THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 973/2012

Reportable

Date: 27 November 2013

In the matter between:

BORN FREE INVESTMENTS 364 (PTY) LIMITED **Appellant**

and

FIRSTRAND BANK LIMITED **Respondent**

Neutral citation: *Born Free Investments 364 (Pty) Ltd v Firstrand Bank Ltd* (973/12) [2013] ZASCA 166 (27 November 2013)

Bench: Ponnan, Bosielo and Pillay JJA, Van der Merwe and Zondi AJJA

Heard: **14 November 2013**

Delivered: **27 November 2013**

Summary: *Pactum de non cedendo* – enforceability of – *pactum* created in contract creating non-transferable right – enforceable against liquidator in insolvency.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Wepener J sitting as court of first instance):

The appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

JUDGMENT

Ponnan JA (Bosielo and Pillay JJA, Van der Merwe and Zondi AJJA concurring)

[1] The appellant, Born Free Investments 364 (Pty) Limited (Born Free), sued the respondent, Firstrand Bank Limited (FRB), as the cessionary of two claims from the liquidators of two companies in liquidation. The two companies, Summer Season Trading 49 (Proprietary) Limited (Summer Season) and Central Lake Trading 256 (Proprietary) Limited (Central Lake), had borrowed moneys from FRB and at the time of their liquidation owed the latter R49.2 million and R25.1 million, respectively. FRB, whose claims were admitted by the liquidators, is a major creditor in each insolvent estate. Born Free alleges that FRB repudiated the loan agreements that had been concluded by it (FRB) with each of Summer Season and Central Lake and that as a result those companies suffered losses of R109.2 million and R69.1 million, respectively. It is those claims that Born Free, pursuant in each instance to the cession to it from the liquidators of those companies, asserts against FRB.

[2] Born Free accordingly instituted action against FRB in the South Gauteng High Court. It alleged in its particulars of claim:

> "3.1 On 6 June 2009 and at Pretoria, Summer Season Trading 49 (Proprietary) Limited ('Summer Season') ceded to the plaintiff all rights of performance and all claims that Summer Season had against the defendant arising from agreements between Summer Season and the defendant and arising from the defendant's breaches of those agreements and/or from misrepresentations made by the defendant to Summer Season ('the claims'). A copy of a memorandum of cession recording the cession is annexed hereto as Annexure 'SS1'.

"3.2 On 6 June 2009 and at Pretoria, Central Lake Trading 256 (Proprietary) Limited ('Central Lake') ceded to the plaintiff all rights of performance and all claims that Central Lake had against the defendant arising from agreements between Central Lake and the defendant and arising from the defendant's breaches of those agreements and/or from misrepresentations made by the defendant to Central Lake ('the claims'). A copy of a memorandum of cession recording the cession is annexed hereto as Annexure 'SS2'.

"3.3 Summer Season was placed in voluntary liquidation in terms of section 352 of the Companies Act 61 of 1973 by means of a special resolution duly registered by the Registrar of Companies on 18 September 2009.

"3.4 Central Lake was placed under final winding up by order of court on 1 September 2009.

"3.5 On 3 December 2010 the North Gauteng High Court, Pretoria, on the application of Summer Season's and Central Lake's duly appointed liquidators and under cases numbers 42315/10 and 42316/10, set aside the aforesaid cessions on the basis that they amounted to dispositions without value.

"4.1 On 1 July 2011, alternatively, on 11 July 2011 and at Alberton, alternatively, Bedfordview, Summer Season (in liquidation) and Central Lake (in liquidation), both duly represented by their duly appointed liquidators, in writing, ceded, transferred and made over the claims to the Plaintiff, duly represented by D. Perkins."

[3] The memorandum of agreement recording the cession of the claims reads:

"1. **WHEREAS**:

1.1 the cedents have claims against First Rand Bank Limited ('FRB') arising out of breach by FRB of agreements with the cedents and/or arising out of breach by FRB of agreements with the cedents and/or arising out of misrepresentations made by FRB to the cedents ('the claims');

1.2 the cedents, prior to their liquidation, ceded the claims to the cessionary ('the first cessions');

1.3 the North Gauteng High Court set aside the first cessions on the basis that they amounted to dispositions without value in terms of section 26(1)(b) of the Insolvency Act 24 of 1936;

1.4 the cedents have, thereafter, agreed to sell the claims to the cessionary so as to enable the cessionary to prosecute the claims.

