46/95

CG CASE NUMBER: 70/93

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

STANDARD GENERAL INSURANCE CO LTD Appellant

and

S A BRAKE C C Respondent

CORAM: **SMALBERGER, VIVIER, VAN DEN HEEVER JJA, NICHOLAS et OLIVIER AJJA**

HEARD ON: **2 MARCH 1995**

DELIVERED ON: **10 MAY 1995**

J U D G M E N T

VAN DEN HEEVER JA

SB/gn

The main issue in this appeal, is whether the respondent had *locus standi* to sue the appellant despite a cession in *securitatem debiti* in favour of the Bank of Lisbon and South Africa Limited ("the bank").

The respondent, a close corporation, formerly S A Brake (Pty) Ltd, ("SA Brake") issued summons against the appellant, an insurance company ("Stangen"), in the Witwatersrand Local Division for R2 108 288,40 with interest and costs. SA Brake alleged that

> "[it] carried on business at all times material hereto at 9 Village Road, Selby, Johannesburg ('the premises') as retailers of motor spares, clutch and brake reconditioning and exports and importers of brakes, air brakes and clutches
> ...
> 3. During the period February to May 1989, the plaintiff entered into a written agreement of insurance ('the policy') in terms of which the defendant undertook to insure it:
> 3.1 against loss or damage caused at the premises *inter alia* by fire, as well as against all risks mentioned in the policy; and
> 3.2 against loss or damage to certain motor vehicles identified in the schedule of the policy caused *inter alia* by fire;
> ...

6. During or about 18/19 June 1989 and at the premises a fire occurred.

7. As a result of the fire:

7.1 plant, machinery, office contents, furniture, stock, money and vehicles ... which the plaintiff owned and/or for which it was responsible was destroyed and/or damaged beyond repair ..."

Details of the property were then set out and its alleged value given, as well as the consequential loss suffered and claimed. SA Brake alleged further that it had complied with all its obligations in terms of the policy, which Stangen had repudiated, refusing to make any payment to SA Brake.

Stangen pleaded that on or about 23 March 1987 and at Johannesburg S A Brake and Stangen had entered into a written policy of insurance number FM992/901049 ("the original policy"), and that

"3.2 On or about 10 July 1987 and at Johannesburg the plaintiff ceded, assigned, transferred and made over all its right, title and interest in, to and under the original policy to the Bank of Lisbon and South Africa Limited ('the cessionary'); a copy of the

cession is annexed hereto, marked 'D'.

3.3 The defendant received and registered the cession on or about the 5th August 1987.

3.4 It was a tacit term of the cession that it would be effective and of application also in respect of any policy issued by the defendant to the plaintiff in *replacement of the original policy but containing* substantially the same conditions and insuring substantially the same risk.

3.5 The policy as defined in the particulars of claim was issued by the defendant in replacement of the original policy, contained substantially the same conditions as those contained in the original policy and insured substantially the same risk.

3.6 The interest of the cessionary in and to the policy has at all times material hereto at the request of the cessionary, been noted by the defendant on that policy."

Stangen referred to and annexed two further documents as E and F, which are hereinafter referred to, in support of its submission that SA Brake had "no right, title or interest in, to or under the policy, or to any sums of money recoverable thereunder".

Admitting that it refused to make any payments, Stangen pleaded

that the fire had been deliberately caused by a person or persons unknown to Stangen but acting on behalf of SA Brake. The *quantum* of SA Brake's alleged loss was also put in issue.

Annexure D, signed on 10 July 1987 (called the "short cession" at the trial) is a document emanating from the bank headed "CESSION OF INSURANCE POLICY", which records that SA Brake

> "... [does] hereby cede, assign, transfer and make over all my/our right, title and interest in, to and under the Policy of Assurance No FM 992/901049 for an * ---------- amount of R1,745,000-00 effected with ... [Stangen] and to any sums of money recoverable thereby unto [the bank], its order or assigns, as collateral security for all or any sums of money now owing by me/us or for which I/we am/are liable or which I/we may hereafter owe or become liable for directly or indirectly to the said Bank from whatever cause arising".

Then follow the place and date of signature, signatures on behalf of SA Brake and of a witness, a signature on behalf of Stangen against the statement "Notice received and registered this 5th day of August, 1987", and an asterisked footnote explaining what the gap after the asterisk in

the body of the cession - and deleted in this instance - is intended for: "If used for the cession of an increase in the amount of a policy, insert 'additional'". (The oral evidence confirmed the note on the document, that Stangen received and registered the cession. It was sent the day it was signed.)

