REPORTABLE (105)

Judgment No. SC 123/02

Civil Appeal No. 293/00

THE LIQUIDATORS OF TIRZAH (PRIVATE) LIMITED, BELMONT LEATHER (PRIVATE) LIMITED, G & D SHOES (PRIVATE) LIMITED, P B SHOES (PRIVATE) LIMITED (all in liquidation) v

(1) MERCHANT BANK OF CENTRAL AFRICA LIMITED
(2) SYFRETS MERCHANT BANK LIMITED
(3) ZIMBABWE BANKING CORPORATION LIMITED

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, MALABA JA & GWAUNZA AJA
HARARE, SEPTEMBER 30, 2002 & MARCH 10, 2003

C W Jordaan SC, with him *E W Morris*, for the appellants

A P de Bourbon SC, for the respondents

ZIYAMBI JA: The appellants are liquidators of four companies ("the companies") which are part of a group of eight companies, the entire shareholding of which was owned by one man and his family.

In 1993 the companies, with the exception of PB Shoes (Private) Limited, in consideration of certain loans of monies advanced to them, ceded all their book debts to the first and second respondents ("Merchant Bank" and "Syfrets"). As security for the monies advanced to them two notarial deeds were executed.

In 1995 the same three companies, now joined by P B Shoes (Pvt) Ltd, ceded all their book debts to the three respondents ("the banks") in consideration for sums of

money lent to them and totalling 70 million dollars ("the capital debt").

The companies later went into liquidation and the appellants collected the debts covered by the cessions from the debtors and banked them. The respondents requested payment thereof in terms of the cessions but were met with resistance from the appellants. An application was therefore filed in the High Court by the respondents who sought a declaratory order as to the validity and enforceability of the cessions as well as an order for immediate payment to them by the appellants of the monies collected. A special order of costs was sought against the respondents for filing an affidavit which, it was alleged, contained argumentative and irrelevant material. The order for immediate payment was not persisted in at the trial and the High Court's judgment is concerned with the declaratory order as well as the question of costs.

The High Court found the cessions to be valid and enforceable and ordered the costs to be the costs in liquidation, declining to make a special order of costs against the respondents. The appellants now appeal to this Court against the whole judgment of the High Court.

Mr *Jordaan*, for the appellants, maintained in his argument before us that the deeds were invalid and therefore unenforceable. His argument went like this:

In the 1993 cessions, the same debts were ceded separately to Merchant Bank and Syfrets. This amounted to a splitting of the debts, which is not permissible in law without the consent of the debtors. The 1995 cession purported to

cede all the book debts of the companies, and that included the debts covered by the 1993 cessions. This amounted to a further splitting of the debts without the consent of the debtors. The appellants also took the view that the provision in the cession that the respondents should rank *pari passu* amounted to a splitting of the debts to various individuals, which was also impermissible in law without the consent of the debtors. The cessions were therefore invalid and therefore void *ab initio*.

The respondents, however, while not conceding that there was a splitting of the debts, contend that even if there was a splitting and such was impermissible at law, it would render the cession unenforceable as opposed to invalid in that the debtor could consent to it at a later date. Further, the debtors, having paid the debts, had waived their right to raise the question of the validity of the cessions and this could not now be raised by the appellants as representatives of the cedents against the respondents.

The 1993 cessions

These were made simultaneously and in separate documents to Merchant Bank and Syfrets. In each deed the "cedents … agreed to cede … by way of pledge up to the total amount secured by this Deed all their book debts which may hereafter be owing to them by their debtors".

It would appear, therefore, that the same debts were ceded separately to two different creditors. *Prima facie*, there was the possibility that the cessions could have resulted in the debtors' position being made more burdensome by being,

for example, faced with separate actions from the respondents and that the consent of the debtors to the cessions was therefore necessary. See *Mountain Lodge Hotel (1979) (Private) Limited v McLoughlin* 1983 (2) ZLR 238 (SC) at p 246C; *Anglo-African Shipping Co (Rhodesia) (Pvt) Ltd v Baddeley & Anor* 1977 (1) RLR 259.

