A business (the company) borrows money from a credit provider (the bank) in order to finance its day-to-day operations (the debt). In securing the debt, the bank takes cession in securitatem debiti of all the company’s book debts. Subsequent thereto, the company is placed under supervision in terms of ch 6 of the Companies Act 71 of 2008 (the Act) – namely, the provisions relating to business rescue. These provisions, specifically those contained in s 133, among others, stipulate that there is a moratorium on legal proceedings against the company (including enforcement action) or in relation to property belonging to the company.

Confronted with these facts, can the bank now realise its securities held (and belonging to the company) to the cessionary (on our facts, the bank). On discharge of the secured debt, the cedent will regain full title to the right ceded. This type of security is a form of a pledge (where the cedent retains the dominium of the claim or a reversionary right to it), as opposed to a security transfer (where the right for purposes of security is completely transferred from the cedent to the cessionary) (see D Hutchinson and CJ Pretorius (eds) The Law of Contract in South Africa 2ed (Cape Town: Oxford University Press 2012) at 366 – 367; SW van der Merwe et al Contract General Principles 4ed (Cape Town: Juta 2012) at 425; RH Christie and GB Bradford Christie’s The Law of Contract in South Africa 6ed (Durban: LexisNexis 2011) at 489; and AJ Kerr The Principles of the Law of Contract 6ed (Durban: Butterworths 2002) at 451). This is fundamental, as will become clear later on.

What is the moratorium envisaged in terms of s 133 of the Act?

When a company commences with business rescue proceedings, the Act protects the company’s financial position by temporarily placing a general moratorium on all legal proceedings that creditors and employees may have against the company, which in turn allows the company to try and find its business footing again. It is meant to give the company some breathing space (see R Bradstreet “The new business rescue: Will creditors sink or swim?” (2011) 2 SALJ 352 and Investec Bank Ltd v Bruyns 2012 (5) SA 430 (WCC)). It is during this general moratorium that a company should channel all of its available resources to attempt to obtain investors willing to bail the company out of its financial troubles, instead of paying off its existing debt (see Bradstreet op cit at 352). As a result, business rescue has certain significant legal consequences, not only for the company’s activities, but also for its stakeholders (Dennis Davis (ed) Companies and Other Business Structures in South Africa 3ed (Cape Town: Oxford University Press 2013) at 235).

Section 133 of the Act reads as follows:

133 General moratorium on legal proceedings against company
(1) During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except –
(a) with the written consent of the practitioner;
(b) with the leave of the court and in accordance with any terms the court considers suitable;
(c) as a set-off against any claim made by the company in any legal proceedings, irrespective whether those proceedings commenced before or after the business rescue proceedings began;
(d) criminal proceedings against the company or any of its directors or officers;
(e) proceedings concerning any property or right over which the company exercises the powers of a trustee; or
(f) proceedings by a regulatory authority in the execution of its duties after written notification to the business rescue practitioner.
(2) During business rescue proceedings, a guarantee or surety by a company in favour of any other person may not be enforced by any person against the company except with leave of the court and in accordance with any terms the court considers just and equitable in the circumstances.
(3) If any right to commence proceedings or otherwise assert a claim against a company is subject to a time limit, the measurement of that time must be suspended during the company’s business rescue proceedings.”

The application of the general moratorium is regarded as one of the most important consequences of business rescue. It results in the enforcement of claims against the company, or property belonging to the company, or that which is within its legal possession, to be temporarily prohibited and suspended for the entire duration of the business rescue (see Davis et al (op cit) at 235. See also FHI Cassim (managing ed) Contemporary Company Law 2ed (Cape Town: Juta 2012) at 879). Legal action against the company will be allowed only with the written consent of the practitioner or with the leave of court, and in accordance with any terms the court considers suitable (s 133 (1)(a) and (b) of the Act).

Who can realise the security held in securitatem debiti?

As a general rule, the principles governing the consequences of out-and-out cessions also apply to security cessions. Likewise, the requirements for a cession in securitatem debiti are those applicable to ordinary cessions (see Van der Merwe et al (op cit) at 428).

On our facts outlined above, once the cession has been made the company loses its right against the debtor. What it acquires is a personal right against the bank for re-cession of the right on redemption of the principal obligation,
What can the bank do?

The bank’s rights and obligations are, in our opinion, obvious. The bank, and only the bank, can collect the book debts of the company. The bank needs re-cede its rights to the company only once the debt has been repaid to the bank in full. The moratorium in terms of s 133 of the Act will therefore not affect the bank’s rights to realise its security whatsoever; the actions that the bank will be taking against the debtors of the company fall within the ambit of taking legal proceedings or enforcement proceedings against the company, or in relation to any property belonging to the company, or lawfully in the company’s possession.

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flowing from the contractual arrangement accompanying the cession. This so-called pactum fiduciae also places the cessionary under a duty to preserve the subject matter of the cession. On default of the cedent, the cessionary is entitled to realise the security. This may be done either directly by claiming performance from the debtor and applying the performance in satisfaction of the principal debt, or indirectly by doing the same with the proceeds of a sale of the ceded right. Any balance remaining after the satisfaction of the principal debt must be paid over to the cedent’ (Van der Merwe et al (op cit) at 428 – 429).

What is of importance is that the company (cedent) cannot now claim any monies from its debtors; that right has been ceded to the bank (cessionary). This has been enunciated in the case of Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd 1993 (1) SA 77 (A). We quote the passage most relevant to our discussion:

‘The true position is of course that the cessions divested the respondent of the right to claim its contractual re- numeration … . Only the bank could recover payment of any amounts due for work done. That the respondent, as cedent, continued to collect payment of its book debts made no difference: [T]hat is frequently a particular term of the arrangement between cedent and cessionary especially where book debts are ceded … . In short, having surrendered its claim for payment to the bank, the respondent surrendered any lien it may have had against Canadian Gold or, for that matter, the appellant’ (paras 29 – 30 of the judgment).

Taking cognisance of the above and incorporating it into our set of facts, it appears to be plain that only the bank is vested with the power to recover payments of book debts of the company. The company will be able to enforce its personal right in court only after taking re-cession of the right. It is up to the bank to either enforce the right against the debtor, or to sell the right to a third party. In either event the proceeds are used to satisfy the debt. Should there be any surplus available, this must be paid to the company (see Hutchinson and Pretorius (op cit) at 369). Should the bank choose to sell (on-cede) its rights, the maxim nemo plus iuris ad alium transferre potest quam ipse haberet (no one can transfer more rights than he himself has) will necessarily apply.

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