"2. **NOW, THEREFORE, IT IS AGREED AS FOLLOWS:**

2.1 **Cession**

In execution of the abovementioned sale the cedents hereby cede, transfer and make over to the cessionary the cedents' right, title and interest in and to the said claims.

2.2 **Authority**

The cedents hereby authorize the cessionary to notify FRB of this cession.

2.3 **Warranty and liability for damage**

It is understood and agreed that the cedents do not warrant the validity of the said claims and shall not be liable to the cessionary in respect of any fees, costs or charges that may be sustained by the cessionary in the event of the said claims proving irrecoverable for any reason whatsoever.

2.4 **Acceptance**

The cessionary hereby accepts the said cession upon and subject to the terms and conditions of this agreement."

[4] In answer to Born Free's claims, FRB: (a) denied the validity of the cession on the basis that its contract with each of Summer Season and Central Lake contained in clause 15.1 was a *pactum de non cedendo* in these terms: "You shall neither cede any of your rights nor assign any of your obligations under this agreement without our prior written consent"; (b) contended that the Central Lake resolutions were ineffectual and could not be relied upon by the Central Lake liquidators for their authority to conclude the Central Lake cession inasmuch as they had not been agreed to 'by meetings of creditors and members' as required in terms of s 386(3)*(a)* of the Companies Act 61 of 1973; and (c) that, properly construed, the resolutions of both Summer Season and Central Lake did not authorise the liquidators to conclude the cessions relied upon since the agreements upon which the cessions depended are not 'sales' within the meaning of that expression as contained in those resolutions.

[5] FRB's first two contentions found favour with the high court (per Wepener J). The third did not. The high court accordingly dismissed Born Free's claims with costs, but granted leave to it to appeal to this court in respect of its conclusion on the first two contentions raised and leave to FRB to cross-appeal in respect of its conclusion on the

third. However, as counsel accepted from the bar in this court, FRB's cross-appeal is, in truth, a conditional one.

[6] For present purposes I shall restrict myself to a consideration of only the first of the three contentions raised by FRB. For, on the view that I take of the matter, that contention, if upheld, is dispositive of the appeal. The question that this appeal therefore raises is whether the right, title and interest in and to the claims in question were capable of being ceded by the duly appointed liquidators of Summer Season and Central Lake to Born Free in view of the stipulation in clause 15.1.

[7] It seems to have been accepted that each cession was the result of the sale of an asset and that in each instance it was the mode of transfer to Born Free of the said right so as to enable Born Free to institute the action. The submission on behalf of Born Free is that the liquidators entered into each sale and cession in accordance with their duties in terms of the insolvency law and that clause 15.1 of the agreement is therefore in law inapplicable to and of no effect as against them. Accordingly, so it was contended, a *pactum de non cedendo* does not bind a liquidator who cedes a contractual right pursuant to his duties as liquidator.

[8] Counsel for Born Free sought support for that submission in the following dictum of Olivier J in *Lithins v Laeveldse Koöperasie Bpk & another* 1989 (3) SA 891 (T) at 895G–I:

> "I think it can safely be deduced from these cases that there is a general principle in our law to the effect that the *pactum de non cedendo* does not bind the trustee or liquidator in insolvency, unless it appears in a lease, in which case s 37(5) of the Insolvency Act applies, or unless it appears from the *pactum* that it would also be applicable in the case of insolvency."

Olivier J accordingly concluded (at 897C–D):

> "In my view, the principle of the non-applicability of the *pactum de non cedendo* extends to all cases where a trustee or liquidator in insolvency sells and cedes a claim in his discretion, irrespective of whether he had other options of dealing with the claim."