However, I do not agree with the submission that such a possibility of prejudice to the debtors would, in the absence of consent to the cessions by the debtors, render the cessions void *ab initio*. Rather, I take the view that such a cession could, at the instance of the debtor who proves that he is prejudiced by the cession, be declared invalid and unenforceable. Thus the test is not the potential prejudice apparent at the time of grant of the cession but whether the cession does result in prejudice to the debtor. I find support for this view in the following passage from the *Anglo-African Shipping Co (Rhodesia) (Pvt) Ltd v Baddeley & Anor supra*. At pages 264H-265C, GOLDIN J (as he then was) remarked:

> "… whenever a cession of an entire debt does result in prejudice to the debtor the cession will not be effective. Where a creditor sues for a *pro rata* share of the debt only, or where under cession in *securitatem debiti* the cessionary only becomes entitled to enforce his security by the payment of portion of the debt ceded to him, this would amount to a splitting of a debt without the consent of a debtor and would be unenforceable. Any claim for a portion of the debt, even where the whole debt was ceded, would assume the character of and be subject to the rule governing a cession of part of a debt.
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> Any debtor whose entire indebtedness has been ceded to co-creditors jointly and severally without his consent is therefore always entitled to raise the question of prejudice of such a cession and may thereby render the cession invalid and unenforceable. (See and compare SCHREINER J in *Spies v Hansford and Hansford Ltd supra* at p 9 and CORBETT J in *Kotsopoulos v Bilardi, supra* at p 397)." (My emphasis)

A factor which militates against the contrary view advanced by the

appellants is that the debtors could, if they chose to, give their consent to the already effected cessions. See *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 at 827C where TROLLIP JA said:

> "Ordinarily, a creditor cannot divide and separate or split such a right of action or debt without the consent of the debtor (see *Spies v Hansford & Hansford Ltd* 1940 TPD 1; *Lief NO v Dettmann* 1964 (2) SA 252 (A) at 275 F-G). The reason is the possibility that it may render the debtor's position more burdensome by causing him prejudice, hardship, or inconvenience (see the *Spies* case at 8-9). In so far as (the) respondent's consent was required for what (the) appellant did, it is manifest that such consent was tacitly given. That is to be inferred from the following. At no stage did (the) respondent offer the slightest objection or opposition to such separation or splitting of the right of action or debt". (My emphasis).

See also *Twiggs v Millman NO & Anor* 1994 (1) SA 458(C) at p 462C-F.

The debtors have not raised the issue of invalidity but, on the contrary, have made payment of the debts and been discharged from liability. They can, in view of the payment of the debts without demur, be taken to have waived their right to contest the validity of the cessions. Their position has not been shown to be prejudiced by the cessions. It is therefore, in these circumstances, not open to the appellants to take the issue of invalidity for want of consent. Accordingly the cessions were correctly declared to be valid.

The 1995 cession

With regard to the 1995 cession, the learned judge found it to be a valid composite cession to "the banks". In that he was, in my view, correct. However, he was silent regarding the contention by the appellants (the respondents in the lower

court) that the debts ceded to the banks included those already ceded to Merchant Bank and Syfrets in 1993, and that accordingly the cession was invalid by virtue of the fact that there was a splitting which was impermissible at law without the debtors' consent.

Whether there is a splitting of a debt or debts is a fact which is to be ascertained by looking at the intention of the parties. See *Segal & Anor v Segal & Ors* 1977 (3) SA 247 (C) at p 252 G-H.

