

67/95

Sack no. 459/93

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between

COOPERS & LYBRAND

First Appellant

COOPERS THERON DU TOIT

Second Appellant

COOPERS & LYBRAND SERVICES (PTY) LTD

Third Appellant

and

ROLF ANTHONY BRYANT

Respondent

Coram: JOUBERT, EM GROSSKOPF, STEYN, NIENABER et

HOWIE JJA

Heard: 15 May 1995

Delivered: 30 May 1995

JUDGMENT

JOUBERT JA:

This is an appeal against the judgment of LUDORF J in the East

London Circuit Court dismissing with costs a special plea by the appellants to

the respondent's particulars of claim. Leave to appeal was granted to the appellants by the Court a quo. The appeal is prosecuted by the first appellant ("Coopers & Lybrand") while the second and third appellants abide the decision of this Court.

On 20 December 1991 the respondent ("Mr Bryant") sued the appellants, a firm of chartered accountants and auditors, for damages arising from the breach by them of a verbal agreement he had concluded with them on 20 February 1989 (alternatively, negligent misrepresentation) to advise him whether or not his proposed business involvement with Henry Phillip Wholesalers CC (trading as Henco) was financially sound. He contended that he acted to his detriment by accepting and acting on their professional advice which negligently confirmed the soundness and viability of the proposition. It was common cause that Mr Bryant was a businessman.

On 16 October 1992 the appellants raised a special plea to Mr Bryant's particulars of claim, viz. that his claim against the appellants was subject to the terms of a deed of cession, dated 16 April 1985, between him and the Standard Bank of South Africa Ltd ("the Bank") in consequence of which he had

divested himself of locus standi to institute the present action.

In his amended replication to the special plea Mr Bryant stated inter alia that upon a proper construction of the deed of cession only debts relating to the trading business styled Bryant's and run by him in East London were subject to its terms and that the said business was the only trading business operated by him at the time.

The printed deed of cession, as completed on 16 April 1985, read as follows:

"The Standard Bank of South Africa Limited.

Cession of Book Debts

Deed of Cession

In consideration of The Standard Bank of South Africa Limited (hereinafter with its successors or assigns referred to as 'the Bank') allowing me/us/the Company hereinafter mentioned such banking facilities as the Bank may in its sole discretion deem fit (either by way of the continuation of any existing facilities and/or providing new or further facilities), and/or as security for guarantees already given or to be given to the Bank by me/us/the Company subject to the conditions hereinafter mentioned. I/we, the undersigned, ROLF ANTHONY BRYANT

do here pledge, cede, assign and transfer unto and in favour of the Bank all my/our/the Company's right, title and interest in and to all book debts, and other debts, and claims of whatsoever nature, present and future, due and to become due to me/us/the Company and to all rights of action arising

thereunder, as a continuing covering security for all sums of money which I/we/the Company may now or at any time hereafter owe or be indebted to the Bank, notwithstanding any temporary extinction of such indebtedness, or extinction of any indebtedness in terms of the Limitation and Disclosure of Finance Charges Amendment Act No 90 of 1980, or otherwise, and whether such indebtedness be incurred by me/us/the Company in my/our/the Company's name or in the name of any firm in which I/we/the Company may be trading and either solely or jointly with others in partnership or otherwise, and whether such indebtedness arise from money already advanced or hereafter to be advanced or from Promissory Notes or Bills of Exchange already or hereafter to be made, accepted or endorsed, guarantees given or to be given by me/us/the Company to the Bank on behalf of third parties, or guarantees given or to be given by the Bank on my/our/the Company's behalf and whether such liability be indirect or contingent or otherwise howsoever, including interest, discount, commission, law costs, stamps and all other necessary or usual charges and expenses.

I/We/The Company hereby warrant(s) and represent(s) that I/we/the Company have/has not prior to this Cession ceded the claims and rights hereby ceded to any other person or concern; but if it should so happen that I/we/ the Company, in breach of this warranty and representation have/has done so, then this Cession shall operate as a pledge and cession of my/our/the Company's reversionary rights, including all my/our/the Company's rights of action whatsoever against the prior cessionary, pledgee or other holder of such claim or claims for the time being, upon all the same terms and conditions as those herein contained, *mutatis mutandis*; and as a pledge and cession of all my/our/the Company's remaining right, title and interest in and to the claims ceded by such prior cession, which pledge and cession is to come into effect as a direct cession of the claims in question or the residue thereof and of all claims and rights thereafter arising, as the case may be, upon the prior cession ceasing to exist.

