REPUBLIC OF SOUTH AFRICA

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 18779/12

In the matter between:

RETMIL FINANCIAL SERVICES (PTY) LTD	Applicant
and	
SANLAM LIFE INSURANCE COMPANY LTD	First Respondent
DEWALD PRETORIUS N.O. (as nominee of Old Mutual Trust Ltd)	Second Respondent
THE MASTER OF THE HIGH COURT, KIMBERLEY	Third Respondent
OLD MUTUAL TRUST LTD	Fourth Respondent
SLABBERT AUTO BODY REPAIRS CC	Fifth Respondent

Date of hearing: 14 February 2013

JUDGMENT DELIVERED ON 30 APRIL 2013

DAVIS AJ:

[1] This case brings into sharp focus the uncertain correlation between the interest retained by the cedent and the interest gained by the cessionary under a cession *insecuritatem debiti.*[1]The disputeis whether the cessionary of a life policy over the life of the cedent, which was ceded to it*insecuritatem debiti*as collateral for a debt owed by a third party,may demand the immediate payment of the proceeds of the policyin circumstances where:

1.1 the life policy, ie the principal debt, has fallen due for payment by virtue of the death of the cedent;

1.2 the cession has not yet 'matured', i.e., where the debt for which the security was effected ('the secured debt') is not yet due; and

1.3 the insurer has offered payment of less than the full value of the life policy, and the executor of the cedent's estate, who disputes the reduced payment, wishes to defer payment on the policy pending the outcome of the insurer's internal payment review process.

[2] The relevant facts are, for the most part,common cause, the issues between the parties being of a legal nature.

[1] See P M Nienaber 'Cession' 2 *LAWSA* Part 2 (2 ed), para 53, and the discussion at footnote 14.

[3] The applicant ('Retmil') is a duly registered credit provider in terms of the National Credit Act 34 of 2005. On 17 August 2011 Retmil entered into a loan agreement with the fifth respondent, Slabbert Auto Body Repairs CC ('the Close Corporation'), in terms whereof it loaned the Close Corporation an amount of R877 253.00, repayable by way of thirty six monthly instalments in an amount of R31 108.60 ('the loan').

[4] Mr. J.J. Slabbert, a member of the Close Corporation who held 96% of the members' interest in the Close Corporation, provided security for the loan. He bound himself as surety and co-principal debtor in favour of Retmilfor the due fulfilment of the Close Corporation's obligations under the loan and effected a cession *in securitatem debiti*in favour of Retmil of his right, title and interest in Sanlam Policy Number 4291809XI over his life ('the policy'). It is not clear from the papers what the full value of the policy was, but it appears to have been an amount of R 1 500 000.00.[2]The insurer under the policy is the first respondent ('Sanlam').

[5] Mr. J. J. Slabbert, whom I shall hereinafter refer to as 'the deceased', died on 23 June 2012. The second respondent ('the Executor') was appointed as the executor of his estate.

[6] After the death of the deceased, the Close Corporation continued to pay the monthly instalments due in respect of the loan. The Close Corporation has at all

[2] Annexure SLA 1 to the Answering Affidavit, Record p 107.

material times been up to date with such payments and has not defaulted. At the time when this application was launched, the loan still had a period of approximately twenty three months to run, which is roughly two-thirds of the loan period.

[7] The policy was not listed as an asset in the deceased estate in the inventory which the Executor lodged with the third respondent ('the Master'). It does not appear from the papers whether or not the Executor was aware of the existence of the policy when the inventory was compiled.

[8] Following the death of the deceased, Retmil notifiedSanlam that he had died and requested payment of the proceeds of the policy ('the proceeds').

[9] On 24 August 2012, Sanlam notified Retmil that it was prepared to recognise the claim on the policy, but that it was offering a reduced amount of R 831 538.00 and notfull payment under the policy, because of alleged non-disclosures by the deceased when the policy was taken out. An opportunity of 90 days was afforded to make written representations to Sanlam regarding this decision, in the event of it being disputed.

