

**IN THE HIGH COURT OF SOUTH AFRICA**  
**(TRANVAAL PROVINCIAL DIVISION)**

In the matter between

Case number 3038012003

<b>CONSOLIDATED NEWS AGENCIES (PTY) LTD (in liquidation)</b>	1 <sup>st</sup> Applicant
<b>JLC FOURIE N.O</b>	2 <sup>nd</sup> Applicant
<b>JE KLOPPER N.O</b>	3 <sup>rd</sup> Applicant
<b>K KEEVY N.O</b>	4 <sup>th</sup> Applicant
<b>J DAMONS N.O</b>	5 <sup>th</sup> Applicant

and

<b>ABSA BANK LTD</b>	1 <sup>st</sup> Respondent
<b>CENTRAL NEWS AGENCY (PTY) LTD (in liquidation)</b>	2 <sup>nd</sup> Respondent
<b>S ANTICEVICH N.O</b>	3 <sup>rd</sup> Respondent.
<b>PB MOKWENA N.O</b>	4 <sup>th</sup> Respondent
<b>A MOOSA N.O</b>	5 <sup>th</sup> Respondent
<b>CONSOLIDATED NEWS AGENCIES HOLDINGS (PTY) LTD</b>	6 <sup>th</sup> Respondent
<b>THE MASTER OF THE HIGH COURT PRETORIA</b>	7 <sup>th</sup> Respondent
<b>THOMPSON WILKES</b>	8 <sup>th</sup> Respondent

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**JUDGMENT**

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HARTZENBERG J:

[1] The question to be decided in this matter is whether the cedent of a claim, ceded *in securitatem debiti*, retained a reversionary interest in it, after cession thereof to the cessionary, and if so, whether upon the liquidation of the cedent, its liquidators became entitled to recover and administer the claim. The application arises from the financial collapse of the CNA stores that occurred in July 2003. Apart from the obvious financial interest of the liquidators of the cedent company, in the liquidation and

administration of a R133 million claim, it is not clear to me what the outcome of an order, as prayed for by the applicants, will be on creditors and more in particular on the first respondent. I accept that it will be to ABSA's disadvantage and will benefit other creditors.

[2] Although there are five applicants and eight respondents the parties whose interests are at stake are Consolidated News Agencies (Pty) Ltd ("Consolidated" or "the cedent"), ABSA Bank Ltd, (ABSA), Central News Agency (Pty) Ltd. (in liquidation) ("Central" or "the debtor") and Consolidated News Agency Holdings (Pty) Ltd ("Holdings" or "the cessionary"). There are so many applicants and respondents because both Consolidated and Central have been liquidated, on respectively 27 July 2003 and 1 August 2003, and their liquidators have been cited as parties to the application.

[3] On 23 May 2001 Holdings and Central bound themselves as sureties and co-principal debtors to ABSA for all their present and future debts. They ceded all their existing and future claims, including claims from loan accounts to ABSA *in securitatem debiti*. On 8 November 2001 Consolidated sold its 61 top stores to Central for an amount of some R177-million by way of a book entry. In terms of an agreement between Central, Consolidated and Holdings, dated 16 April 2002, Consolidated ceded its claim against Central to Holdings *in securitatem debiti*. In a subsequent document, bearing the heading "Cross Suretyship" dated 11 July 2002, Central and Holdings again bound themselves as Sureties and co-principal debtors to ABSA for each other's debts. Clause 4

