Direct and indirect characterization worksheet

SAFLII Note: Certain personal/private details of parties or witnesses have been responded from this document in accordance with the law and SAFLII Policy Republic of SOUTH AFRICA IN THE HIGH COURT OF SOUTH AFRICA (LIMPOPO DIVISON, POLOKWANE) CASE No: 387/2016 Reportable: Yes of interest to other judges: Yes, 27/9/2016 In the case between: LIBERTY GROUP LIMITED APPELLANT AND JOHANNES THEOBALT HATTINGH OF NIEKERK RESPONDENT VERDICT M.G.PHATUDI J [1] INTRODUCTION: 1.1. It is an application for summary broadcast launched by the Applicant against the Respondent seeking payment of the amount of R470 000, 00 and interest thereon. The Applicant is the Plaintires and the Respondent is the Defendant in the main action. The application is opposed. The facts that give rise to the application are in short: - [2] The Applicant (Plaintiff) has instituted an action against the Respondent (Defendant) for the payment of an amount of R470 000, 00 and 9% interest thereon a temporary morae to date of payment. The Applicant's claim is one based on unjustified enrichment claimed that the Applicant paid bona fide and wrongly paid to the Respondent an amount of R470 000, 00 which according to the Applicant was not due and payable to the Respondent. [3] It seems that at all material times the Respondent was the owner of a Guaranteed Revisable Lifestyle Insurance Policy issued and endorsed by the Applicant. The guaranteed benefit payable in terms of the policy in the prevalence of the insured event was an amount of R1 808 263.00. The insured