[10] Because the payment offered was for less than the full value of the policy, Retmil was advised by its attorneyto inform the Executor of the situation. Retmil's attorney accordingly wrote to the Executor on 3 September 2012 in the following terms:

> 'Retmil is die eienaar by wyse van Sessie van gemelde polis en hou ek instruksies dat Retmil Sanlam se verminderde uitbetaling gaan aanvaar ter delging van hierdie skuld. Hierdie skrywe is bloot om u in kennis te stel dat gemelde aanbod vir Retmil aanvaarbaar is aangesien dit expo facto feitelik korrek is dat die oorledene nie volle openbaarmaking by die aansoek van hierdie polis gedoen het nie. Indien die erfgename voel dat u as eksekuteur of hulle Sanlam se bevinding wil aanveg, dring ons kliënte aan op sekuriteit vir die volle uitstaande bedrag tesame met sekuriteit ten bedrae van R250 000.00 vir regskostes. Die rede hiervoor is eenvoudig datons kliënte nie bereid is om 'n onaanvegbare saak op hul risiko met Sanlam aan te gaan en op die einde van die saak ernstige finansiële verlies kan ly indien die saak onsuksesvol is nie. Indien gemelde betaling en sekuriteit nie binne die eersvolgende werksdae ontvang word nie, gaan ons voort om uitbetaling van die polis te versoek'. (Emphasis added.)

[11] On 5 September 2012 the Executor met with Retmil's attorney. He requested that the matter be held in abeyance until Friday 07 September 2012 to afford him the opportunity to take instructions from the heirs as to whether the Executor should purchase Retmil's claim under the policy for R 831 538.00, being the amount offered by Sanlam. Retmil's attorney confirmed the arrangement as follows in a letter to the Executor dated 5 September 2009:

> 'Ons sal aan u versoek voldoen om die aangeleentheid met betrekking tot die aanvaarding van Sanlam se offer, agterweë hou tot en met Vrydag, om u die geleentheid te gee om moontlik die eis by ons teen die bedrag soos aangebied deur Sanlam, te koop, waarna ons die eis dan aan u as die eksekuteur, en/of enige person wat die gelde betaal, sal sedeer vir verdere hantering na eie goeddunke'.

[12] On 7 September 2012 the Executor's attorney wrote to Retmil's attorney informing him that he had not been able to obtain a copy of the cession and requesting that same be made available urgently to enable himto advise the Executor.Retmil's attorney responded in a letter dated 10 September 2012, in which he stated that the matter had been held in abeyance until Friday 7 September 2012 to enable the Executor to purchase Retmil's claim, and as that had not happened, he regarded the matter as concluded.

[13] On 10 September 2012, Retmil notified Sanlam in writing that it accepted the reduced payment offered by Sanlam in respect of the policy.There is no indication in the papers that Retmiltook any steps to investigate the allegations of non-disclosure, as opposed to merely accepting Sanlam's word at face value.

[14] On 12 September 2012 the Executor sent an email to Sanlam in which he questioned the validity of the cession andrequested Sanlamnot to pay the proceeds of the policy to Retmil, but directly to the deceased estate.The Executor then proceeded to raise a number of objections and queries regarding the cession, which were notpersisted with and are not relevant to this application.Two of the points of dispute raised by the Executor remain relevant, however,namely that the amount owing on the loan is less than the amount being offered on the policy, and that the Close Corporation is up to date in respect of its obligations in terms of the loan.

[15] The attitude adoptedby Retmil appears fromthe following passages in an email written by its attorneysto Sanlam, and copied to the Executor's attorney, on 20 September 2012:

> 'Dit is ook ons kliënt se houding dat hulle, as sessionaris, die eienaar van die polis is, en geregtig is om die aanbod, soos Sanlam gemaak het, te aanvaar, en het hulle ditook reeds skriftelik gedoen. Die boedel is ook skriftelik hiervan in kennis gestel, en is daar selfs aan hulle die geleentheid gegee om die R 831 000,00 wat die polis werd is, aan Retmil Fiansiële Dienste te betaal, waarna hulle met hulle hersieningspoging oor Sanlam se berekenings, kan voortgaan. Hulle het egeter geweier om hierdie aanbod te aanvaar.
>
> Mnr Vosloo (aanvaar) namens die boedel en die BK, dat die BK inderdaad gelde verskulding is aan Retmil Finansiële Dienste. Die feit dat die betaling tans op datum is, hou geen regsgronde in om uitbetaling van die polis, agterweë te hou, nie. Sy mening dat (ons) slegs die regte in terms van die sessie op die polis kan uitoefen, indien die Beslote Korporasie agterstallig is met sy lening, hou geen water nie. Dit is juis vir sekuriteit vir hierdie lening … dat die sessie geneem is op die lewensversekeringspolis op wyle Mnr J J Slabbert se lewe, en word Remill Finansiële Dienste nou daadwerklik benadeel.
>
> Wat betref die siening dat die bedrag van die polis R 831 000.00 meer is as die uistaande bedrag, wens ons te bevestig dat die leeningsooreenkoms voorsiening maak vir regskostes en bevestig ons dat die surplus indien enige, op die verbandlening ten behoewe van die boedel, inbetaal sal word ….' (Emphasis added.)

