THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

CASE NO: 499/2000

In the matter between:

AUSSENKEHR FARMS (PTY) LTD Appellant

and

TRIO TRANSPORT CC Respondent

Before:	**SMALBERGER, MARAIS, NAVSA, MPATI JJA & LEWIS AJA**
Heard:	**7 MARCH 2002**
Delivered:	**28 MARCH 2002**
Summary:	**Termination of cession *in securitatem debiti*; *locus standi* of cedent to claim payment from debtor prior to termination; interruption of prescription.**

J U D G M E N T

LEWIS AJA

LEWIS AJA:

[1] The respondent, a transport contractor, instituted action in the Cape High Court against the appellant, a farming concern, for payment of the sum of R127 383 in terms of a contract for the transportation of fruit. For the sake of convenience I shall refer to the parties as the plaintiff and the defendant respectively. This appeal is against the decision of Foxcroft J, with his leave, that the defendant was bound to pay the amount claimed. The plaintiff's claim was for payment of fees for transporting consignments of grapes and other fruit from Namibia, and destined for export from South Africa to Europe. A number of issues, and a counterclaim for damages, were considered by the court *a quo*. During the course of the trial, however, the counterclaim was abandoned and the defendant admitted that it would have owed the transportation fees but for a new defence raised in a plea filed after the leading of evidence by the plaintiff. The defence was that the plaintiff, at the time of issue of the summons, had had no *locus standi* to sue since it had ceded its rights against its debtors *in securitatem*

debiti to ABSA Bank Ltd (the bank), and the cession was current at the time when action had been instituted.

[2] The existence of the cession had been brought to light in the course of the evidence of the plaintiff's chief witness, a Mr Mouton, and the defendant introduced a special plea alleging not only the absence of *locus standi*, but also prescription, in that the claim lay at the instance of the bank, but had become prescribed because more than three years had elapsed since the cause of action had arisen. It was not disputed that the cession had been current at the time of institution of action. It was alleged by the plaintiff, however, that the rights had been re-ceded to it subsequently. The defendant responded that even if the cession had subsequently been cancelled, or the rights of the bank re-ceded to the plaintiff, the claim had become prescribed.

[3] Foxcroft J found that the cession had been terminated shortly after the action had been instituted; that the claim had not prescribed; and that the plaintiff should succeed in its claim.

[4] The claim for payment had become due on about 6 February 1996. The cession to the bank had been effected on 4 September 1995. The plaintiff's action was instituted on 11 February 1997. The plaintiff alleged, and this was not in dispute, that the defendant had admitted liability both in February 1996 and in August of that year, when the defendant's representative had conceded liability to the plaintiff and had agreed to effect payment by no later than 4 October 1996.

[5] The special plea, filed by the defendant on 31 May 1999, relied on a number of provisions of the cession and was to the following effect:

(a) The plaintiff had no locus standi to institute the action because it had, on 4 September 1995, ceded to the bank its rights 'in en tot alle bedrae wat nou aan die sedent veskuldig is of van tyd tot tyd aan die sedent verskuldig mag word ongeag die oorsaak daarvan . . .' .

(b) Clause 4 of the cession provided that it was 'onherroeplik en sal van krag bly solank as die sedent geld aan die bank skuld en die sessie sal van krag wees as voortdurende en dekkende sekuritiet ten gunste van die bank totdat die sedent se huidige en toekomstige skulde aan die bank ten volle gedelg is'. The defendant averred that at the time when the action was instituted the plaintiff owed money to the bank.

(c) Clause 15 of the cession read: 'Geen wysiging van hierdie akte van sessie sal van enige krag wees tensy dit skriftelik geskied en onderteken word deur beide die sedent en die bank nie.' The

defendant alleged that there had not been any variation of the cession (which included, it argued, a re-cession), which complied with this provision. Any purported oral cession or waiver was similarly precluded by this term.