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"The cession reads as follows: "As security for the fulfillment of the Sureties obligations in terms of this Suretyship, the Sureties hereby cede to the Creditor all claims; including claims arising from loan accounts, which the Sureties have or hereafter may have against the Debtors. If any such rights or claims have already been ceded to a third party, this cession shall be a cession of the Sureties reversionary rights in and to such claims. For this purpose the sureties hereby authorise the Creditor, in the event of being in default with their obligations to the Creditor in terms hereof, to take all and any action which the Creditor may deem necessary and the Sureties undertake to take all steps necessary and to deliver all documents evidencing such claims to the Creditor"

of the document records a cession *in securitatem debiti*. The only difference, apart from a slightly different wording that needs no further mention, between this cession and the cession contained in the May 2001 Suretyship is that in the latter there is specific reference to "claims arising from loan accounts". That difference is also of no moment for the purposes of the decision in this matter. Also on 11 July 2002 Holdings gave a general cession to ABSA "in and to any claims evidenced by any document listed in the attached schedule'. The schedule refers to 50% of Holdings' loan account in Central. It has likewise nothing to do with Consolidated's loan account in Central.

[4] When Consolidated was liquidated it owed an amount of ± R995 million to its holding company, Holdings. The claim was unsecured. After the liquidation of Central ABSA submitted a claim of R133-million to the liquidators of Central. It was claimed as the balance of the purchase price of 61 "Top Stores" owing to Consolidated by Central, ceded by Consolidated to Holdings and Ceded by Holdings and Consolidated to ABSA. Consolidated and Holdings also proved claims for the same R133 million. The Joint Liquidators of Central submitted a memorandum to the Master. The history of the sale of the 61 Top Stores was set out. They referred to the cession by Consolidated to Holdings of 16 April 2002. They also referred to the cross-suretyship and the cession by Central and Holdings contained therein and stated that the effect thereof was:

1. That Consolidated ceded the Consolidated loan to Holdings;
2. That thereafter Holdings ceded the Consolidated loan to ABSA; and
3. That Holdings has a reversionary right, should the ABSA claim be settled, in and to the Consolidated loan.

[5] It was, further stated in the said memorandum that claims for the same amount were proved by Consolidated, Holdings and ABSA. It was stated that as Consolidated had ceded its claim to Holdings it was not entitled to claim the amount from Central. The Master was requested to disallow that claim. In respect of Holdings' claim it was stated that as Holdings had ceded the claim to ABSA it did not have a claim against Central and the Master was likewise requested to disallow the claim. In respect of the ABSA claim it was stated that the claim was based on the cession by Holdings to ABSA and that it accordingly vests in ABSA. The Master allowed the ABSA claim and expunged the claims of Consolidated and Holdings.

[6] Consolidated brought an application in this court against the Master and the Liquidators of Central to review and set aside the decision of the Master. It is contended that the decision was made in a manner that was procedurally unfair in that the Master did not allow *audi alteram partem*. By agreement between the parties the review application has been stayed, pending the outcome of this matter.

[7] Consolidated prays for the following declaratory orders: 1. That the ownership of the claim vests in it. 2. That ABSA is a creditor of Central. 3. That ABSA is not entitled to be paid a dividend by Central or its liquidators. 4. That the liquidators of Central are to reflect ABSA, as a creditor of Consolidated, for the amount of the claim, in Central's Distribution and Liquidation account and to expunge ABSA as the creditor entitled thereto.

[8] ABSA has raised five points *in limine*. I shall deal with them *seriatim*. The first point is that Consolidated has no authority to bring this application. It is pointed out that the creditors of Consolidated resolved on 10 April 2003 that "all....claims.... which the liquidators may wish to proceed with shall be subject to directions to be given to them at a further statutory meeting of creditors. Until such directions have been given, no litigation shall be proceeded with". Although the liquidators attempted at a meeting of creditors on 10 June 2003 to obtain a resolution enabling them to

proceed against ABSA they could not get such authority. Thereafter on 2 July 2003 the liquidators applied to the Master in terms of the provisions of Sections 386(4), 387(2), 334 and 339 of the Companies Act No, 61 of 1973 for an extension of their powers. ABSA objected and the Master refused and indicated that they were to approach the court for such permission. It was submitted that the application is to be dismissed and the liquidatdrs ordered to pay the costs in their personal capacities.