life was in terms of the policy H.J.LT. Van Niekerk was born on [...] October 1920. [4] On 13 June 2013 the Respondent, in terms of a written deed of Cession, ceded to Daniel Johannes Johannes Hendrik Van Niekerk (the Cessionary) his right to a portion of the benefit of the policy in amounting to R470 000, 00. It is alleged that the session was in the form of a security for a debt owed by the Respondent to the session. The Respondent claims that the Cession concluded was in its nature a session in the securitatem debiti[1]. [5] The insured, Mrs Van Nekerk, died on 18 August 2015 as a result of which the benefit was due and payable under the policy. After that, the applicant paid the full amount of the policy (R1 808 263, 00) to the Respondent. (Johannnes Van Niekerk). It is alleged that payment bona fide was made and with the error apparently payable to the Respondent on 25 September 2015, the Applicant also paid the Cessionary (Daniel Johannes Van Niekerk) an amount of R470 000,00. [6] At the time of the deceased's death, (life assured) the Cession was still in force, the same not cancelled or terminated. To that extent, the applicant claims that the Respondent was unfairly enriched at the expense of the Applicant at the expense of R470 000, 00 sin cause. It is improtor payment that led to the current proceedings. The action was defended, from there the application summary judgment is sought against the Respondent. [7] The sharp question asked for consideration is for the court to determine the nature of the Termination Agreement, and the form it obtained to determine if the Respondent established a bona fide defense to the action[2]. You therefore do not have to take in the underlying merits of the dispute. [8] A copy of the Cession form is attached to the details of claim marked as Schedule B[3]. It describes the nature of the Cession as - The on the political word as a third party. As already indicated, the owner of the policy is the Respondent herein. The Cession further qualifies the purpose of its transfer as:- Supplementary: temporary transfer of the debt. The figure of R470 000 was inserted into a handwriting form. This follows after the intention of the seventh was not its rights under the policy for 'Complete and permanent transferability'.' [9] A closer investigation of the policy being considered confirms that the Respondent is the owner of the insurance policy. The seventh-day sedated the rights and/or obligations under the policy to the Cessionary (Daniel Van Niekerk) as safeguarding to a third party. Such session and what it claims to surbis is that it will be temporary security for a debt the defendant owes the session. [10] In the issuance, what form of security the parties intended to have an impact on the benefits under the life insurance policy. [11] It was submitted on behalf of the Applicant that the Respondent and the Cessionary allegedly agreed that an out and out-of-cession of rights to the Cessionary would be limited to the Cessionary amounting to R470 000,00. With the debt extinguished, so the submission has gone, the right that is ceded to reverse the sessions to the Respondent. Consequently, the express provisions of the Cession militize against the view provided by the Respondent to the effect that it is no more than a promise of law. This submission is not supported by the content of the Cession itself. It would require probative evidence at the trial. [12] It is a tritegy that a party that relies on a Cession must assess the existence of the contract of Cession and prove in terms of which a personal right to a debtor of the Cedent (creditor) is transferred to a new creditor, in this case the Cessionary[4]. Usually, the cause of a session of the cedar of his/her rights dives against the debtor. [13] Furthermore, a session that holds a hold on the safety of a debtor is not entitled to recover directly from the debtor, until such time as the debtor is in default_ The session leaves the seedent with a reversionary law [14]. In the present case, the Respondent claimed that the nature of the session was one for security of a debt as opposed to an out and out of session. It was always the intention of the parties when they the termination agreement. [15] In Millman v Twiggs and another[5], Heter JA said: When a right is ceded with the sworn object to obtain a debt, the session is considered a Promise of Law: dominion of law remains with the anointed and rests on its insolption with its trustee, which is entitled under the common law to administer it in the best interest of all creditors , and with proper regard to the special position of the promise. The continued principle was formulated by Innes YES in the National Bank of South Africa v Cohen's Trustee 1911 N.235 on 250, and reaffirmed in such recent cases as Bank of Lisbon and South Africa Ltd v Die Master and Other 1978(1)SA 276(A). [16]. In Grobler v Oosthuizen[6], Brand JA had the opportunity to deal with the nature of and distinguished a blatant session versus a session in securitatem debiti. [17] In the present case, it seems that on a proper analysis of the transaction as a whole, the session was made for the purpose of obtaining a debt owed to the session by the cedar. On reading the papers before the court there is no evidence to suggest that the session was made an out and out of session. [18] The true character of the session therefore depends on the intention of the parties. The heading to the parties appears under the heading Polish in which it emerged from the that.it form was obtained as Security for a debt. It goes without saying that the construction of the session one by security for a debt is The effect of a security for a debt is that the main debt is promised to the session, while the cedar retains what is described as the bare dominion or a reversible interest in claim against the chief debtor. [19] It is a trite that is right in all its aspects in the session. After the session in securitatem debit, the cedar, has no direct interest in the main debt and is left only with a personal right to the session by virtue of the poctum fiduciae, to claim re-termination after the insured debt was dismissed. [20] Once the main debt has automatically returned to the cedar, or because it has been discharged, the collection of the main debt must be through the state session for the rest of the year. of the testimony before the cedent for the restoration of which the latter then has a claim against the former. [21] Apply to the · Facts in this application, the Respondent claims that the transaction amounts to a session in security debit other than a promise, which must be distinguished from a fiduciary security session or an 'out and out of session. [22] For the purposes of a claim for summary, it is not clear that applicant rests his claim on the debt due to Van Niekerk: that it has become due and payable or that the promise has expired. [23] The session was clearly intended to be one of the safety for a debt in favour of the The session, Mr D J H Van Niekerk. The weight of authorities suggests that such a session is for a debt, through and large, accepted as a promise of the right in question and that the dominance of the law at all material times with the cedar content. Ownership of the whole policy subsequently remained with Respondent, the Applicant had no good reason to pay the R470 000, 00 to the session. [24] There is no credible reason asked by the Applicant on why it chose to pay out the amount claimed to the session, as the nature of the security for a temporary basis was to ensure Respondent's debt to the session. It created a contractual relationship between the session and the Respondent Once fun payment was dismissed to the Respondent, the promised security expired. [25] On a shine of the dispute in this, it is my view that the Respondent has a bona fide defense to answer the claim. For the reasons outlined above, I came to the following conclusion; ORDER: 1. The application for summary Judgment is dismissed with cost 2. The Respondent is found leave to defend the action.

Respondents Board: Adv M.Bressler Instruction by: Morne Coetzee Attorneys C/O De Bruin Oberftozer Attorneys: Polokwane Date heard: 01 August 2016 Date of Verdict 27 September 2016 [1] P12, Para: 15 and PP 45-48, index bundled. [3] Cessien form/Session Form, P22 Indexed Bundle [4] Love No v Dettman 1964 2 ALL SA 448 (A), 1964(2) SA 252 (A) [5] 1 19 SA 674 (AD) at 676 H-I [6] 2009(5) SA 500 at 505 C-D (SCA) (SCA) (SCA) (SCA)