(d) Any claim of the bank for enforcement of the defendant's debt had prescribed in terms of section 11 (d) of the Prescription Act 68 of 1969 as at 6 February 1999. The bank was thus unable either to enforce the claim against the defendant or to re-cede it to the plaintiff.

[6] The plaintiff, rather than amending its summons, and by apparent agreement with the defendant, filed a replication dated 8 June 1999. It admitted the fact of the cession, and that at the time when it had instituted action it was indebted to the bank 'in respect of the debit balance on an overdrawn account'. The plaintiff conceded, moreover, that 'as a consequence of the aforesaid cession, plaintiff, having divested itself of its rights in respect of, *inter alia*, its book debts, no longer had *locus standi* to enforce such rights'. The plaintiff averred, however, that the bank had cancelled the cession on about 5 June 1997, and that all its former rights, including its claim against the defendant, had revested in it. Alternatively, it averred that had such cancellation and consequent revesting not occurred, there had been a re-cession of the rights by the bank to

the plaintiff in terms of a written agreement dated 3 June 1999, and which was attached to the replication.

[7] The plaintiff denied that the provisions of the deed of cession relied upon by the defendant in its plea precluded the cancellation or re-cession pleaded. Further, it contended that the defendant had in February 1996 acknowledged its indebtedness for the transportation of fruit by the plaintiff during 1995 and 1996, and had undertaken to pay the balance of what was owing by means of post-dated cheques, the last of which was payable on 30 June 1996. Four of the cheques had been dishonoured, and the plaintiff had, in August 1996, given the defendant a further extension of time to pay until 4 October 1996. Accordingly, the plaintiff averred, the running of prescription had been interrupted on a number of occasions during the period from February to October 1996, and the claim of the bank had not become prescribed before the re-cession to the plaintiff on 3 June 1999.

[8] After the filing of these further pleadings, the plaintiff led the evidence of the commercial manager of the Durbanville Branch of the bank, Mr André van Schoor. Van Schoor had been the credit manager of the branch in 1995. He had had extensive dealings with the plaintiff's representatives – he was involved, he said, with at least 90 per cent of their transactions with the bank. He testified that the overdraft facility of the plaintiff had increased significantly towards the end of 1996. The plaintiff had been advised to reduce the amount by which it was overdrawn, and in January 1997 a meeting had been held with representatives of both the bank and the plaintiff in this regard. He stated:

> 'In Januarie het ons met hulle ooreengekom dat hulle die debiteure sal vorder en dan die fasiliteit sal afkort. Ons het spesifiek vir hulle gesê dat hulle die debiteure moet vorder want in die verlede het ons al agtergekom sodra as die bank betrokke raak by die vordering van debiteure dat sekere debiteure dan net ophou betaal en dit is hoekom ons vir hulle gesê het om die debiteure te vorder en ons het dit gemonitor, soos hulle het elke dag vir ons lyste van die debiteure gegee met die bedrae wat inbetaal is en ons het dit afgemerk om die fasiliteit so af te bou na nul toe.'

Relying on this evidence, which was not gainsaid, Foxcroft J held that the bank had permitted the plaintiff to exercise the rights held by it by virtue of the

cession. The collection of the debts by the plaintiff had had the effect of reducing the overdraft such that a nil balance was achieved on 4 June 1997. At that stage, the learned judge said, 'the overdraft having disappeared, the cession disappeared with it'.

[9] Foxcroft J held, furthermore, that the existence of other debts owed by the plaintiff to the bank after that date was no bar to his conclusion. The cession had been intended to secure only the overdraft facility. This was certainly the uncontroverted evidence of Van Schoor, supported by that of Mouton for the plaintiff. Van Schoor testified that the purpose of the cession had been to secure 'die oortrokke fasiliteit en die kredietlyn'. When asked whether the cession had not also served as security for other obligations, Van Schoor responded that obligations in respect of vehicles were secured through the assets themselves. His view was that the cession was cancelled when the overdraft ceased to exist despite the existence of other amounts owed by the plaintiff to the bank. The

overdraft had been extinguished, he testified, on 4 June 1997, the first date on which there was no longer a debit balance on the account.