[9] The liquidators admit that they did not initially have authority to bring the application. They were advised that their lack of authority was not an issue which ABSA could properly raise and regarded an application for authority as an unnecessary expense. Thereafter and on 1 April 2004 at a meeting of creditors the creditors present voted to ratify the liquidators' action in bringing the application at authorised the continuance thereof.

[10] The liquidators have brought the application in the name of Consolidated. There is rivalry between the various creditors of Central. ABSA is a creditor for a large amount. This litigation, if successful must be to the advantage of other creditors, and in particular of Consolidated, and to the disadvantage of ABSA. ABSA as a major creditor of not only Holdings but also of both Central and Consolidated is in a position where it can manipulate the liquidation process in its favour. The liquidators' primary task is to liquidate the assets of the companies, determine the debts of the companies and to distribute the proceeds among proven creditors, giving effect to the claims by creditors in respect of security and preference. The liquidators ought not to be manipulated by some creditors to the prejudice of others.

[11] If a liquidator litigates without the authorisation of the creditors it may be, if it transpires that he was wrong in his approach, that he personally may be responsible for the costs. On the other hand if the litigation is necessary for the liquidator to give effect to what he was appointed to do, i.e. to liquidate

and distribute the assets correctly, third parties will not be able to non-suit the liquidator because of lack, of authorisation<sup>2</sup>. Similarly in the case of a creditor who tries to prevent a liquidator to obtain a court ruling that will be to his disadvantage but to the advantage of other creditors, the court ought not to non-suit the liquidator unless it becomes apparent that the conduct of the liquidator is unreasonable. I say so whilst I am fully mindful of the fact that the application was brought contrary to the directions of the body of creditors, and without the authorisation by the Master. A further reason why the point taken by ABSA cannot succeed lies therein that the liquidators' actions were ratified and the litigation authorised. Authority for the statement is to be found in the judgment of Nicholas AJA in *Neugarten and Others v Standard Bank of South Africa Ltd.*, 1989 (1) S A 797 (A) at 804E<sup>3</sup>. The first point *in limine* cannot succeed.

[12] The second point *in limine* is basically that as Consolidated has ceded its claim to Holdings and it in turn ceded it to ABSA, without a re-cession of the claim Consolidated has no claim against Central and accordingly no cause of action. It is the direct antithesis of Consolidated's contention that it was never divested of its bare *dominium* in the claim and that, upon liquidation, its liquidators became entitled to recover and administer the claim for the benefit of the creditors. It is essential for this point to succeed that the bare *dominium* vested in ABSA. It follows that the decision on this point *in limine* and the decision in the applicants' application involve exactly the same investigation. If the applicants' application succeeds this point is without substance and *vice versa*.

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<sup>2</sup>See the judgement of Ramsbottom J in *Waisbrod v Potgieter and Others*, 1953 (4) SA 502 (NV) at 507H where, he states "...As between himself and the company the liquidator requires to be authorised before he embarks on litigation, and if he does so without the prescribed authority the Court may refuse to allow him his costs out of the assets of the company and he may have to pay them himself. But that does not give a person with whom the liquidator is litigating the right to object that the liquidator has not been authorised to institute the proceedings."

<sup>3</sup>"At common law ratification is equal to prior consent."

[13] Another point *in limine* is based upon the provisions of section 83 of the Insolvency Act, No 24 of 1936. The argument is that ABSA, as it was entitled to do, "realized" its claim in terms of the provisions of section 83 when it proved it in the insolvent estate. If the bare *dominium* vested in Consolidated it was impossible for ABSA to prove a valid claim. If on the other hand the bare *dominium* did not vest in Consolidated this application is stillborn. Again this point will automatically be resolved with the decision in the main application. I may just point out that section 83 concerns the realization of securities. Without going into detail it is clear that a creditor who fears that the value of the security may depreciate or who prefers speedy payment of the debt may invoke the provisions of sections 83(1) and 83(2) or may come to an agreement about a value, to be placed on the security and accept that in terms of section 83(3) rather than to wait that the trustee realizes it. What is also relevant is that in terms of section 83(8)(c) a creditor may not "realize" a right of action without the approval of the trustee or the Master. I mention these features of section 83 to indicate that in my view the section creates special rights, other than proving claims and receiving dividends, in favour of certain creditors. As ABSA has failed to give notice in accordance with section 83(1), proved a claim and is awaiting the result of the normal winding up procedure, it is not one of the creditors in whose favour section 83 has been enacted. In my view section 83 is not at all relevant for the decision of this matter.