The respondents state it was never their intention to split the debts or to put any additional burden on the debtors. This would appear to find support in the fact that, in the 1995 cession, the cessionary is the group referred to as "the banks" and the capital debt is the total sum owing by the companies to the banks inclusive of the sums secured by the 1993 cessions. Further, it would appear to be the position that the debts which were the subject of the 1993 cessions were, so to speak, embodied in the composite cession of 1995 with the resultant effect that all the book debts of the companies were ceded to the banks. There was, therefore, no question of any prejudice to the debtors.

In any event, the debtors have discharged in full their liability in respect of the debts which were the subject of the cession. As in the case of the 1993 cessions, it is not now open to the appellants to raise the question of the invalidity of the cessions on the ground of prejudice to the debtors.

The appellants further contended, in the alternative, that the deeds were void for vagueness. They submitted that it is not clear from the wording of the cessions whether the deeds constitute an out-and-out cession or cessions of a pledge. In any event, they argued, the 1993 cessions exceed the authority given to the Appearer to effect the cessions. Both errors, they submitted, rendered the cessions void. The learned judge in the court *a quo* had this to say:

> "I accept that '(if) an agreement is couched in such wide terms that it is not clear that the parties intended a pledge or out and out security, the agreement should be regarded as void for vagueness'. Scott *The Law of Pledge* 2 ed p 252.

However, the following passage from the same learned author on the same page is of assistance in determining both points raised by the liquidators:

> 'It is not always easy to determine the intention of the parties. This is particularly so where the following words are encountered in a deed of cession: "I hereby cede, transfer, assign and pledge as continuing covering security all my right, title and interest in". In such an instance it is not possible to determine the intention of the parties from the cession itself and the transaction as a whole should therefore be scrutinised. The words "as security" indicate that the parties intend to effect a cession *in securitatem debiti* and not an ordinary cession, but from the rest of the words it is not clear whether they intended the cession to be in the nature of a pledge or an out and out security cession. … If the parties intended to effect an out and out cession, there are certain modifications which they will have to bring into effect by agreement. These are a *pactum fiduciae*, an agreement against further cession, and an agreement too that the cessionary himself will not institute action before the cedent's debt is due. If the parties use the words cede and pledge, but the above agreements are not included in their transaction, I think the inference may be drawn that they intended to create a pledge.'
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> Scott *supra* 252.

> In this case, it is clear that the companies intended to effect a cession of pledge only. The transaction as a whole shows, by inference, this to be the intention of the parties. The preamble to the deeds state this to be the intention. The deed do not contain a *pactum fiduciae*, an agreement that the cessionary will not institute action before the cedent's debt is due. The deeds are therefore not void for vagueness. What was intended and what may be inferred as having been effected is a cession of a pledge.

The rule, which enables one to find the parties' true intention from vague wording in a cession, can also be used to find that intention from contradictory wording in that cession. The statement by the declarer to the 1993 cessions that he was ceding all the companies' debts is contrary to his authorisation. It is also contrary to the expressed intention set out in the preamble. I do not think that that contradiction renders the cession void. The true intention of the parties can be gleaned from the surrounding circumstances. The resolutions of authorisation, the preambles to the deeds and the remainder of the deeds clearly indicate an intention to cede a pledge of book debts. What has occurred in the declaration of cession is an error by the draftsman of the cession and the declarer to it. Whatever might be the position in respect of an affected third party, as between the parties to the cession, the claim of the cessionary is restricted to that of a pledge of book debts."

The above accords with my own views on the matter. It is my conclusion, then, that the learned judge therefore correctly found the 1995 cession to be valid and enforceable.

The appellants argue that in any event the cedents had received no value from the respondents, the capital sum having been advanced to Tirzah which had no book debts. This argument has, in my view, no substance as in each of the deeds of cession the cedents acknowledged having received the money as a consideration for which the cession was given to the respondents and in each deed the liability of the cedents was expressed to be joint and several. The 1995 cession provided:

"AND THE APPEARER DECLARED THAT WHEREAS:

(a) The Cedents have been granted and may from time to time be granted certain banking facilities by … 'the Banks'."