[10] When it was put to Mr van Schoor by Mr *Barnard*, for the defendant, that the cession could not have been cancelled at that stage because the plaintiff had also owed the bank money on a bond over immovable property, his response was similarly that the debt was secured by the property itself, which was valuable and easily realizable. The contention that the cession was framed also as covering security for future indebtedness was met with the same response: the bank had sufficient security in other forms to protect itself, and did not rely upon the cession. The cession was intended to cover only the overdraft and credit facility, and when that had terminated, the cession had been 'cancelled'. Van Schoor asserted that he had had the authority to cancel the cession, and had taken steps to do so. He testified that there had in fact been a formal cancellation on 5 June 1997. It subsequently came to light that he had been mistaken in this regard. A formal record of the termination of the cession (a form entitled 'Permanent

Withdrawal of Securities') was signed by Van Schoor only on 14 November 1997. But Van Schoor also said that the bank's computer system had not reflected the existence of the cession after June 1997, testimony that also was not controverted. Foxcroft J held that the later completion of the bank's formalities did not affect the legal position, since the cancellation had in fact taken place earlier.

[11] In so far as the status of the plaintiff was concerned in August 1996, when it granted an extension of time to pay to the defendant, the court *a quo* held that although the bank was the creditor (by virtue of the cession) the plaintiff had acted as agent for the bank. It had been dealing with the debtors itself since the bank (according to Van Schoor) did not involve itself in the collection of the debts. In *Pentz v Government of the Republic of South Africa* 1983 (3) SA 584 (A) at 594C-E Nicholas AJA held that section 14 (1) of the Prescription Act should be construed as meaning 'an acknowledgment to the creditor or his

agent'. The running of prescription was thus found to have been interrupted in August 1996.

[12] It is to be noted, however, that the plaintiff did not plead that at the time when the acknowledgment of debt had been made to it, it had been acting as agent for the bank. Mr *Barnard* submitted also that no evidence had been led to support the proposition that the plaintiff had attempted to claim payment on behalf of the bank. I shall deal with this argument later.

[13] Foxcroft J granted the plaintiff's claim on the basis that the cession to the bank had ceased to be in force in early June 1997, and that when the nature of the plaintiff's claim was changed (by virtue of the replication in June 1999) the claim had not yet prescribed.

[14] On appeal, Mr *Barnard* argued that the claim had indeed prescribed, submitting, first, that the plaintiff could not rely on any agency agreement either for the purpose of instituting the action or in order to assert that the prescription period had been interrupted.

[15] The principal difficulty with the argument that the plaintiff had been acting as the bank's agent in instituting action is that it had, in its replication, admitted that it had no *locus standi* to enforce the rights against the defendant at that time; and that it had nowhere pleaded that it had litigated on behalf of the bank. It had sued in its own name. Moreover, it appeared that the representatives of the plaintiff had overlooked the existence of the cession at that time and had not deliberately or consciously litigated as agent for the bank. Mr *Vivier*, for the plaintiff, did not pursue the argument that although the plaintiff had initially sued *qua* principal, when it discovered that the rights actually vested in the bank at the time of institution of action, its conduct had in some way subsequently been ratified by the true principal. It seems to me that the defendant's argument that the plaintiff had sued in its own name, on the incorrect assumption that the rights against the defendant vested in it, is correct. Accordingly, this aspect of the defendant's argument is well-founded.