[14] A further point raised by ABSA is that the application is to be dismissed because of the review proceedings on the basis of *lis pendens*. Without investigating whether the review application is between the same parties and whether the applicant in this matter would be bound by a judgment in that matter on the basis that the issues in this application are *res judicata.*, this whole argument must be seen in the light of the following important aspects: The parties to the review proceedings have agreed to stay those proceedings pending finalization of this matter. The Master is the real respondent in the review

proceedings and will surely have to be represented in that application. In the present matter the Master abides the decision of the court. This court has a discretion to allow the application to proceed. Assuming, without deciding the point that ABSA could raise the defence of *lis pendens*, it is obvious that I must exercise my discretion towards proceeding with matter rather than staying it. In so far as it is necessary I hereby formally do so. The point does not succeed.

[15] In the duplicating affidavits ABSA took a point that there was a factual dispute about the subordination of its claims which is incapable of being resolved otherwise than by having it referred to evidence. It was submitted that the claim is to be dismissed on that ground. ABSA did not persist with that point in argument, in my view, wisely so.

[16] In paragraph 40 of the answering affidavit the following is stated on behalf of ABSA:

*"Holdings, Consolidated and Central applied to ABSA for increased banking facilities, and not merely Holdings as indicated. Pursuant thereto, additional finance was made available by ABSA to Holdings, Consolidated and Central and utilised by the latter entities. This resulted in the facility being increased from R38 million to R70 million."*

As support for the statement ABSA relies on annexure V8 on p301 of the papers. It is a letter, dated 28 June 2002, from ABSA addressed to Holdings. It indicates that until 1 September 2002 there will be an increase of R32 million in the total banking facility of the group to a maximum of R70 million. Certain conditions are stipulated the last of which reads:

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See *Van As v Appollus en Andere*, 1993(1) SA 606(C) and 610D and the cases referred to in that judgment on pages 609 and 610.

*"Additional security required:*

*Unlimited cross-suretyship between CNA Holdings and Calicom Trading 192 (Pty) Ltd (name change to Central News Agencies (Pty) Ltd).*

*Cession of shares and loan accounts by CNA Holdings in the name of Calicom Trading 192 (Pty) Ltd."*

[17] It is more than probable that the cross-suretyship of 11 July 2002, mentioned in paragraph 3 above was executed in fulfillment of the stated condition. What is significant is that nowhere in annexure V8 is there any mention of the entity Consolidated. It may be that ABSA intended to get a suretyship and cession of rights from Consolidated but there is no such document amongst the papers and the claim submitted to the Master, that was handed in with leave of the applicant. There seem to be confusion on this aspect by ABSA because in the heads of argument Mr. Robinson states:

*"CONSOLIDATED previously ceded this claim to HOLDINGS, and both HOLDINGS (Sixth Respondent) and CONSOLIDATED in turn ceded this claim to their bankers, ABSA."*

That statement is factually incorrect because there was never a cession of rights by Consolidated to ABSA.

[18] In the final analysis the situation is simply the following: Central owed Consolidated R177 million in respect of the purchase price of the 61 top stores. Consolidated ceded the claim to Holdings *in securitatem debiti*. Holdings ceded all its claims and certainly whatever was ceded to it in respect of this claim to ABSA. Holdings and Central gave a cross-suretyship to ABSA. The cross-suretyship does not have an effect on this claim. It is accepted that Consolidated benefited from the increased banking facilities.