Annexure E, signed earlier on 8 July 1987 (referred to as the "long cession" at the trial) is a four-page bank document in terms of which SA Brake "pledged and ceded" to the bank *in securitatem debiti* all claims of whatever kind against any person whatever that it might have or acquire.

Annexure F is a notarial bond, by which SA Brake was obliged i.a. to "insure [all the property hypothecated] and keep it insured against risk of loss or damage by fire", to take out further policies against additional risks if called upon to do so, and to "validly cede and make over the respective policies of insurance to the Mortgagee to be held as collateral security herewith ..." The bond also provides that the bank shall have

the right and be entitled to enforce any claim arising from any such insurance policy "effected or to be effected" and to institute action for that purpose.

In its replication SA Brake admitted having executed annexures D, E and F, but disputed that they had the effect contended for by Stangen. As regards the short cession, this is based on a denial of the tacit terms alleged by Stangen; in regard to both the long cession and the notarial bond, on an allegation that SA Brake retained the right to sue for and recover all sums due under the policy by virtue of the common law, alternatively the provisions of the relevant documents.

SA Brake went on to set out facts on which it relied for an alternative contention advanced, that Stangen was estopped from disputing that SA Brake had *locus standi* to institute the present action.

At the commencement of the trial, Goldblatt J granted an order in terms of Rule 33(4) the effect of which is that the issues of *locus standi*, the tacit terms, and estoppel were to be dealt with separately from other

issues in the case.

It was argued before him on behalf of SA Brake i.a. that none of the documents annexed to Stangen's plea had been effective in transferring SA Brake's claim against Stangen to the bank, it being common cause that the document embodying the insurance contract had remained in the possession of SA Brake's insurance broker and so had never been delivered to the bank. The trial judge commented that there was considerable uncertainty in our law as to whether or not the delivery of the document evidencing the debt is an essential requisite for a completed cession. He held himself bound by the full bench decision in NEZAR v DIE MEESTER EN ANDERE 1982 (2) SA 430 (T), *seemingly supported by a comment of FH Grosskopf JA in* ROMAN CATHOLIC CHURCH (KLERKSDORP DIOCESE) v SOUTHERN LIFE ASSOCIATION LIMITED 1992 (2) SA 807 (A) at 813 C-D, that delivery to the cessionary of the document evidencing the ceded right is required for a proper completion of the cession. In the absence of such

delivery, Stangen had failed to prove that SA Brake had divested itself of its rights, and so of its *locus standi* to litigate to enforce those rights, against Stangen.

It was accordingly unnecessary for the trial court to determine any of the other issues covered by its order in terms of Rule 33(4). It did, however, make a finding adverse to SA Brake in relation to the estoppel alleged in order to determine an appropriate costs order. This finding was not challenged before us.

After the appeal had been noted and enrolled, this Court held in BOTHA v FICK EN 'N ANDER delivered on 30 November 1994, that where a right exists independently of the written instrument recording it, the cession of such right may as a rule be effected without either physical delivery to the cessionary of the document evidencing the underlying *causa* giving rise to such right, or proof that the cedent had exerted "all effort" to divest himself of the right. That judgment undercuts the ground on which Goldblatt J rested his judgment and

which had made it unnecessary for him to have regard to the precise content of any of the documents relied on by Stangen; or to decide whether by virtue of the tacit term alleged any one of them is applicable to the 1989 policy in terms of which SA Brake claims, and, if so, whether it constitutes not only an obligationary agreement but an effective transfer agreement by which SA Brake divested itself of its right to claim from Stangen.

Before us Mt Tuchten, for SA Brake, urged that the conclusion of the court *a quo* was correct, but for reasons different from those stated by Goldblatt J. He argued as follows. The cessions were merely obligationary agreements, and no transfer agreement effecting delivery was arrived at between the bank and SA Brake. At the time the cessions were effected no right to claim under the policy had yet come into existence and delivery of it could not as a matter of law be effected *in anticipando*.. There was no evidence of the bank's acceptance of transfer of SA Brake's right to claim under the policy. Indeed, the evidence

indicated that the bank was not only content that SA Brake should institute the action, but had initially provided or contributed towards funds to enable SA Brake to do so, which indicated that it had not accepted transfer of that right from SA Brake to itself. And he argued that the tacit terms alleged by Stangen in regard to the short cession had not been proved.