[16] The Executor's position, in turn, is evident from the following paragraphs of his attorney's response to the aforesaid letter, written on 21 September 2012:

‘5. Ons benadruk weereens dat ’n hof nie op hierdie stadium genader hoef te word nie en sal sodanige regskostes heeltemaal onnodig wees. Daar is geen benadeling vir Retmilnie. Die hersiening van die uitbetaling, indien op hersiening geneem, moet sy normale loop hê waarna Sanlam die nodige uitbetaling kan maak aan die party(e) geregtig op die opbrengs daarvan.

6. Die sessionaris is nie eienaar van die polis nie. Die sessie waarop (Retmil) steun is ‘n sydelingse sessie vir uitstaande skuld en nie ‘n uit en uit sessie nie. Mnr.J J Slabbert was die eienaar van die polis en vanwee sy afsterwe val dit in die bestek van sy boedel en sy ekskuteur as verteenwoordiger.

7. Ons kan met respek nie met (Retmil) saamstem dat (hulle) in terme van die leningsooreenkoms se inhoud nou geregtig is op (hulle) regskostes nie. Ons ontvang graag bewys van ‘n hofbewel welke (hulle) geregtig maak op (hulle) kostes alternatiewelik ‘n afskrif van kostes deur (hulle) getakseer asook welke klousules in die ooreenkoms (hulle) geregtik maak op regskostes welke (hulle), na bewering, tot datum opgeloop het.

8. Ons benadruk weer, indien die sessie van 2011 geldig is en gegee is vir die skuld van die BK dan is (Retmil) slegs geregtig op die totale uitstaande balans van die lening verskuldig deur die BK aan (Retmil) en die balans betaalbaar aan die boedel.

…

Ons benadruk weereens dat ons nie die Hof gaan nader om u te stop om die geld aan Retmil uit te betaal nie, indien u sou voortgaan is dit op u risiko … Ons behou al ons kliënt se regte voor in, tot en ten aansien van die Sanlam Polis en stel u in kennis dat enige gelde verkeerdelik deur Sanlam uitbetaal …verhaal gaan word … vanaf Sanlam….’ (Emphasis added.)

[17] Faced thus with the threat of future litigation by the Executor if it paid out on the policy, Sanlam adopted the stance that it could not paythe proceeds to Retmil without a Court Order authorising it to do so.Retmil accordingly launched the present application for an Order authorising Sanlam immediately to pay the proceeds of the policy to Retmil, and directing the Executor to bear the costs of the application. Sanlam does not oppose the relief sought, but the Executor does.

[18] In his answering affidavit the Executor took issue with the entitlement of Retmil to accept a lower payment than the full value of the policy, alleging that Retmil's conduct was reckless and not in the interests of the cedent. He disagreed with Retmil's conclusion that Sanlam had an unanswerable case regarding non-disclosureand stated that he had already successfully persuaded Sanlam to increase its offer of payment from R 831 538.00 to R 1 108 718.00 – an improvement of the order of R 277 000.00.

[19] The Executor contends that the policy forms an asset in the deceased estate, and that he is therefore entitled and duty bound, in his representative capacity as Executor, to challenge Sanlam's decision to make a reduced payment, inasmuch as he is obliged to protect the interests of the cedent.His attitude is that payment of the policy proceeds should be held in abeyance until such time as Sanlam's internal payment review process has been completed.He argues, further, that Retmil is not entitledto insist on immediate payment of the proceeds in circumstances where the Close Corporation has not defaulted on the loan and is up to date with all payments.

[20] The third respondent ('the Master'), who has no objection to the relief sought,gave a report in which he stated that:

> 'Die feit dat die polis aldus gesedeer is, beteken geensins dat hulle *[sic]* as boedelbates verdwyn nie. Die eksekuteur kan die gewaarborgte skuld vereffen, kansellasie van die sessie daarna verkry en selfvan die versekeringsmaatskappy vorder wat kragtens die polis uitbetaaalbaar is of hy kan wag dat die sessionaris self ingevolge die sessie van die versekeraars vorder, neem wat hom toekom en die balans aan die boedel uitbetaal.'