It is further agreed that it shall always be in the discretion of the Bank as to the extent, nature and duration of the facilities to be allowed to me/us/the Company, and that the security afforded by this cession shall not be in

substitution for but shall be in addition and without prejudice to any other security which the Bank may now or in the future hold.

I/We/The Company hereby undertake(s), whenever called upon by the Bank to do so, to furnish it with a statement certified by my/our/ the Company's bookkeepers or auditors, setting out in detail the total amount of the said debts together with the names and addresses of the debtors and the amount due by each debtor. The Bank shall further have the right through either its proper officers or duly appointed agents at all reasonable times to inspect all my/our/the Company's relevant records.

It is further agreed that the Bank shall be entitled, and it is hereby specifically authorised and empowered, to take possession and control of my/our/the Company's records, accounts and books at any time should the Bank deem in its interest to do so, and I/we/the Company agree(s) to produce such records, accounts and books to the Bank or in any Court of law when called upon by the Bank to do so. I/We/The Company also agree(s) to hand to the Bank all promissory notes, bills of exchange and other negotiable instruments as well as all other documents recording or evidencing any debt due or to become due to me/us/the Company as soon as any such promissory note, bill of exchange, negotiable instrument, document or other evidence is received by me/us/the Company.

As from the date hereof the Bank shall at all times have the right by itself or by its nominees or agents to collect all sums of money due or to become due to me/us/ the Company in respect of the said debts, and the Bank's right to give notice of his Cession to any of the debtors and to draw bills of exchange on or obtain promissory notes from any of the debtors, hereby recognised and it is agreed that the exercise of any such rights shall not be construed as relieving me/us/ the Company from any liability to the Bank and shall not prejudice the Bank's claim against me/us/the Company.

It is further agreed that in the meantime until notice to the contrary is given by the Bank, I/we/the Company shall act as the Bank's agent in the collection of all moneys due or to become due to me/us/ the Company and that all such moneys shall be paid to the Bank and shall, if so required by the Bank, be deposited in a special banking account in the name of the Bank, over which

the Bank shall have sole control.

I/We/The Company hereby nominate(s), constitute(s) and appoint(s) any General Manager or Assistant General Manager for the time being or any Branch or Acting Branch Manager of the Bank as my/our/the Company's true and lawful attorney and agent irrevocably and in rem suam, with power of substitution, to exercise all the rights of action and powers and right accruing to me/us/the Company for the purpose of calling up and collecting all the said debts (the right to collect which shall vest in the Bank on the signing hereof) and to institute whatsoever legal proceedings the Bank may consider necessary and to prove any claim in any insolvent estate, and generally to do all that may be requisite and necessary just as if I/we/the Company were acting therein, and in particular to recover all moneys and rights due to me/us/the Company in respect of the said debts and to grant valid receipts and acquittances therefor in my/our/the Company's name, provided, however, that it shall always be lawful for the Bank either before, during or after the collection of the said debts to sue me/us/the Company for the recovery of all moneys due by me/us/the Company to the Bank and to obtain judgment against me/us/ the Company and to attach any other of my/our/the Company's property and to sell it in execution in satisfaction of such judgment.

I/We/The Company shall be liable and shall reimburse the Bank for all costs, including attorney and client costs, incurred by the Bank in the collection of any such debts, and I/we/the Company further absolve(s) and hold(s) the Bank blameless for any loss or damage sustained in or by reason of the collection of the said debts, or the Bank's failure or omission to collect any of the said debts.

I/We/The Company further authorise(s) the Bank to retain all moneys owing to me/us/the Company by the Bank in any deposit or other account at any Branch of the Bank, and at any time without prior notice to me/us/the Company by the Bank in any deposit or other account at any Branch of the Bank, and at any time without prior notice to me/us/the Company to set off and apply such moneys or any portion thereof towards payment of any amount which I/we/the Company may now or hereafter be indebted in to the Bank.

