THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

CASE NO: 392/2002
Reportable

In the matter between

STANNIC **APPELLANT**

and

SAMIB UNDERWRITING MANAGERS (PTY) LTD **RESPONDENT**

CORAM: MARAIS, FARLAM, LEWIS JJA

HEARD: 8 MAY 2003

DELIVERED: 30 MAY 2003

SUMMARY: ***Claim by cessionary of rights under insurance policy where insurer not notified of cession; onus of proving knowledge; distinction between actual and deemed (constructive) knowledge.***

JUDGMENT

LEWIS JA

[1] The appellant, Stannic, is a division of the Standard Bank of South Africa Ltd. The respondents are insurers and underwriters. The first respondent, Samib, on behalf of the second respondent, Guardrisk, underwrote risks in terms of insurance agreements and saw to claims administration and settlement.

[2] On 5 November 1997 Stannic, in terms of an agreement of hire purchase, sold a Volvo truck to a close corporation, Noordwes Brandstof Verspreiders BK (Noordwes). Stannic reserved ownership of the vehicle until the full purchase price (R892 341, including finance charges) was paid. Noordwes undertook, under the agreement, to insure the truck against, inter alia, damage and destruction; and to keep the truck fully insured, paying all insurance premiums due, until it had paid the final instalment of the purchase price.

[3] An unusual feature of the hire purchase agreement, and on which this appeal ultimately turns, is that it incorporated a clause in terms of which Noordwes ceded to Stannic, as security for the performance of its obligations under the contract, its rights and interests in the insurance contract that it was obliged to enter into. I shall return to the terms of the cession later.

[4] Noordwes took delivery of the truck and on 5 November 1997 insured it with Guardrisk, represented by Samib. (I shall, however, for the sake of convenience, refer generally to Samib in this judgment since the interests of the two respondents coincide and Guardrisk was represented at all times by Samib.) The value of the truck was agreed to be R651 908.

[5] Some eight months later the truck was involved in a collision and was damaged beyond repair. In September 1998, shortly after the collision had occurred, Samib, represented by a Dr Beetge, and Noordwes, represented by a Mr Potgieter, who was a member of Noordwes, and indeed of a variety of other corporate entities which

ran transport operations, agreed that the claim of Noordwes under the insurance policy would be settled in an amount of R651 908, less excess, salvage costs and unearned premiums. The settlement amount was, in the result, R553 043.

[6] Pursuant to this agreement, Guardrisk paid to Stannic the sum of R173 745. The balance of R345 027 it purported to set-off against unpaid premiums owed by Noordwes. Noordwes was liquidated after the alleged set-off had occurred.

[7] Stannic sued Samib and Guardrisk for payment of the sum that was purportedly set-off against the outstanding premiums. The basis for its claim was that as cessionary of the rights under the insurance policy it was entitled to the full proceeds. It alleged that Samib had had full knowledge of the cession and had nonetheless paid the cedent. The debt had thus not been discharged. It alleged that Samib, if it had not actually had knowledge of the cession, had constructive knowledge of the right of Stannic to be paid the proceeds of the policy. In the alternative, Stannic claimed in delict on the basis that Samib, with full knowledge of Stannic's rights, had misappropriated the sum of R345 027. Stannic further contested the validity of the set-off.

[8] The Pretoria High Court (per Botha JA) dismissed the action, finding that Samib had had no knowledge, actual or constructive, of the cession, and accordingly that the debt under the insurance contract had been validly discharged. The appeal against the decision lies with the leave of the court below.

[9] Counsel for Stannic conceded at the hearing that it could not be shown that the representative of Samib, Beetge, who had dealt with the insurance of the vehicle in question, amongst many others, had ever seen the contract of sale, with the cession clause in it, or had ever been formally advised that the cession existed. Stannic conceded also that it would have to be shown that Samib had at least constructive knowledge of the cession, and not only of Stannic's ownership of the truck, in order for it to rely on the cession as against Samib. Stannic also did not seek to rely on any agreement between itself and Samib in terms of which Samib had undertaken to pay any

settlement amount to Stannic.[1]

[10] The argument in so far as set-off was concerned was also abandoned. Stannic's appeal thus proceeded only on the basis that Beetge had had constructive knowledge of the rights of the bank to the proceeds of the insurance claim, and that when the set-off against Noordwes' debts had taken place, the debt had not been validly discharged.

