies was authorised. R762 835-36 retention money was accordingly paid by the employer to the contractor.

3 On 11 July 1990 the engineer instructed the contractor to complete the "snag list" by 31 July 1990. The latter date became the final date of completion of Route 5 and the bridge on Route 6. The certificate of completion was issued on 31 July 1990 when in terms of Clause 49 (1) (a) the maintenance period of twelve months commenced to run. This maintenance period in respect of Route 5 and the bridge on Route 6 was subsequently extended by the engineer to 30 April 1992.

4 On 27 August 1990 the engineer in terms of Clause 48 (1) issued a certificate of completion in respect of Route 6 when the maintenance period of twelve months in terms of Clause 49 (1) (a) commenced and would be operative until 26 August 1991.

4 By 29 August 1990 the contractor had completed all work in terms of the contract and moved off the site.

5 On 10 February 1991 the last progress certificate 24 prior to the provisional liquidation of the contractor was issued. It reflected a sum of Rl 106 376-37 as the balance of the retention money. The parties are agreed that since February 1991 until October 1991 the employer withheld an amount of Rl 105 589-39 as the balance of the second half of the retention money.

6 On 10 June 1991 the contractor was placed in provisional liquidation.

7 On 2 July 1992 the engineer issued a final Certificate of Completion.

In the present matter we are concerned with the balance of the retention money in regard to Route 6. Mr Tselentis. on behalf of the Bank, contended that in terms of Clause 48 (1) the contractor at the practical completion of the contract acquired a contingent right to the balance of the retention money. According to his argument this contingent right of the contractor by virtue of the cession vested in the Bank before 10 June 1991. I cannot agree. In my judgment Clause 62 (2) confers on the contractor a vested right to payment of the balance of the retention money "when the Engineer shall

have certified payment thereof within 14 days of the expiration of the Period of Maintenance." But since the period of maintenance did not expire before 10 June 1991 and no certification of payment by the Engineer occurred before the said date, it follows that the contractor acquired no vested right to the balance of the retention money before its provisional liquidation on 10 June 1991. Assuming (without deciding) that the contractor obtained a contingent right, as claimed by Mr Tselentis. then such contingent right would have vested on 10 June 1991 in the contractor's insolvent estate according to the provisions of sec 339 of the Companies Act 61 of 1973 read in conjunction with sec 20 (1) (a) and 20 (2) (a) of the Insolvency Act 24 of 1936.

In the result I would dismiss the appeal with costs, including the costs of two counsel.

C P JOUBERT JA

CONCUR

NESTADT JA