SA Brake did not replicate that annexures E or F superceded the short cession D. The fact that the bank did not wish to be joined in the action either in the court *a quo* or before us appeared, from the evidence adduced on the issue of estoppel, to be due to an appreciation of problems which it would be faced with in such action which it is not necessary to detail. SA Brake did not plead any waiver, abandonment, or re-cession, whether tacit, implicit, or otherwise, by the bank of rights under the short cession in favour of SA Brake. It is those rights which must accordingly be determined.

I deal first with the relevance of the 1987 short cession to the 1989

policy in terms of which SA Brake sues.

Mr Breno testified on behalf of the plaintiff. For practical purposes, he was SA Brake. Though Mr Karr and Mrs Breno each had an interest in the corporation, Breno was the only one running the business. Despite his purported ignorance of the content of the documents he signed on behalf of SA Brake, Breno did not deny that SA Brake was bound by those documents.

The history of the matter is as follows. After the conversion of the proprietary limited company to a close corporation in February of 1987, SA Brake in July of the same year approached the bank for overdraft facilities. On 8 July 1987 a resolution was passed by SA Brake that it would enter into a "Deed of Pledge and Cession" in favour of the bank in terms of the bank's standard Form 66. This, the long cession, was signed on the same day.

The previous day already, on 7 July, SA Brake had passed a resolution that Breno as a member of SA Brake

> "be and is hereby authorised to represent the company in ceding assigning and transferring all the company's right title and interest in and to Insurance Policy No. FM 99290/1049 issued by Standard General Insurance or any policy or policies issued in substitution for these policies and any subsequent amendments thereto issued by Standard General Insurance or any other insurance company in favour of the Bank of Lisbon as the legal holder of the Mortgage Bond/Notarial Bond hypothecating the Property insured under the said Policy." (Emphasis added.)

It is clear that the bank was intent upon having a belt and braces when affording SA Brake overdraft facilities, and the necessary steps were taken virtually simultaneously. Asked: "You authorised the passing of this bond in favour of the Bank of Lisbon?" Breno answered "Right", though his recollection of actual documents was vague . According to the bond itself, which was executed on 15 July, that was done under a power of attorney from SA Brake signed already on 8 July. It bears repeating that by the notarial bond, SA Brake undertook not only to insure the property hypothecated with Stangen, but to keep it so insured.

The original policy was a so-called STOP policy - an acronym for Stangen Total Options Policy. The premiums were paid by monthly debit order and the term was monthly. The original agreement, if each term were to be regarded as a separate contract, died before it was born: the policy was signed on behalf of, i.e. risk accepted by, the insurer on 23 March 1987 but the first period of insurance is recorded as being from 15 to 28 February 1987, renewable on the first of each successive month. It would have made no commercial sense whatever for the bank to go to the trouble of creating all the documentation evidencing its security in respect of fire cover for only the month in which that was done, particularly since a fire policy has no cash value until the occurrence of the postulated uncertain event. It would similarly verge on the ridiculous to require a separate cession to be effected not only every month, but, for example, every time stock was disposed of or added to. The policy provided for quarterly reports on stock and profits to Stangen. The bank's letter of grant required a similar accounting to it. Though the

original policy contained sections also covering SA Brake in areas in which the bank was not interested, their interests ran parallel as regards the fire section of the policy. It was in the interests of both that the property insured remain so insured against risk of loss by fire for at least the estimated value of the relevant assets, regardless of whether there were immaterial amendments to the contract by which SA Brake ensured that this situation continued. Though it is unnecessary to decide whether the short cession was accepted by the bank as proleptic performance of an obligation imposed on SA Brake by the notarial bond - which was probably the case - the fact that that obligation was not only to insure but to "keep insured" serves further to confirm my view that the tacit term contended for in relation to the short cession passes the tests set out in Christie, CONTRACT, 2nd ed. pp. 194-201. Moreover Breno admitted that he understood (when he signed the resolution of 8 July 1987) that the bank wanted transfer of rights for not only the one policy but any policy that would amend the first one. Cf CINEMA CITY (PTY) LTD

v MORGENSTERN FAMILY ESTATES (PTY) LTD AND OTHERS 1980 (1) SA 796 (A) 804 D-E. In short the bank and SA Brake were *ad idem* that it was the contingent right under policy FM992/901049 as renewed or extended from month to month to cover loss by fire of the property on its premises which SA Brake listed from time to time, that was ceded to the bank *in securitatem debiti.*