[21] Retmil did not annex a copy of the policy to the application. It appears, however from the letter written to Retmil by Sanlam on 24 August 2012, that the policy was taken out with effect from 1 June 2009, ie prior to the conclusion of the loan.

The issues

[22] The difficulty in this case is that, the deceased having died, the time for payment on the policy has arisen, whereas the loan is not yet due and payable.

[23] An additional difficulty lies in the fact that Sanlam is offering, and Retmil has purported to accept, payment of less than the full value of the policy, which potentially prejudices the interests of the deceased estate*qua* cedent. Retmil insists on immediate payment of the reduced amount offered on the policy, whereas the Executor wants to defer payment and attempt to negotiate for an increased offer. In short, Retmil and the Executor are at loggerheads over who is rightfully entitled to deal with the policy, and Sanlam is invidiously caught in the middle.

[24] In my view this case turns on the answers to the following questions:

22.1 first, whether or not Retmil was entitled to demand immediate payment of the proceeds in order to discharge the loan,notwithstanding the fact that the loan was not yet due;

22.2 second, whether or not Retmil was entitled to accept Sanlam's reduced payment offer on the policy; and

22.3 third, whether or not the Executor is entitled, despite the cession, to deal with Sanlam in an attempt to secure an increased payment on the policy.

The nature and effect of a cession *in securitatem debiti*

[25] Counsel for Retmil and the Executor were *ad idem* that the cession in this case was one *in securitatem debiti* and not an out-and-out cession.

[26] It is helpful, as a starting point, to refer to therelevant principles governing cession *in securitatem debiti*. Our courts have repeatedly held that a cession *in securitatem debiti* is analogous to a pledge.[3]The cedent, as creditor of a right, cedes his right or

[3] See *Development Bank of Southern Africa Ltd v Van Rensburg* 2002 (5) SA 425 (SCA) at 447 C – E, and authorities cited there.

claim to the cessionary, as security for a debt owed to the latter.Nienaber summarises the general position regarding cession *in securitatem debiti*as follows:[4]

'Such a cession … is concluded on the understanding that the right will be retained by the cessionary until, and will revert to the cedent together with all fruits and advantages which the right may have accumulated, when the debt so secured has been redeemed. In the interim the cedent, having divested him or herself of the right, no longer has the *locus standi* to deal with or enforce it, while the cessionary, although the only party entitled to performance, may not as a rule exercise all the powers of a *dominus:* he or she ought not to recover performancenor alienate the debt, but is only permitted to act on the claim if the cedent defaults, unless the parties have agreed, either expressly or tacitly, that he or she may or must do so in the meantime.'

[27] As in the case of a pledge, the cedent as security-giver is not wholllydivested of an interest in the asset which he surrenders to the cessionary as security-receiver. He retains what has been variously described as 'the bare dominium' and 'a reversionary interest' in the ceded right.[5]Ownership of the ceded right is not transferred to the cessionary but remains with the cedent, entitling him to the reversion of the ceded right on settlement of the secured indebtedness.[6]On the insolvency or death of the cedent, the bare dominium or reversionary interest in the ceded right forms part of the estate of the cedent.[7]

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[4] 2 *LAWSA* Part 2 (2 ed) para 52.

[5]*Development Bank of Southern Africa Ltd v Van Rensburg supra* n 3 at 447 F, 2 *LAWSA* Part 2 (2 ed) para 53.

[6]2 *LAWSA* Part 2 (2 ed) para 55.

[7]*National Bank of South Africa Ltd v Cohen's Trustee* 1911 AD 235.

[28] Until such time as the secured debt has been paid, only the cessionary has *locus standi* to enforce the ceded right.[8] While a cession *in securitatem debiti* is in force, only the cessionary may receive payment on the ceded claim.[9]

[29] However, by virtue of the reversionary interest, which is an interest in the debtor's satisfaction of the ceded claim,[10]the cedent also enjoys*locus standi* to protect his interest in the right by appropriate means, even if he cannot for the time being enforce the right.[11]

[30] During the currency of the cession *in securitatem debiti* the cessionary, like the pledgee, is under a duty to exercise due diligence with regard to the right and to protect the interests of the cedent, on pain of liability for damages sustained by the cedent should he fail to do so. He must deal with the ceded right as a *bonus paterfamilias.*[12]

[31] Against this backdrop, I turn now to deal with the three questions posed above.