The 1993 cessions contained similar clauses. (See pages 88, 12 and 50 of the record).

Finally, the appellants submitted that Syfrets and Zimbank have no *locus standi* to bring this application, as their rights under the deeds of cession were ceded, between September 1996 and 1997 (the exact dates are not clear from the copies of the deeds filed of record) to a company called Climax which was not a party to this application. They submitted that the re-cession by Climax to these two respondents, for the purposes of the court application, was invalid in that it was not accompanied by a re-cession of the securities which were ceded, by them, to Climax.

The learned judge found that even if this was the case, it did not affect the standing of Merchant Bank to bring the application, since it was the validity and enforceability of the cessions which were in issue – not who was to enforce them. In this regard, the trial court erred as it was called upon to declare that the cessions were not only valid and enforceable but enforceable "at the instance of the applicants".

I agree, that the issue of the cessions to Climax does not affect the question of the validity of the cessions, but for different reasons as will appear below. As to who may enforce the cessions, in the normal course of things it is the applicant who secures the order who is entitled to enforce it. In this case a departure from the norm has not been shown to be justified and, the deeds having been found to be valid, each of the respondents as joint cessionary is in a position to enforce the whole debt. See *Anglo African Shipping Company (Rhodesia) (Pvt) Ltd v Baddeley And Another*

supra at p 264A. See also *Kotsopoulos v Bilardi* 1970 (2) SA 391 at p 397 where CORBETT J (as he then was) stated as follows:

> "This being, in general, the character of a debt owed to co-creditors jointly and severally, there is much to be said for the view that the cession of a debt to two or more persons jointly and severally does not amount to a splitting of the debt and does not impose additional burdens or duties upon the debtor; and that, therefore it may be validly effected without the consent of the debtor. The only point which arises is whether each co-creditor is entitled to claim and sue for a *pro rata* share of the debt only, thus creating a multiplicity of claims and actions. It may well be that in such a case the Court would take the view that, inasmuch as each co-creditor was entitled to claim the whole debt, action to recover a mere *pro rata* share would amount to an improper splitting of a single claim and would disallow this procedure under its general power to prevent an abuse of the process of the Court …".

I now deal with the issue of the cessions to Climax. It raises the question whether Syfrets and Zimbank could lawfully cede their rights under the composite cession to Climax as they purported to do. One would have to look to the terms of the deed of cession and the surrounding circumstances in order to determine the intention of the parties and it seems to me, having regard to the terms of the 1995 deed of cession, that they could not do so. The debts were ceded to a group of cessionaries referred to as "the Banks". It is "the Banks" which alone were given the right, in terms of the deed of cession, to "cede, assign or make over to any person or persons … the whole or any part of its rights under this Deed". It is "the Banks" which alone were given the power to institute proceedings for the recovery of "any amount due under a debt ceded or to be ceded in terms hereof"; and, in my view, it is "the Banks" alone which could, in terms of the deed of cession, cede to Climax its rights under the Deed.

Indeed, Mr *Jordaan* submitted in his heads of argument (see para 37) that "cession by one of the co- creditors to a third party … [could] … only be effected with the consent of his co-creditors".

No such consent was obtained. Therefore, the cessions to Climax were invalid and unenforceable and did not affect the right of the banks to bring this application.

Costs

The question of costs is for the discretion of the trial judge. The learned judge gave reasons for the order which he made. The power of this Court to interfere is limited to a finding that there was an improper exercise by the trial judge of his discretion. This allegation was not made, nor is any impropriety apparent on the record. Accordingly, this Court is unable to interfere with the order of the court *a quo* as to costs.

In the result, the appeal is dismissed with costs.

MALABA JA: I agree.

GWAUNZA AJA: I agree.

Joel Pincus, Konson & Wolhuter, appellants' legal practitioners

Gill, Godlonton & Gerrans, respondents' legal practitioners