The evidence adduced by Stangen was that on the anniversary date of the policy in 1988 the wording and name of the STOP policy were changed, the latter to "Multimark", but the content remained essentially the same. Later the policy was given a new number only because SA Brake changed its insurance broker from one functioning in Johannesburg to one operative in Pretoria so that the policy was administered thereafter by Stangen's Pretoria branch. During 1989 two contracts were embodied in the one document. That annexed to SA Brake's particulars of claim reflects the insured as being SA Brake and an associated close corporation operating from the same premises, S A Auto Electrical CC

("Auto"), for their respective rights and interests. But each paid its own premium in respect of its own interests and was allocated its own policy number for administrative purposes. Auto was liquidated on 27 February 1990, the liquidator instituting a separate action against Stangen, by virtue of its contract with Stangen as reflected in the policy. It is unnecessary to fine-comb the STOP policy and its Multimark successor and the series of schedules attached to each at various dates, in search of differences between them. There are a few, which obviously affect the relationship between Stangen and SA Brake from time to time in minor respects. But the 1989 document annexed to SA Brake's particulars of claim deals with the same matter as the 1987 one viewed from the bank's point of view in its demand for security and SA Brake's when giving it. In both what was insured, the risks insured against, namely of loss by fire of the value of those assets, and the parties, remained the same.

I come then to the effect of the short cession. Had it purported to cede a right with a present cash value, the effect would have been that

for as long as SA Brake was indebted to the bank - as it at all relevant times was - SA Brake, having divested itself of the right, would no longer have had *locus standi* to enforce it. GOUDINI CHROME (PTY) LTD v MCC CONTRACTS (PTY) LTD 1993 (1) SA 77 (A) 87 G-H. There could also have been no doubt that the cession would have constituted both the obligationary and transfer agreements. Apart from the fact that cession is according to our law primarily just that: an act of transfer (JOHNSON v INCORPORATED GENERAL INSURANCES LTD 1983 (1) SA 318 (A) 331 G-H), the document , D, is unequivocally framed in the present tense. In it SA Brake says that it effects transfer forthwith: "I/we ... do hereby cede ... transfer ... make over all my/our right"; and nothing more could have been required of the bank; which immediately asked Stangen to take cognizance of the right given to and taken by it. Cf also LOUW v W P KOöPERATIEF BPK EN ANDERE 1994 (3) SA 434 (A) 443 F-G.

This Court has interpreted the cession of a debt *in securitatem*

debiti as being analogous to the pledge of a corporeal asset. (LEYDS NO v NOORD-WESTELIKE KOöPERATIEWE LANDBOUMAATSKAPPY BPK EN ANDERE 1985 (2) SA 769 (A) 780 B-G; LAND- EN LANDBOUBANK VAN SUID-AFRIKA v DIE MEESTER EN ANDERE 1991 (2) SA 761 (A).) Mr Tuchten argued that on that basis, the short cession was incapable of effecting delivery of what was not yet in existence. The claim against Stangen only came into existence when the fire occurred, and there was no evidence of any meeting of the minds of SA Brake and the bank at that stage which would constitute the transfer agreement by which SA Brake divested itself of that claim and so of its *locus standi.*

However, the right dealt with in the short cession is not a future right though even future rights may be and usually are accepted by the cessionary *in anticipando.* This may cause problems when insolvency supervenes and the date of vesting becomes important. But SA Brake's right was a contingent and not a future one, and there is no bar in logic

or in law to the present effective transfer of a contingent right. Here too no further act of acceptance would be necessary on the part of the bank. See SCHREUDER v STEENKAMP 1962 (4) SA 74 (O).

It is unnecessary to go into the thorny question how the cedent who has divested himself of a claim can attempt to protect his rights should the cessionary refuse or fail to do so. Until he pays his debt to or makes some arrangement with the cessionary, he himself cannot enforce the claim. It was not SA Brake's case as pleaded or pursued that anything of that nature had occurred.

Under the circumstances the appeal succeeds with costs. The order of the court *a quo* is set aside and replaced by an order of absolution from the instance, with costs.

L VAN DEN HEEVER JA

CONCUR:

SMALBERGER JA)
VIVIER JA)
NICHOLAS AJA)
OLIVIER AJA)