[11] The clause in the hire purchase agreement providing for the cession reads:

'Die koper sedeer hiermee aan die verkoper, as sekuriteit vir die behoorlike nakoming van die koper se verpligtinge ingevolg hierdie ooreenkoms, al die koper se reg, aanspraak en belang op en by enige versekeringspolis wat ingevolge hierdie ooreenkoms aangegaan is en onderneem om sodanige polis op aanvraag aan die verkoper to lewer.'

Stannic contended that where a right has been ceded, and the debtor pays the cedent rather than the cessionary, the onus lies upon the debtor to show that he had no knowledge of the cession and thus paid the cedent in the *bona fide* belief that the obligation would thereby be discharged. In *Brook v Jones*[2] James J expressed this principle and added a gloss. He said:

'In general it can be said that when the debtor has knowledge of the cession, from whatever source he may derive it, then he will not discharge his debt if he pays the cedent rather than the cessionary. As I understand the law this is because such a payment would not normally be a *bona fide* one. If, however, the debtor is able to establish that although he had some knowledge of a claim by the cessionary that the debt had been ceded to him, he has nevertheless paid his

[1] This was the basis on which *Marine and Trade Insurance Co ltd v J Gerber Finance (Pty) Ltd* 1981 (4) SA 858 (A) was decided.
[2] 1964 (1) SA 765 (N) at 767D—F.

debt to the cedent in good faith, this payment will free him of liability to the cessionary. ‘

The gloss relates to payment in good faith even where the debtor does have knowledge of the cession. That proposition has yet to be determined and, as will be seen, does not arise in this matter.

[12] In *Trust Bank van Afrika Bpk v Oosthuizen*[3] the court held that where a debtor against whom an action is brought raises as a defence that in ignorance of the cession he has already paid the cedent, the onus is on the debtor to prove that he had no notice of the cession. This approach requires the debtor to prove a negative: that he did not have notice of the cession. Whether this is the correct approach is dubious. The cessionary has full knowledge of the cession. The debtor does not necessarily have any. The cessionary is in a position to notify the debtor, and so avoid payment to the cedent in discharge of the debt. Risk of such payment should thus be on the cessionary, and the onus should rest on him to prove knowledge.[4] In view of the conclusions reached later in this judgment, however, it is not necessary to decide finally the question where the onus lies in proving knowledge, or the lack thereof, of the cession on the part of the debtor.

[13] Stannic contends that although there was no proof that Beetge, as the controlling mind and representative of Samib, had ever seen or had formal notice of the cession, Beetge had constructive knowledge of it. The argument is based on the following evidence. Beetge had been asked to ‘note an interest’ of Stannic in the vehicle, and while it was not common cause that he had done so at the time when the insurance was taken out, it became clear that he had been made aware of the interest before the set-off was effected. Secondly,

[3] 1962 (2) SA 307 (T).

[4] See P M A Hunt in 1962 *Annual Survey of South African Law* 128—9.

Beetge had said on several occasions, both in an enquiry following the liquidation of Noordwes, and in giving evidence at the trial, that he knew the money (the moneys paid in settlement of the insurance claim) belonged to the bank (‘behoort aan die bank’). Thirdly, Samib had paid a part of the settlement amount to Stannic and must have known that Stannic was entitled to the balance.

[14] Although it was not disputed that Samib had at some stage become aware of the ‘interest’ of Stannic, Stannic conceded that Samib did not, by virtue of that fact alone, have knowledge of the cession. The interest usually noted by insurers is that of a bank in the vehicle: the insurer recognizes that the bank has reserved ownership until it has been paid in full. It knows therefore that the bank has rights in the vehicle, and that, in the normal course, if the vehicle is destroyed, the bank will be entitled to be paid the proceeds of the insurance policy. Samib argued, correctly in my view, that such knowledge means only that the insurer is entitled to assume that when it discharges its debt to the insured, the insured has an obligation to pay the bank. There was nothing in the evidence which suggested that Samib knew that Stannic, as cessionary of the rights

under the insurance policy, was *entitled* to be paid the settlement amount directly by Samib. On the contrary. The settlement amount was negotiated with Potgieter of Noordwes. It was agreed by Noordwes and Samib that a portion would be paid to Stannic, and indeed it was. That does not lead to any inference that Samib knew or believed that the balance of the settlement was payable to Stannic.

