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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 1404/2015

In the matter between:

WESTERN BREEZE TRADING 43 (PTY) LTD

Applicant

and

ENGEN PETROLEUM LTD

Respondent

JUDGMENT DELIVERED ON 17 MARCH 2016

RILEY, AJ

[1] On 3 February 2015 the applicant, Western Breeze Trading 43 (Pty) Ltd (“Western Breeze”) brought an urgent application against the respondent, Engen Petroleum Limited (“Engen”) in terms of which it seeks the following relief:

1. That pending the resolution of the action referred to hereunder Engen is interdicted and restrained from contacting any of the debtors of Western Breeze and/or attempting to collect any debts due to Western Breeze by any of the debtors of Western Breeze.
2. That within 30 days of the granting of the order under (1) *supra*; Western Breeze is to bring action proceedings against Engen for the determination of the validity of the memorandum of agreement entered into between the parties on 30 June 2014 and the setting aside of such agreement.

[2] The founding papers were signed on 29 January 2015 and issued on 30 January 2015 and served on Engen that afternoon. On 3 February 2015 i.e. the day of the hearing of the matter Anton Frederick Pienaar (“Pienaar”) deposed to what has been referred to as Engen’s Preliminary Answering Affidavit which was also served and filed on the same day. In Engen’s Preliminary Answering Affidavit, Pienaar states specifically that his failure to traverse seriatim the contents of the founding affidavit and to controvert any allegation made therein must not be construed as an admission of that allegation and that should this court not dismiss the application on 3 February 2015 for *inter alia* lack of urgency, he reserves the right to supplement his affidavit and to answer fully to the founding affidavit in due course. On the same day Bruce Anthony Gaskell (“Gaskell”) who also deposed to the founding affidavit, deposed to the replying affidavit of Western Breeze which was served on Engen.

[3] On 3 February 2015 the matter was postponed by agreement to 21 April 2015. The order of Henney J which was granted by agreement can be summarised as follows:

1. The application for the interim interdict and the relief sought in terms of prayers 1 to 3 of the notice of motion be postponed for hearing to the semi-urgent roll;
2. Pending the determination of this application, any cession agreement between Western Breeze and Engen is suspended and Western Breeze may collect all debt due to it of any nature, and Engen is not permitted to collect any debts due to Western Breeze;
3. Engen is to deliver any further affidavits by 3 March 2015;
4. Western Breeze is to deliver its further reply thereto if any, by 24 March 2015;
5. Western Breeze and Engen will file their heads of argument respectively by the 7th and 14th April 2015;
6. Without prejudice and without any admission of liability whatsoever Western Breeze will make payment to Engen in the amount of R 350 000-00 on or before 16 March 2015 in reduction of the debt owed by Windsharp Trading (Pty) Ltd (“Windsharp”) to Engen;
7. The costs occasioned by the postponement are to stand over for later determination.

[4] On 5 March 2015 Engen served and filed a notice of counter-application which can be summarised as follows:

- 4.1 That at the hearing of the main application, Windsharp is joined as second respondent in this application;

- 4.2 That Western Breeze and Windsharp are directed to furnish Engen with copies of their debtors book for the period 1 September 2014 to 21 February 2015 or the last day of the calendar month prior to this order whichever is the later, including the name and physical address of each debtor and the amounts outstanding by each debtor as at the accounting months and of the book during that period;
- 4.3 That Western Breeze and Windsharp are directed to furnish Engen with a copy of the alleged cession agreement concluded with Scania Finance Southern Africa (Pty) Ltd;
- 4.4 That Western Breeze is directed to forthwith disclose to Engen full details of all receipts of payments from its debtors received after 09 December 2014 supported by vouchers and bank statements of the account into which such funds were deposited;
- 4.5 Windsharp is directed to forthwith disclose to Engen full details of all receipts from its debtors received after 9 December 2014 supported by vouchers and bank statements of the account into which such funds were deposited;
- 4.6 Western Breeze and Windsharp are interdicted and restrained from passing off any of the debtors of Windsharp as those of Western Breeze and *vice versa*.