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[8] *Bank of Lisbon and South Africa Ltd v The Master and Others* 1987 (1) SA 276 (AD) at 294 C; *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 (1) SA 77 (AD) at 87 G – H; *Development Bank of Southern Africa Ltd v Van Rensburg supra* n 3 at 447 J – 448 A.

[9] *National Bank of South Africa Limited v Cohen's Trusteesupra* n 7at p 251; *Trautman v Imperial Fire Insurance Co* (1895) 12 SC 38 at 41; *Barclays Bank (D, C & O) and another v Riverside Dried Fruit Co (Pty) Ltd* 1949 (1) SA 937 (C) at p 945.

[10] *Development Bank of Southern Africa Ltd v Van Rensburg supra* n 3 at 447 G.

[11] 2 *LAWSA* Part 2 (2 ed) para 55.

[12] *Priest v Logie's Estate* 1926 EDL 40 at p 43; *S A Breweries v Levin* 1935 AD 77 at p 84.

Was Retmil entitled to demand immediate payment of the proceeds of the policy in order to discharge the loan?

[32] I consider it important to distinguish between the right to receive payment of the proceeds and the right to appropriate the proceeds received, as opposed to preserving them intact.Retmil's case is based on the assumption that, on the death of the deceased, it became entitled not only to receive payment of the proceeds, but also to use the proceedsto settle the loan. In my view this assumption is flawed. The proceeds became payableon the death of the deceased, and Retmil, as cessionary, is the party entitled to receive such payment.[13]It does not follow, however,that Retmil is therefore alsoentitled, without more, to use the proceeds to discharge the loan prematurely.

[33] It is not in dispute that the Close Corporation is continuing to service the monthly instalments due under the loan, and that it is up to date with its payments, the last of which will fall due on 31 August 2014.Retmildid not allege in its papers that the Close Corporation has committed a breach of the loan resulting in acceleration of the indebtedness under the loan. It must therefore be accepted, for purposes of this application, that Retmil is not entitled to call up the full balance owing on the loan.[14]

[13]See note 9 *supra.*

[14]Counsel for Retmil contended belatedly that the default clause in the loan had been triggered due to the change in membership of the Close Corporation following the death of the deceased. That case was not, however, made out on the papers, and the argument cannot avail Retmil in the circumstances.

[34] The general rule is that a cessionary *in securitatem debiti* is only permitted to enforce the ceded claim if the debtor defaults in respect of the secured debt.[15]The question which arises, however, is what the rights of the cessionary are whenthere has been no default in respect of the secured debt, but the principal or ceded debt has fallen due for payment.

[35] Nienaber JA considered this very question in *Development Bank of Southern Africa Ltd v Van Rensburg*('Development Bank'), where he stated the following:[16]

> 'The … issue of when and to what extent a cessionary … will have a right to *collect* the debt, even if the cedent is not in default, is a factual and not a legal issue; it is governed by the terms, express and tacit, of the obligationary agreement between the cedent and the cessionary….
>
> Only the cessionary has the standing to enforce the principal debt and he may as a ruledo so … only if and when the cedent defaults on the secured debt. The primary purpose of the exercise, after all, is for the cession to serve as a form of collateral security: for the cessionary to retain, to restore and not to redeem the principal debt….
>
> Even so, there is a potential problem when the cedent is not in breach but the principal debtor is. So, too, when the principal debt falls due during the subsistence of the security and it becomes imperative for someone to take action, for instance to avert prescription.In those circumstances the terms of the obligationary

[15]*Freeman Cohen's Consolidated Ltd v General Mining and Finance Corp Ltd* 1906 TS 585 at 591; *Volhand and Molenaar (Pty) Ltd v Ruskin* 1959 (2) SA 751 (W) at 753 F and 754 E - F; *Land- en Landboubank van Suid-Afrika v Die Meester* 1991 (2) SA 761 (A) at 771 D – E; *P G Bison v The Master* 2000 (1) SA 859 (SCA) at 864; T J Scott and S Scott *Wille's Law of Mortgage and Pledge in South Africa* 3 ed p 151; Susan Scott *The Law of Cession* 2 ed p 241-242; 2 *LAWSA* Part 2 (2 ed) para 52.

[16]*Supra* n 3 at 447 B and 447 J – 448 E.