[16] But the submission of the plaintiff, and indeed the finding of the court *a quo*, that the plaintiff had been acting in its capacity as the bank's agent in August 1996, when it gave the defendant an extension of time within which to pay its debt, is of a different order. The evidence of Van Schoor and Mouton was unequivocal in this regard. It was the practice of the bank to require their debtors, such as the plaintiff, to collect their own debts. They were actively encouraged to do so. I have already discussed the testimony of Van Schoor that the bank had instructed the plaintiff to proceed against its debtors. Although the meeting in January 1997 at which the bank's representatives had insisted that the plaintiff's overdraft be reduced, and that the plaintiff do this by way of proceeding against the debtors, and the defendant in particular, had followed the plaintiff's attempt in 1996 to obtain payment of its account by the defendant, there can be no doubt that it was acting even on the earlier occasions on behalf of the bank. Whatever moneys it collected from the defendant were required by the bank to be paid into the plaintiff's overdrawn account (see clause 2(b) of the deed

of cession, set out below). And the bank monitored on a regular basis the plaintiff's progress in respect of the collection of amounts owing.

[17] The conclusion that the plaintiff was acting as agent on behalf of the bank when attempting to claim payment from the defendant, and when affording the defendant an extension of time in which to make payment, is fortified in my view by the wording of clause 2 (b) of the deed of cession. It reads:

> 'Die sedent erken en onderneem ten gunste van die Bank:
> (a) . . .
> (b) Dat terwyl die sedent 'n bedrag aan die Bank veskuldig is, alle gelde wat die sedent na die datum hiervan mag invorder van die sedent se debiteure deur die sedent ingevorder en ontvang sal word as agente namens en ten behoewe van die Bank en die sedent onderneem, . . . om sodanige invordering en ontvangs van gelde van die sedent se debiteure te staak vanaf die datum waarop die Bank die sedent en/of die sedent se debiteure in kennis mag stel dat die Bank in die toekoms self die bedrae, deur die sedent se debiteure verskuldig en ingevolge hierdie sessie gesedeer, sal invorder.'

I consider, therefore, that the court *a quo* was correct in finding that when the defendant acknowledged to the plaintiff its indebtedness, and requested an extension of time for payment until October 1996, the running of prescription was interrupted.

[18] The question remains as to the basis on which the plaintiff could have acquired the right itself to enforce the action for payment against the defendant after 5 June 1997. Mr *Vivier* contended for two, alternative, bases. The first, in chronological sequence, is that when the plaintiff's overdraft was extinguished in June 1997, the cession terminated and rights against debtors revested in the plaintiff. The other is the purported re-cession of rights by the bank to the plaintiff on 3 June 1999, the record of which was attached to the replication. The effect of that is dependent on whether the cession had in any event ceased to exist in June 1997, in which case the re-cession was a nullity and does not fall to be considered further.

[19] Did the cession terminate when the overdraft was extinguished? The evidence of Van Schoor in this regard has already been discussed. It was the view of Van Schoor that as soon as the overdraft had been paid, he should cancel the cession. He maintained that he had taken the necessary steps to terminate it.

And it was on the basis of that cancellation that the court *a quo* held that the cession had come to an end and the rights ceded had revested in the plaintiff.

[20] The legal principles governing the termination by consent of a cession (and which would *a fortiori* govern a cession *in securitatem debiti*) are discussed in *Johnson v Incorporated General Insurances Ltd* 1983 (1) SA 318 (A) at 332. Joubert JA, relying on *Voet Commentarius* 18.4.16, stated that the parties can by agreement terminate a cession.

> '*Voet* verwys hier na 'n ontbindingsooreenkoms wat deur die sedent en die sessionaris ten aansien van die oordragsooreenkoms aangegaan word omdat hulle die wedersydse wilsooreenstemming van die oordragsooreenkoms wil terugtree (*resiliri*). Hulle bedoeling is onmiskenbaar om die oordragsooreenkoms ongedaan te maak met die bedoeling van die sessionaris om op te hou om reghebbende van die vorderingsreg te wees en met die bedoeling van die sedent om weer reghebbende van die vorderingsreg te wees. Die ontbindingsooreenkoms bring a *translatio* van die vorderingsreg mee en vervul derhalwe die funksie van 'n terugsessie.'