[9] However, in *Capespan (Pty) Ltd v Any Name 451 (Pty) Ltd* 2008 (4) SA 510 (C), a full court of the Cape Provincial Division (per Thring J (Allie and Waglay JJ concurring)) expressed the view that Olivier J's approach in *Lithins* was flawed. Thring J stated (at 518C–D):

> "It seems to me, with respect, that the learned judge failed in this case to draw the distinction which Prof Scott says should be drawn between *pactum de non cedendo* in relation to existing rights, on the one hand, and *pacta* in relation to rights which have been created *ab initio* as non-transferable rights, on the other."

Thring J added (at 518H–519C):

> "For these reasons I conclude, first, that a distinction must be drawn between a *pactum de non cedendo* which prohibits the cession of an existing right, ie one which pre-existed the conclusion of the *pactum*, on the one hand, and a *pactum de non cedendo* of a right which, by means of the *pactum* itself, was created *ab initio* as a non-transferable right, on the other. In the case of the first *pactum*, that which relates to an existing right, it will not always be enforceable; in particular, it will not bind the trustee in insolvency or the liquidator of the creditor and prevent him from executing a valid 'involuntary' cession of the right to a third party in the course of carrying out his duties as trustee or liquidator. However, in the case of the second *pactum*, that which relates to a right which was created *ab initio* as a non-transferable right, the *pactum* is valid and enforceable against the world because the right is simply inherently incapable of being transferred by anyone; and a cession of such a right contrary to the *pactum* will be putative, and of no force or effect, even if it is a so-called 'involuntary' cession; in other words, it will bind even a trustee in insolvency or a liquidator of the creditor. I hasten to add that I do not use the term 'insolvency cession' to include the vesting of an insolvent's assets in his trustee, which takes place, not by an act of cession, but automatically, by operation of law, as was mentioned in *Paiges'* case: the term as I understand it refers now to an attempt by a trustee or liquidator to transfer the right concerned, by means of cession, to a third party."

[10] It needs be noted, as Thring J did in *Capespan*, that no reference had been made by Olivier J in *Lithin's* case to the judgments of this court in *Paiges v Van Ryn Gold Mines Estates Ltd* 1920 AD 600; *MTK Saagmeule (Pty) Ltd v Killyman Estates (Pty) Ltd* 1980 (3) SA 1 (A); or *Trust Bank of Africa Ltd v Standard Bank of South Africa Ltd* 1968 (3) SA 166 (A). Thring J consequently opined that the "law [was] too widely stated" by Olivier J in *Lithin's* case.

[11] In *Trust Bank*, Botha JA held (at 189D–G):

> "The rule of our law is that all rights *in personam*, subject to certain exceptions based principally upon the personal nature of the rights, not here relevant, can be freely ceded, but an owner's rights of free disposal of his property may be restricted by a *pactum de non cedendo*. The effect of such a *pactum* depends upon the circumstances. *Voet*, 2.14.20 and Sande, *Restraints*, 4.1.1, and 4.2.1, point out that an agreement whereby an owner deprives himself of the free right to deal with his own property, is without effect unless the other contracting party has an interest in the restriction, and Windscheid, *Pandektenrechts*, 8th ed., p. 358, note 5, refers to the fact relied upon by *Seuffert* that also in the case of corporeals a contractual prohibition against alienation does not render the alienation void. These principles do not, however, apply where the right is created with a restriction against alienation, and the restriction is contained in the very agreement recording the right, for in such a case the right itself is limited by the stipulation against alienation and can be relied upon by the debtor for whose benefit the stipulation was made. (*Paiges v Van Ryn Gold Mines Estates Ltd*., 1920 AD 600 at. pp.615 and 617, and see *Windscheid*, *op. cit*., para. (C) and note 5, and Dernburg, *Pandekten*, 7th ed., vol. II at 141)."

Some five decades earlier that principle was expressed thus in *Paiges* (at 617): "The stipulation against cession is part and parcel of the agreement creating the right, and the right is limited by the stipulation."