> agreement, express and tacit, will have to provide the answer whether it is permissible for the cessionary forthwith to institute proceedings against the debtor and thereafter to account to the cedent for the proceeds so recovered. It is accordingly not accurate to assert that, for as long as the cedent is not in default of his obligations towards the cessionary, the latter is invariably precluded from taking action pursuant to the cession.' (Emphasis added.)

[36] The papers before me are silent regarding the contents of the obligationary agreement between Retmil and the deceased. It seems that this agreement was likely tacitly concluded, as the only express reference to the cession is that found in the loan document,[17] where the cession is simply listed as one of the securities provided, and the cession itself, which was effected by way of a *pro forma* Sanlam cession document.

[37] I consider that, in order to make out a case for its alleged entitlement, on the death of the deceased, immediately to apply the proceeds todischarge the loan notwithstanding an absence of default on the part of the Close Corporation,it was incumbent upon Retmil to showthat it was authorised to do so, whether expressly or tacitly, in terms of the obligationary agreement which gave rise to the cession. This it has not done.Retmil has not alleged, much less proved, an express or tacit term entitling it to discharge the loan forthwith on the death of the deceased.

[38] I might add, *en passant*, that had Retmil relied on such a tacit term,I consider it unlikely that it would have succeeded.One can readily infer that the parties would

[17] Annexure B to the Founding Affidavit, Record p 31

have intended that Retmil should be entitled to do all things necessaryto preserve its security under the policy,[18] for the parties could not have intended that the security, and indeed an asset in the cedent's estate, should be lost due to failure to comply with any requirements laid down in the policy for due lodgement of a claim.It is also easy to envisage that they would have intended that Retmil should be entitled to receive payment of the proceeds and retain them in trust as security, to be returned, together with accrued interest,on the expiry and discharge of the loan, since this would be in keeping with the nature and purpose of a cession*in securitatem debiti*. It is more difficult to infer, however, that the parties would have agreed that Retmil should be entitled to use the proceeds for the immediate discharge of the loaninstead of allowing the loan to run for its full period, duly serviced by the Close Corporation. I consider it unlikely that the deceased would have consented to the forfeiture of an asset which would otherwise be returnable to the estate on discharge of the loan, for the benefit of the deceased's chosen heirs.It is significant, in this regard, that the loan did not contain a stipulation that the full balance owing under the loan would become due and payable immediately on the death of the deceased.

[39] Returning, then, to the distinction between the right to receive payment and the right to appropriate the proceeds, I consider that Retmil, as cessionary, is entitled to receive the full proceeds, subject to a duty to account and pay any surplus to the

[18] For instance, by notifying Sanlam timeously of the death of the deceased.

Executor.[19]It has the right to receive payment of the value of the policy, not to consent to a lesser payment.[20]And in the absence of any agreement authorising it to do so, Retmil would not be entitled to deal with the proceeds in any way.[21]It would, in my view, be obliged to hold the proceeds in trust as security for the due performance of the Close Corporation's obligations under the loan, and to return them, withaccrued interest,to the Executor on the expiry and discharge of the loan.[22] This caters for the interests of both the cessionary and the cedent, since the cessionary is fully secured while the cedent's asset remains intact.[23]

[40] It therefore follows, in my view, that Retmil was not entitled to demand immediate payment of the proceeds for the purposes of settling the loan.

Was Retmil entitled to accept Sanlam's offer of reduced payment on the policy?

[41] The cessionary must act as a *bonus paterfamilias*in relation to the ceded right. Until the secured debt falls due, he may not deal with the ceded right unless he is empowered - expressly or tacitly - to do so.[24]He may not, for instance, compromise

[19] See *Kuranda v Boustred* 1933 WLD 49 at 53; *Rixom v Mashonaland Building Loan and Agency Co Ltd* 1938 SR 207 at 213.

[20]*Infra*.

[21]*The Law of Cessionsupra* n 15 p 242; 2*LAWSA* Part 2 (2 ed) para 52.

[22]*Oertel N.O. v Brink* 1972 (3) SA 669 (WLD) at 675 A.

[23]See *Leyds N.O. v Noord-Westelike Ko□peratiewe Landboumaatskappy Bpk en andere* 1985 (2) 769 (A) at 780 F – G, where the Court recognized that the interests of the estate of the pledgor and his creditors should be protected as far as possible.