A formal act of re-cession is thus unnecessary. This conclusion follows logically, in any event, from the principle that a contract of cession has the effect not only of creating rights and obligations, but also of transferring rights from the cedent to the cessionary. If rights can be transferred by a cedent to a cessionary

by virtue of an agreement, which embodies an intention to transfer and to accept transfer respectively, then clearly they can be retransferred by virtue of an agreement to terminate the cession, which will in turn, necessarily, embody the intention to transfer the rights back to the cedent. Such an agreement may take any form: it might be concluded tacitly, by conduct or in writing. But there can be no reason why some additional act or formality is required for retransfer. See in this regard the discussion in *Standard General Insurance Co Ltd v SA Brake CC* 1995 (3) SA 806 (A) at 814I--815A.

[21] Mr *Barnard* submitted that there can be no unilateral cancellation of a cession, and, naturally, that the requisite retransfer cannot occur unless both parties intend that the rights formerly ceded should revest in the cedent. That must be so. But there was ample evidence that the bank and the plaintiff were agreed that the overdraft would be extinguished, and that the plaintiff would then once again possess all the rights that it had, prior to the cession, enjoyed against its debtors, including the right to sue them. Mouton testified that it was his

understanding that as soon as the overdraft was extinguished the cession would terminate: it was ‘per definisie ook gekanselleer’ when the overdraft facility was itself cancelled. Although Mouton was not aware of any formal steps taken to record the cancellation, he had certainly agreed that the cession would terminate at a particular point – when the plaintiff’s account ceased to have a debit balance. The cancellation was thus not unilateral: the bank and the plaintiff agreed on termination, and that agreement would by its nature have entailed the respective intentions to transfer and to accept transfer of the rights in question.

[22] Mr *Barnard* argued further, however, that this conclusion was in conflict with the provisions of the contract of cession itself. First, the cession was stated to be in respect of *all debts* owed to the bank by the plaintiff, both existing and future (clauses 1 and 4). The plaintiff had owed the bank various sums of money from time to time after the alleged re-cession. Secondly, any variation (including a re-cession, it was argued) was required to be in writing, signed on behalf of the bank and the cedent (clause 15).

[23] The first argument was met by Mr *Vivier* with the response that both the bank and the plaintiff had intended, no matter what the wording of the contract was, that the cession would constitute security only for the overdraft; and that once the overdraft had been extinguished, the cession, despite the existence of other debts, would be terminated. That submission is borne out by the evidence of Van Schoor and Mouton, discussed above. Where the parties to a contract are agreed on its meaning, is it open to a third party to contend for a different meaning even if that does accord with the apparent meaning of the written document reflecting the agreement? Similarly, as to the second argument, is it open to a third person to insist that a variation of a contract by the parties be in writing when the parties themselves are not relying on the provision in their contract requiring written variations?

[24] In answering these questions one must consider the purpose of the provisions at issue. Clearly all contractual terms are designed to govern the relationship between the parties themselves. The terms are included at their

instance and for their particular requirements. The term governing the nature and extent of the rights ceded to the bank ensures certainty, for the parties, in the event of a dispute as to whether a particular right is covered by the cession. A term prohibiting variation of a contract unless it takes a particular form likewise ensures that the written record of the parties' agreement governs their relationship, and accordingly affords certainty as to the terms of the contract.

[25] Where the parties dispute the meaning of a term then a court must necessarily look to the wording of the provision itself to determine its correct construction. But where they agree on its meaning, even though the provision appears objectively to reflect a different understanding, it would be absurd to insist on binding them to a term upon which neither agrees only because of a third party's insistence on reliance on the apparent meaning of the provision.

[26] Accordingly, in my view, it should not be open to the defendant to contend that although the parties intended the cession to constitute security only for the overdraft, it covered also all other debts owed or that might in future be

owed to the bank. And similarly, where the parties have agreed that the cession will be extinguished when the overdraft ceases to exist, it should not be open to the defendant to argue that the re-cession must be in writing in order for it to take effect. Thus even if the re-cession by the bank to the plaintiff in June 1997 did constitute a variation of the contract (a dubious proposition in itself, since the re-cession constitutes a termination of the relationship and not a change to contractual terms) if the parties were not contending that a written termination was needed, it was not open to the defendant to argue invalidity of the act.