[15] Similarly, when Beetge testified that he knew that the money belonged to the bank, this did not mean that he knew that Samib had an obligation to pay Stannic as cessionary. One can infer nothing more from such evidence than that he was aware that Stannic, which had an interest in the vehicle, might be entitled to claim from the insured whatever proceeds were recovered from the insurer. It is also not clear from the evidence when Beetge formed the view that the money 'behoort aan die bank'. It may well have been after the insolvency enquiry had commenced.

[16] Samib contended, however, that the evidence taken as a whole led to the conclusion that Beetge must have suspected that Stannic, rather than Noordwes, was entitled to payment: and that he had deliberately refrained from making enquiries such that knowledge of the cession had to be imputed to him. Warning lights had flashed, it was argued, and Beetge had deliberately ignored them. Counsel for Stannic placed great reliance in this regard on *Frankel Pollak Vinderine Inc v Stanton NO*.[5] After a comprehensive account of cases dealing with constructive or imputed knowledge in a variety of different contexts, Wunsh J said:

'In all the examples I have given, where knowledge is essential, there is a common thread. What is required is actual knowledge. Where a person has a real suspicion and deliberately refrains from making inquiries to determine whether it is groundless, where he or she sees red (or perhaps amber) lights

[5] 2000 (1) SA 425 (W) at 438B—G.

flashing but chooses to ignore them, it cannot be said that there is an absence of knowledge of what is suspected or warned against. In the absence of direct evidence, a court has to determine the existence of knowledge as an inference from the established facts and circumstances. If a person's professed ignorance is so unreasonable that it cannot be accepted that he or she laboured under it, evidence of the ignorance will not be believed in the absence of some acceptable explanation. But this amounts to a finding of actual, subjective knowledge made when a person willfully precludes himself or herself from acquiring it.

We are, here, in the field of *dolus eventualis*. . . .'

Dolus eventualis would be present, Wunsh J said, where a person deliberately ignored the risk – that is, 'shut its eyes to it or reconciled itself to and took the risk'.

[17] One must be careful to distinguish between an inference of actual knowledge from the established facts, on the one hand, and the attribution of knowledge because of the application of the 'shut-eyes' doctrine on the other. It appears to me that the learned judge, in the passage quoted, conflated these concepts. Actual knowledge may be proved in a number of different ways. It may be inferred from the facts proven: the facts and circumstances may be such that the only reasonable inference to be drawn is that the person whose conduct is in issue had actual knowledge of a matter – in this case of the existence of the cession. That is quite different from finding that there has been a 'sedulous avoidance of all possible avenues to the truth'.[6] In the case where a person has deliberately avoided establishing the truth, despite the flashing of warning lights, it cannot be said that he or she has actual knowledge. In such a case, a court will impute knowledge to him or her – constructive knowledge. The consequences are generally the same, however.

[18] In my view there is no evidence from which one can draw an

[6] Halsbury 2 ed vol 23 (1936) para 59, referred to by Greenberg JA in *R v Myers* 1948 (1) SA 375 (A).

inference that Beetge had actual or constructive knowledge. His evidence (and that of the broker who placed the insurance with Samib) was consistent: he had not ever seen the hire purchase agreement between Stannic and Noordwes (and there was no evidence to the contrary); he had not been advised by Stannic or Noordwes that Stannic had taken cession of rights under any insurance policy in respect of the vehicle; Samib had paid portion of the settlement figure to Stannic pursuant to an agreement with Noordwes; and he knew that Stannic had an interest in the vehicle, but not that it was entitled to be paid the proceeds of any policy by Samib. There was also no evidence at all that it is normal practice for banks to take cession of rights under insurance policies and that Beetge would have been aware of such a practice if it existed.

[19] In the circumstances, the overwhelming weight of the evidence is that Beetge, and through him Samib, had no knowledge, actual or constructive, of the cession to Stannic of the rights of Noordwes. Accordingly, when the set-off between Samib and Noordwes occurred, the debt to Noordwes was discharged. The decision of the court below should thus be confirmed.

[20] The appeal is dismissed with costs.

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C H LEWIS

JUDGE OF APPEAL
Concur:
Marais JA
Farlam JA