[5] On 5 November 2014 Engen had already instituted proceedings for the winding up of Windsharp in the KZN Division, Pietermaritzburg. On 25 March 2015 Windsharp

issued summons against Engen out of this court in terms of which it seeks the following relief:

- 5.1 That Engen render a full account, supported by vouchers of all purchasers of product by it during the period 2009 to December 2014;
- 5.2 Debatement of the said account;
- 5.3 Payment to it of whatever amount appears to be due to it upon debatement of the account.

[6] On 21 April 2015, and by agreement between the parties, the application was postponed to 18 June 2015 for hearing on the semi-urgent roll and it was further agreed that the provisions of paragraph 2 of the Order of Henney J dated 3 February 2015 continue to remain of full force and effect pending the determination of the application. The costs occasioned by the postponement, was to stand over for later determination. On 18 June 2015 counsel for Western Breeze and Windsharp commenced argument but the matter was postponed for further argument to 17 August 2015.

The background facts

[7] During January 2009 Engen and Windsharp, a trucking transport haulage courier company, which is part of the Gaskell Family Group of Companies, concluded an agreement with one another styled the Engen Diesel Club agreement ("EDC"). The material terms of the agreement are not in dispute and can be summarised as follows:

- 7.1 The EDC commenced on 12 January 2009, endured for an initial period of 5 years and thereafter for a further automatic renewal period of 5 years, unless Engen notified Windsharp to the contrary;
- 7.2 Engen shall submit a statement of account to Windsharp on a monthly basis and unless Windsharp disputes its correctness, within 30 days from the date of such statement, it shall be deemed to have admitted the accuracy thereof and shall make payment within such period of time;
- 7.3 Should Windsharp fail to pay any amount owing, then the full amount owing to Engen shall immediately become due and payable without notice to or demand being made on Windsharp; and
- 7.4 Should Windsharp breach the agreement, it acknowledges that Engen may suspend its obligations under the agreement until Windsharp remedies its breach, without Windsharp being entitled to suspend its obligations.

[8] On 11 January 2014 the agreement was automatically renewed.

[9] It is not in dispute that Windsharp breached the agreement by failing to make payment of the amounts of R3 123 423-46 and R2 744 980-92 that fell due for payment on 31 December 2013 and 31 January 2014 respectively. Windsharp does not dispute Engen's claim. Engen avers that consequent to Windsharp's breach, Engen's obligations under the agreement were (and remain) suspended. It is common cause that the financial position of Windsharp was so dire that by 25 June 2014, despite its

constant promises to pay, it had only been able to reduce its indebtedness to Engen by the amount of R309 701-05, leaving a balance of R5 558 703-33 owing.

[10] On 25 June 2014 Windsharp entered into a written agreement of acknowledgement of debt and undertaking to pay to Engen the sum of R5 558 703-33 over the period 30 June 2014 to 31 August 2015. It is not in dispute that Windsharp was in immediate breach of this acknowledgement of debt and undertaking to pay Engen.

[11] I pause to mention that on 3 April 2012 Windsharp had signed a memorandum of cession of book debts in favour of Engen. I shall refer to this as the first cession. Its validity is not in dispute.

[12] On 30 June 2014, Western Breeze together with Windsharp, signed a 'Memorandum of Agreement (Cession of Debts)' with Engen, whereby Western Breeze would cede its debtor's book to Engen in discharge of any present and future obligations it might have to Engen.