I/We/The Company further agree(s) that the amount of my/our/the

Company's indebtedness to the Bank at any time (including interest and the rate of interest) shall be determined and proved by a certificate signed by any Manager or Accountant of the Bank.

It shall not be necessary to prove the appointment of the person signing any such certificate, and such certificate shall be binding on me/us/the Company and shall be conclusive proof of the amount of my/our/the Company's indebtedness and shall be valid as a liquid document against me/us/the Company in any competent Court for the purpose of obtaining provisional sentence or summary judgment against me/us/the Company thereon.

At the option of the Bank any claim arising hereunder may be recovered in any Magistrate's Court having jurisdiction notwithstanding that the amount of the claim may exceed the jurisdiction of the Magistrate's Court to which jurisdiction I/we/the Company hereby consent(s).

I/We/The Company hereby choose(s) domicilium citandi et executandi at 10 Gladstone Street, East London and agree(s) that all notices posted to me/us/ the company by registered post at that address shall be deemed to have been received by me/us/the Company within 2 days after the posting of any such notice

Signed [for and on behalf of the Company] at East London on the 16 day of April 1985"

(Signed by Mr Bryant and two witnesses)

(My underlining)

The words between square brackets were not deleted and initialled by Mr Bryant as he should have done since he did not act on behalf of a company. He did, however, delete and initial the word "Director" below his signature.

The above deed of cession is in securitatem debiti to provide the Bank as cessionary with continuing security for allowing Mr Bryant as cedent banking facilities. As consideration for all sums of money which he owed or may owe the Bank he undertook to cede, pledge or transfer to the Bank all his

"right title and interest in and to all books debts and other debts and claims of whatsoever nature, present and future, due and to become due to me and to all rights of action arising thereunder"

The issue in the present matter is whether the terms of the cession are broad enough to encompass the claim of Mr Bryant against the appellants.

Mr Loxton on behalf of the appellants contended that the plain, ordinary and popular meaning of the words "and other debts and claims of whatsoever nature" were not capable of being restricted to book debts. These words were unambiguous and were intended to give wider security than mere book debts. The clear intention of the parties was to cover all debts of whatsoever nature, including book debts. Such literal construction of the cession would not lead to any absurdity, nor would it be contrary to the expressed intention of the parties.

Mr Wise on behalf of Mr Bryant argued that on a proper interpretation of the cession it did not in its terms include the claim of Mr Bryant against the appellants. The intention of the parties was that the words "and other debts and claims of whatsoever nature", like the book debts, should relate to the trading

business of Mr Bryant whereas the claim against the appellants did not.

The matter is essentially one of interpretation. I proceed to ascertain the common intention of the parties from the language used in the instrument. Various canons of construction are available to ascertain their common intention at the time of concluding the cession. According to the 'golden rule' of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument. Principal Immigration Officer v Hawabu and Another 1936 A D 26 at p 31, Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd 1934 AD 458 at p 465-466, Kalil v Standard Bank of South Africa Ltd 1967 (4) SA 550 (A) at p 556 D. As regards the ordinary grammatical meaning of the word "book debt" see the Oxford English Dictionary, 2nd ed., vol 2 s.v. Book, 19 Special combinations: "book-debt, an amount debited to a person's account, a debt owing to a tradesman as recorded in his account-books." In England it has been held judicially that while book debts are connected with the trade of a tradesman it is not necessary for them to be entered in the account-books of the

business. See Paul & Frank Ltd and Another v Discount Bank (Overseas) Ltd and Another [1966] 2 All E.R. 922 [ChD]; Stroud's Judicial Dictionary, 5th ed, vol 1 p 291 s.v. Book debts and Words and Phrases legally defined, Butterworths, 3rd ed, vol 1 s.v. Book Debts, Field NO v Standard Bank Ltd 1979 (4) SA 452 (ZR) at p 456 H.