[24]See note 21*supra.*

or novate the claimor release the debtor.[25]Retmil has not shownthat it was authorised to deal with the policy before the loan fell due. I consider that it was not entitled, on that basis alone, to accepting Sanlam's offer of reduced payment on the policy. It was also precluded from doing so, in my view, by virtue of the fact that it failed to have due regard to the interests of the cedent.

[42] It is apposite to refer to the matter of *Vassen v Garrett,*[26]the facts whereof are similar to those in the present case. The cedent was indebted to the cessionary in terms of a mortgage loan and had ceded to the cessionary, as collateral security, the rights under an insurance policy over the mortgaged buildings. The buildings were destroyed in a fire, and the insurer offered the cessionary a reduced payment on the policy, which he accepted without any regard to the cedent. The Court found that the cessionary was not entitled to compromise with the insurer in disregard of the cedent's rights. Kotze JP made the following pertinent comments in this regard:[27]

> 'The pledgee cannot deal with the pledge or security in disregard of the pledgor's rights, and, if he does so, he will be liable for any loss which the pledgor may have sustained through his conduct. …
>
> When Ward *(the insurer's representative)* informed the defendant *(cessionary)* that he must either accept £150 as an act of grace, or he would receive nothing

[25]*Oertel N.O. v Brinksupra* n 22 at 675 G; *Vassen v Garrett* 1911 EDL 188 at 198; *Rixom v Mashonaland Building Loan and Agency Co Ltd supra*n 19 at 213; 2*LAWSA* Part 2 (2 ed) para 56, footnote 8; *The Law of Cessionsupra* n 15 p 242.

[26]*Supra* n 25.

[27] At 198 – 199.

> at all, the defendant's plain duty as holder of the security was to have informed the plaintiff *(cedent)*, and to have studied her interests as well as his own. Instead of communicating with her, the defendant wholly ignored her and herrights under the policy. He compromised with the company and accepted £150for a security worth *ex facie* £400, and he delivered up that security in order that it might be cancelled by the company upon the bare statement by Ward that there had been a material misdescription by the assured without reference to the plaintiff in the matter at all. This the defendant was not entitled to do. He acted in total disregard of the plaintiff's rights. Had he communicated with her, she might have taken steps to satisfy the defendant's claim in full, and so have protected herself by redeeming the policy and suing the company for the £400. The defendant's conduct therefore amounts to *culpa*, for which he is liable to the plaintiff, who, through his act, has entirely lost her rights under the policy.'

[43] In this case Retmil acted correctly by informing the Executor that Sanlam was offering a reduced payment on the policy. But instead of tendering to return the security to the Executor against payment only of the remaining balance of the loan, Retmil demanded that the Executor pay to it the full R 831 538.00 which Sanlam had offered in respect of the policy, notwithstanding that this amount substantially exceeded outstanding balance on the loan. In my view it was not entitled so to do.

[44] The cedent is entitled, at any time while the cession is in place, to redeem the asset by paying the cessionary the amount required to satisfy the secured debt.[28] The

[28] *Vassen v Garrett* 1911 *supra*n 25at 198; *Oertel N.O. v Brinksupra* n 22 at 675 A – C.

Executor, *qua*representative of the cedent, was therefore entitled to redeem the policy by paying only the outstanding balance on the loan, together with any outstanding interest and costs legitimately covered by terms of the loan. Retmil could not, in my view, hold the Executor to ransom by demanding, as a pre-condition for the release of the security, payment of a greater amount than that which was required to discharge the loan.Inso doing it effectively frustrated the cedent's right to redeem the security.

[45] Furthermore, Retmil failed, in my view, to afford the Executor a reasonable opportunity to peruse the cession, take advice and investigate the matter, before it went ahead and informed Sanlam that it was accepting the reduced offer of payment. No urgency or justification whatsoever was shown for the short period of time – a mere three days – afforded to the Executor to consider the position and act accordingly. To my mind this conduct shows a highhanded disregard for the rights of the cedent.

[46] In addition, it would appear that Retmil, assured of an amount sufficient to satisfy the loan, was content to compromise the claim on the strength merely of Sanlam's say-so, regardless of the cedent's interests and without giving the Executor a fair opportunity to take steps to protect those interests. This was not the conduct of a *bonus paterfamilias.*

[47] It follows that, in my view,Retmil was not entitledto accept Sanlam's offer of reduced payment on the policy.

Was the Executor entitled to enter into a dispute with Sanlam regarding the payment?