[12] *Capespan*, it would seem, renewed Prof Scott's interest in the topic of agreements prohibiting cession. According to her (S. Scott 'Once again: Agreements prohibiting cession' (2008) 19 *Stellenbosch Law Review* 483 at 487):

> "Approached from a law of obligations perspective, the principle of freedom of contract allows the parties to a contract to determine the content of their agreement as they wish, within the boundaries set by the law. They can thus create the claim as an intransferable claim. By its very nature the claim then cannot be transferred. It has never been *in commercio*. Generally such agreements are valid and also effective against third parties. This kind of agreement prohibiting cession is the bone of contention since it inhibits the smooth operation of factoring and securitisation. The interests of the creditor, as well as other third parties (such as the creditors of the cedent and cessionary) are affected by such prohibitions.
>
> "Agreements prohibiting cession could be invalid, *inter alia*, because they are contrary to public policy. There may be various reasons why a contract may be against public policy. The validity of the contract may, of course, also be influenced by the unequal bargaining positions of the parties in principle, however, I can see no reason why agreements prohibiting cession should be against

> public policy. Once the validity of these agreements has been established, the parties to these agreements are bound to their agreements in terms of the principle of *pacta sunt servanda*. This approach was also followed in *Capespan*. The contentious issue is really whether it is against public policy for parties to a contract to re-instate the personal nature of their obligation in such a way that their agreement is effective against third parties."

[13] Christie in *The Law of Contract in South Africa* (6 ed, 2011) at 482 expresses the view that *Capespan* "… convincingly showed that although rights vest in a liquidator or trustee in insolvency by operation of law, not by cession, a *pactum de non cedendo* incorporated in the contract that creates the right is as binding on the liquidator or trustee as on anyone else".

[14] It remains to consider whether the rights which the liquidators of each of Summer Season and Central Lake had ceded to Born Free had been created *ab initio* as non-transferable rights. If they were, then it would follow from what has been set out above that the cession in each instance was invalid and would thus be of no force or effect. Clause 15.1 of each agreement, which contains the *pactum de non cedendo*, is couched in fairly wide terms. The language could not have been clearer – it proclaims in emphatic terms: "You shall neither cede any of your rights nor assign any of your obligations under this agreement without our prior written consent." The prohibition is thus directed in each instance at the other party to the contract, being Summer Season and Central Lake. It stipulates that neither of them shall cede nor assign any of their obligations under their respective agreements with FRB without the prior written consent of the latter. The old adage, *nemo plus iuris ad alium transferre potest quam ipse habere* (no one can transfer more rights to another than he himself has), as formulated by Ulpian (*Digest* 50.17.54), applies (see *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC* 2011 (2) SA 508 (SCA) para 26). De Villiers JA put it thus in *Paiges* at 616:

> "Finally, it is said that a trader who, relying on the common law of the country in regard to cession, gives credit, ought not to be prejudiced by an agreement to which he was no party and of which he was not aware. But this argument loses sight of the cardinal fact that at most the cessionary only steps into the shoes of the cedent, and can have no greater rights than the cedent himself has."

[15] The court's task, as Holmes JA observed in *Oerlikon South Africa (Pty) Ltd v Johannesburg City Council* 1970 (3) SA 579 (A) at 590F, "is one of interpretation: in the absence of clear indications to the contrary it cannot depart from the plain meaning, even if it were to think that certain provisions are unusual or drive a particularly hard bargain". Here, on the plain and ordinary meaning of the words used, it cannot be doubted, I consider, that it was the intention of the parties to the agreements, when they concluded them, to render all rights acquired by Summer Season and Central Lake under those agreements non-transferable. I accordingly conclude that the cession in each instance of the claims of Summer Season and Central Lake against FRB to Born Free by the liquidators of those companies in liquidation was invalid and is of no force or effect.

[16] It follows that the appeal must fail and in the result it is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

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V M Ponnan

Judge of Appeal

APPEARANCES:

For Appellant:	MvR Potgieter SC (with SJ van Niekerk)
	Instructed by:
	Senekal Simmonds Inc, Johannesburg
	Phatshoane Henney Inc, Bloemfontein
For Respondent:	MduP van der Nest SC (EA Limberis SC)
	Instructed by:

Fluxmans Inc, Johannesburg

Lovius Block, Bloemfontein