The mode of construction should never be to interpret the particular word or phrase in isolation (in vacuo) by itself. See Swart en 'n Ander v Cape Fabrix (Pty) Ltd 1979 (1) SA 195 (A) at p 202 C (per RUMPF C):

"Wat natuurlik aanvaar moet word, is dat, wanneer die betekenis van woorde in 'n kontrak bepaal moet word, die woorde onmoontlik uitgeknipt en op 'n skoon stuk papier geplak kan word en dan beoordeel moet word om die betekenis daarvan te bepaal. Dit is vir my vanselfsprekend dat 'n mens na die betrokke woorde moet kyk met inagneming van die aard en opset van die kontrak, en ook na die samehang van die woorde in die kontrak as geheel."

The correct approach to the application of the 'golden rule' of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:

- 1 to ~~the~~ context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the

contract, as stated by RUMPFF CJ supra:

- 2 to the background circumstances which explain the genesis and purpose of the contract i.e. to matters probably present to the minds of the parties when they contracted. Delmas Milling Co Ltd v Du Plessis 1955 (3) SA 447 (A) at p 454 G-H, Van Rensburg en Andere v Taute en Andere 1975 (1) SA 279 (A) at p 305 C-E, Swart's case (supra) at pp 200 E - 201 A, 202 C, Shoprite Checkers Ltd v Blue Route Property Managers (Pty) Ltd 1994 (2) SA 172 (C) at p 180 I-J;
- 3 to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document save direct evidence of their own intentions. Delmas Milling case at p 455 A-C, Van Rensburg's case at p 303 A-C, Swart's case at p 201 B, Total South Africa (Pty) Ltd v Bekker NO 1992 (1) SA 617 (A) at p 624 G, Pritchard Properties (Pty) Ltd v Koulis 1986 (2) SA 1 (A) at p 10 C-D.

As I indicated supra, the parties entered into the deed of cession in securitatem debiti to provide the Bank with continuing security for allowing Mr Bryant banking facilities. For purposes of background circumstances it is common cause that Mr Bryant had two separate banking accounts at the Bank, viz a personal or private account for his personal affairs as well as a business account for his trading business which was a one-man business. It was also common cause as background circumstances that Mr Bryant on 4 April 1985 requested the Bank for an increase of his business account's overdraft facilities in an amount of R60 000.

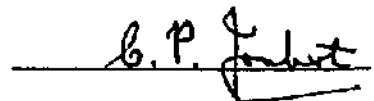
In the deed of cession the expression "book debts" unquestionably referred to his trading debts. Expressions such as "trading", "records", "accounts", "books" and "in the name of the firm in which I may be trading" in the context of the operative part of the deed of cession were obviously intended by the parties to refer to the trading business. There is nothing in the said deed to indicate that the parties intended to provide security to the Bank for Mr Bryant's personal affairs i.e. for his private account. This may be illustrated by means of a few examples such as personal claims of Mr Bryant

based on a marriage settlement, a claim to recover a legacy under a will, a vindictory action to recover his private assets etc. Personal claims of Mr Bryant were never intended by the parties to be included under the phrase "and other debts and claims of whatsoever nature" in the said deed. This was correctly conceded by Mr Loxton. To what debts did the said phrase refer? From the nature and purpose of the said cession including its context as a whole, the intention of the parties was that it was intended to relate to business debts including claims other than book debts. The present claim of Mr Bryant against the appellants is clearly a personal claim which is unrelated to his trading debts. I accordingly find the argument of Mr Loxton that the phrase in question was intended by the parties to include Mr Bryant's claim against the appellants untenable. In my judgment on a proper construction of the deed of cession its terms are not wide enough to include the private claim of Mr Bryant against the appellants. The cession accordingly did not divest Mr Bryant of his private claim against the appellants.

In view of the conclusion to which I have arrived at in regard to the the construction of the deed of cession it is not necessary to deal with the conduct

of the parties subsequent to 16 April 1985 or other extrinsic evidence relating to surrounding circumstances.

In the result the appeal is dismissed with costs which include the costs of two counsel.


C.P. JOUBERT
JUDGE OF APPEAL

CONCUR

E M GROSSKOPF JA

STEYN JA

NIENABER JA

HOWIE JA