[48] Although the cedent in *securitatem debiti* has divested himself of the ceded right,he is not wholly divested of an interest in the asset, for he retains the so-called reversionary interest. Thereversionary interest forms part of the cedent's estate, has value,[29] and can be protected by legal means (such as an interdict) even although the cedent cannot for the time being enforce the ceded right.[30] As Nienaber JA observed in *Development Bank:*[31]

> 'It is that reversionary interest that vests in the cedent's trustee upon his insolvency, to be administered "in the interests of all the creditors and with due regard to the special position of the pledgee" …; that can itself be attached or ceded; that invests him with the *locus standi* to sue or be sued or apply for the debtor's sequestration; and may conceivably entitle the cedent, in an appropriate case and notwithstanding the cession, to perfect in order to protect the ceded security.'

[49] I consider that the Executor was entitled, and indeed duty bound, when faced with the prospect of a reduced payment on the policy, to intervene and protect the reversionary interest of the cedent by engaging with Sanlam in the internal payment review process.

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[29] *Incledon (Welkom) (Pty) Ltd v Qwaqwa Development Corporation Ltd* 1990 (4) SA 798 (A) at 804 J – 805 A

[30] 2 *LAWSA* Part 2 (2 ed) para 53.

[31] S*upra* n 3 at 447 G - H

[50] In my view there can be no prejudice to Retmil as a result of the Executor entering into negotiations with Sanlam, since his attempt to secure a higher paymentcan only serve to increase the value of the security.Nor can Retmil be prejudiced by deferral of payment on the policy for as long as the loan continues to be duly serviced by the Close Corporation.

[51] Retmil's argument that it is being prejudiced by the Executor's conduct appears to stem from its fear that, if he takes the payment on review, Sanlam will reject the claim on the policy entirely, as Momentum Insurance did in regard to another of the deceased's life policies, so that it will loose its security. It seems to me that these fears are unfounded in circumstances where the Executor has already successfully persuaded Sanlam to increase its offer on the policy. In any event, I consider that the deceased could not, by means of the cession, confer greater rights on Retmil than he himself enjoyed under the policy. If Sanlam is indeed justified in rejecting the claim on the policy by virtue of non-disclosure, it follows that the deceased enjoyed no rights under the policy and that Retmil acquired no rights under the cession in the first place.

[52] In my judgment, the Executor was fully justified in taking up the cudgels on behalf of the estate, and insisting on the deferral of payment on the policy until such time as the payment review process has run its course.

[53] There is an aspect which I should mention for the sake of completeness. During the hearing the question arose whether the Executor was entitled to claim and administer the proceeds of the policy on the basis of the decision in *National Bank of South Africa Ltd v Cohen's Trustee.*[32]In that case it was held that the trustee of an insolvent estate was entitled to claim and administer for the benefit of the estate, proceeds of a fire insurance policy which had been ceded as security for a debt, subject to the preferent claim of the cessionary.

[54] Now while the trustee of an insolvent estate and an executor of a deceased estate occupy a similar position in many respects, the essential difference between an insolvent and a deceased estate lies in the existence of a *concursus creditorum* in the case of the former. The decision in *National Bank v Cohen's Trustee*must be understood in the context of the common law rules relating to pledge and the special position which pertains on insolvency. Under the common law, a trustee of an insolvent estate may require that all pledges be delivered to him, subject to the pledgee's right of preference.[33] On death of a pledgor, on the other hand, his Executor must redeem the pledge.[34] There is no indication in this case that the deceased's estate is insolvent, and the rule in *National Bank v Cohen's Trustee* therefore does not, in my view, find application in this case.

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[32]*Supra* n 7.

[33]*National Bank of South Africa Ltd v Cohen's Trustee supra* n 7 at p 250.

[34]See *Katz and another v Gordon* 1958 (4) SA 213 (W) at 220 A – B.

Conclusion

[55] To sum up: I conclude, in all the circumstances and for the reasons given, that:

55.1 Retmil is not entitled to demand payment of the proceeds in the absence of default on the loan;

55.2 Retmil is not entitled to compromise the claim under the policy;

55.3 The Executor is entitled, by virtue of the reversionary interest in the policy which vests in the estate, to take appropriate steps to protect that interest by disputing the reduced offer of payment on the policy and engaging with Sanlam in the claims review process in an attempt to secure an increased offer of payment.

[56] It follows that, in my judgement, Retmil is not entitled to the relief sought.

[57] In the result the application is dismissed, with costs.

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D.M. DAVIS, AJ

Acting Judge of the High Court

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