[27] There might of course be situations where a third party has reasonably relied on the apparent terms of an agreement between others to his or her detriment, such that an estoppel could arise. But that is certainly not the case here, and no argument to this effect was or indeed could have been raised.

[28] In the circumstances I consider that the right to claim payment from the defendant became vested once again in the plaintiff when the cession was terminated on 4 June 1997. And when the replication to the new plea (in effect

embodying the plaintiff's amended claim) was filed by the plaintiff in June 1999, the prescriptive period had not yet run its course, prescription having been interrupted by the defendant's admission of liability and undertaking to pay made in August 1996 to the plaintiff.

[29] It follows that any purported re-cession in 1999 by the bank to the plaintiff was ineffective, and need not be considered.

[30] For these reasons the appeal is dismissed with costs.

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C H LEWIS
ACTING JUDGE OF APPEAL

SMALBERGER ADP)
NAVSA JA) CONCUR
MPATI JA)

MARAIS JA/

MARAIS JA: [1] With one reservation I concur in the judgment of my learned colleague Lewis AJA. In my view, it cannot safely be concluded that the plaintiff was in fact acting as the bank's agent when the acknowledgment of the debt and request for

an extension of time to pay it occurred. It was not pleaded to have been the case and consequently the issue was not pertinently canvassed in evidence. In my opinion, such evidence as there is on record points away from such a conclusion.

[2] The reasons given by Lewis AJA in paragraph 15 of her judgment for the conclusion that when plaintiff instituted action to recover the debt it was not acting as agent for the bank, seem to me to be no less applicable to the capacity in which the plaintiff was acting when the acknowledgment of liability and the request for an extension of time to pay occurred.

[3] There are other indications in the evidence that, despite the provisions of the agreement of cession, the plaintiff probably did not in fact act as the bank's agent in collecting and/or receiving payment of the ceded debts during the period under consideration. The proceeds of the debts so collected or received were not required by the bank to be paid into a separate account of the bank's where they would not be subject to immediate withdrawal by the plaintiff. They were deposited and permitted by the bank to be deposited in the plaintiff's own bank account and no embargo was placed upon the plaintiff immediately utilising those proceeds as it saw fit. That embargo on the plaintiff's freedom of action in regard to deposits and withdrawals from its own

account only came into being at the meeting in January 1997. In short, prior to that embargo, and with the concurrence of the bank, the plaintiff appears to have behaved in fact exactly as it had behaved before the cession. It collected the debts due to it in its own name, paid the cheques or money received into its own current bank account, drew further cheques on the bank account as it saw fit, and utilised the proceeds of the collected debts for its own purposes without demur from the bank. The debtors were unaware of the cession and did not regard the plaintiff as acting as agent for the bank when they paid their debts to the plaintiff.

[4] While it is of course possible in law to agree to constitute a cedent in a cession *in securitatem debiti* as the cessionary's agent to collect and receive payment of the ceded debts without having to advise the debtors that the cedent is acting in that capacity, it does not follow that what happens thereafter will always be, in fact, compatible with that agreement. If it is not, and is consistent only with the cedent having been allowed to carry on exactly as before by collecting and receiving payment of the ceded debts and utilising the monies so collected or received for its own purposes, it would have to be concluded either that the cession was a mere sham or, if it was not, that the cessionary had tacitly allowed the cedent to continue to collect and/or receive payments of the

debts in the cedent's own right and for the cedent's own use, until such time as the cessionary asserted or reasserted its right to collect the debts itself or to have the cessionary collect them as its agent. In law, allowing the cedent to behave in the manner I have described would amount to a tacit re-cession to the cedent by the cessionary of each of the debts so collected or received. That tacit re-cession to the cedent of the debts could of course be brought to an end by the cessionary at any time but, until that was done, the cedent would be acting in his, her or its own right and not as agent for the cessionary.