[19] Mr. Slomowitz relies on the decision in *National Bank of SA Ltd v Cohen's Trustee*, 1911 AD 235 and the line of cases following that decision, inter alia *Leyds v Noord-Westelike Landboumaatskappy*, 1985 (2) SA 759 (A), *Bank of Lisbon & SA Ltd v The Master*, 1987 (1) SA 276 (A), *Inclendon (Welkom) (Pty) Ltd. v Qwaqwa Development Corporation Ltd*, 1990 (4) SA 798 (A) and *Standard General Insurance Co Ltd. v SA Brake CC*, 1995 (3) SA 806 (AD) at 815 B-D. According to those authorities the cedent retains a reversionary right or the *bare dominium* in a right ceded *in securitatem debiti*

On the insolvency of the cedent the reversionary interest vests in, the insolvent estate to be administered in the interests of all the creditors but with proper regard of the rights of the cessionary. In the case of a double cession like it the Bank of Lisbon matter, the cedent cedes the reversionary right with the second cession. The cedent is then completely divested of its rights in end to the ceded claim. In such a case it will only be re-vested with its reversionary right after a re-cession thereof to it. In the present matter, and contrary to what ABSA believes, Consolidated only ceded the claim to Holdings. It did not divest itself of its reversionary interest. Holdings could not cede to ABSA more than what it had acquired from Consolidated.

[20] Mr Robinson argues that there was an outright cession of all its rights by Consolidated to Holdings and wrongly argues that thereafter there was another outright cession by Holdings and Consolidated to ABSA. For his argument however it makes no difference if Consolidated was a party to the cession to ABSA or not. If there was an outright cession to Holdings then surely Holdings could cede the same to ABSA. The argument is the product of the academic debate whether a cession *in securitatem debiti* is to be equated to a pledge of a movable asset, as was held in *National Bank v Cohen's Trustee* and the series of cases following it, and the contrary view that it is an outright cession with a superimposed

undertaking (*pactum fiduciae*) that the cessionary will restore the ceded debt to the cedent on satisfaction of the secured debt. *Lawsa (Nienaber) Vol 2 par 53*. On that approach Mr Robinson is correct and a re-cession by ABSA to Holdings and thereafter by Holdings to Consolidated would be essential before the liquidators could enforce any rights in respect of the ceded claim.

[21] However interesting the academic debate may be and regardless of how many anomalies there may arise by equating a cession *in securitatem debiti* with a pledge of a movable, the fact remains that this court is bound by the decisions relied upon by Mr. Slomowitz. It follows that Consolidated was never divested of its reversionary right, that, despite the argument to the contrary, Consolidated has a cause of action, and that, despite the argument to the contrary, ABSA was not entitled to avail itself of the provisions of section 83 of the Insolvency Act and accordingly that the ownership of the claim vests in the liquidators of Consolidated who are to administer it for the benefit of the creditors with special regard to the rights of ABSA as pledgee.

[23] Counsel are agreed that the successful party is entitled to costs including, the costs of two counsel,

I make the following order: -

1. It is declared that ownership of the claim for R133 336 454,72, in respect of the purchase price for the top 61 stores due by the Second Respondent to the First Applicant in terms of the written agreement concluded between the parties on 8 November 2001, vests in the First Applicant.

2. It is declared that the First Applicant is a creditor of the Second Respondent for the amount of the aforementioned claim.

3. The First Respondent is not entitled to be paid any dividend by the Second Respondent, alternatively the Third, Fourth and Fifth Respondents in respect of the aforementioned claim.

4. The Third, Fourth and Fifth Respondents are directed to reflect the First Applicant as a creditor of the Second Respondent in the Liquidation and Distribution Account of the Second Respondent for the amount of the aforesaid claim and to expunge the First Respondent as being the creditor entitled thereto.