[5] It was for the plaintiff to plead and prove that prescription had been interrupted. In so far as it sought to do so by proving that it was acting as the bank's agent when the acknowledgment of debt and request for an extension of time occurred I do not think it has discharged that onus of proof on a balance of probability. In any event, not having pleaded that it was acting as the bank's agent, I cannot be sure that all the potentially available evidence relevant to that issue was placed before the court.

[6] However, this conclusion is not fatal to there having been an effective interruption of liability. It seems clear that in the case of a ceded debt there can be only one applicable period of prescription of that debt under the Prescription Act 68 of 1969.

That follows from the derivative character of a ceded debt. The debt owed to the cessionary is not a different debt from that owed to the cedent. It is the same debt.

[7] There cannot be one period of prescription for the cedent and a different period of prescription for the cessionary. The prescription commences to run against the debt on the day it becomes due. Unless delayed or interrupted it will continue to run until it has completed its course. And it will do that whether the debt is in the hands of the cedent or the cessionary. But of course effective suspensions or interruptions of prescription which may occur will travel, so to speak, with the debt. An effective interruption or suspension which occurred prior to a cession will inure to the benefit of the cedent if the cedent should subsequently become revested with the right to payment of the debt.

[8] The question which arises in the case of a ceded debt (whether outright or *in securitatem debiti)* is to whom must an acknowledgment of liability be made in order to bring about an effective interruption of prescription? Because of the distinctive and unique character of a ceded debt there seems to me to be much to be said for the view

(at least in a case where the debtor has no knowledge of the cession) that an admission of liability made to the cedent should be regarded as sufficient in law to interrupt the running of prescription. Payment made by the debtor to the cedent in such circumstances will discharge the debt even although the right to claim the debt is no longer vested in the cedent. If the unilateral dealings of the debtor with the cedent can and do in law redound to the prejudice of the cessionary, why should the law balk at allowing the debtor's dealings with the cedent to inure to the benefit of the cessionary? Why should an acknowledgement of debt made to the cedent in the belief that the cedent is the creditor be regarded as devoid of any effect in law upon the debt or the running of prescription against the debt? The situation is very different from one in which the admission of liability is made to a third party who has no connection, factual or jural, with the debt. I leave these questions for future consideration as they were not fully argued and, for the reasons which follow, it is unnecessary to resolve them in this case.

[9]The defendant, in my opinion, is on the horns of a dilemma. On the facts of this case, when the acknowledgment of debt and the request for time to pay was

made, the plaintiff could only have been acting in one or other of two capacities: either as agent for the bank or in its own right by virtue of the freedom of action which the bank had allowed it to have at that time in collecting and receiving payment of the debts. Whether subjectively or objectively regarded, there is no other conceivable capacity in which the plaintiff could have been acting for there is no other basis in law which would have empowered it to claim and receive payment of the debt. Counsel for the defendant was constrained to concede that, on the facts of this case, he could not conceive of any. In whichever of those two capacities the plaintiff was acting at the time or, perhaps more accurately, in whichever of those two capacities it would have to be taken in law to have been acting, the acknowledgment of liability and the request for time to pay made to it would have effectively interrupted the running of prescription.

[10]The further notional possibility, namely, that the plaintiff, knowing that it was in fact not entitled to do so in its own right, nevertheless decided to chance its arm and collect the debts without having any justification in law for doing so,

does not arise on the facts of the case. Nor does the notional possibility of a bona fide but mistaken belief that, despite the cession, it continued to be entitled to collect the debts in its own right even without the concurrence of the bank. It is common cause that the plaintiff's collection and receipt of payment of the debts prior to the meeting in January 1997 took place with the knowledge and consent of the bank. I agree therefore with the order made by my colleague Lewis AJA.

R M MARAIS

JUDGE OF APPEAL