[13] The relevant paragraphs that define the nature of the cession and the definition of debts are:

"1 CESSION AND PLEDGE

The Cedent hereby cedes, transfers and makes over to the Cessionary all the Cedent's right, title and interest in and to the Debts (as defined in clause 2) as a continuing general covering security for the due performance and discharge of

every obligation and indebtedness from whatsoever cause and however arising which the event may now or at any time hereafter have toward the Cessionary, and without limiting the generality of the foregoing, whether such indebtedness be a direct, indirect or contingent liability; whether it be matured or not; whether it may be or may have been incurred by the Cedent individually or jointly with others or by any firm in which the Cedent has or holds or may hereafter have or hold any interest; and whether it arises through any acts of suretyship, guarantee warranty, indemnity or other undertaking signed by the Cedent solely or jointly with others or otherwise. The Cession hereby granted by the Cedent to the Cessionary includes any and all reversionary rights the Cedent might otherwise have had in and to the claim ceded.

2 DEFINITION OF DEBTS

Debts' shall mean all the right, title and interest in and to all and any claims of whatsoever nature and howsoever arising which the Cedent may now or hereafter have against any person whomsoever, and all and any monies and amounts of whatsoever nature which may now be or hereafter become due or owing to the Cedent from whatsoever cause and howsoever arising by any person whomsoever, including in particular, but not limited to, debts generally described as 'book debts'."

The correspondence between the parties leading up to the application

[14] It is not in dispute that in December 2014 and January 2015, Engen addressed notices to a number of the clients of Western Breeze instructing the clients not to pay Western Breeze but rather to pay Engen. The notice reads as follows:

“Re: Engen Petroleum Limited / Western Breeze Trading 43 (Pty) Ltd / Yourselves

1. Reference is made to the Memorandum of Agreement concluded between Engen Petroleum Limited (EPL) and Western Breeze Trading 43 (Pty) Ltd. (Western Breeze) on 30 June 2014, at Westville (the agreement);

2. In terms thereof:

2.1 Western Breeze ceded to EPL all of its rights, as a continuing general covering security, for the performance and discharge of its obligations and indebtedness to EPL from any cause and when so ever arising, all and any claims of whatsoever nature which it has against any person and all and any monies and amounts of whatsoever nature that is due it by any person from any cause, including without limitation its debtors' book and/or book debts; and

2.2 EPL shall, in its discretion, be entitled to collect the debts itself.

3. Kindly be advised that EPL had elected to collect the debts owed to Western Breeze itself, to which notice has been given to Western Breeze.

4. Kindly therefore make payment of all future and current debts owing to Western Breeze to EPL by electronic fund transfer into its Banking Account, the details whereof are found below:

ENGEN PETROLEUM LIMITED

STANDARD BANK THIBAUT SQUARE

BR CODE 0.....

ACC NO 0.....

REF.: WESTERN BREEZE TRADING 43 (PTY) LTD

5. *Kindly be advised that should you continue to make payment to Western Breeze, you shall be deemed in law to have not paid your debt, and EPL reserves the right to institute legal proceedings against you for the recovery of its claim..."*

[15] On a reading of the notice it clearly states that the general covering security was given for the performance and discharge of all of the applicant's obligations and indebtedness to EPL.

[16] On 9 December 2014, and in response to Engen's notice, Hooyberg, the attorneys of record for Windsharp and Western Breeze sent an email to Engen's attorneys of record in relation to the cession agreement dated 30 June 2014 which states *inter alia*:

"... At the meeting held at your offices on 24 October 2014, it was conceded by you that the said cession agreement is null and void, in that, at the time of conclusion thereof, our client disclosed to your client that the debtor's book had been ceded to another creditor. In order to appease your client, our client signed all the documents presented to it at that stage.

In light of the above, we demand that your client immediately desist and refrain from contacting our client's debtors now or in future. Failure to do so has the potential to severely prejudice our client and its business operations."

[17] In a letter dated 10 December 2014 Engen's attorneys responded by stating *inter alia* that Windsharp has entered into more than one cession agreement with Engen and then referred to the earlier cession entered into by Windsharp prior to 30 June 2014. On the same day Hooyberg wrote to Engen's attorneys, and requested *inter alia* that Engen urgently supply a copy of the cession on which they rely.

[18] On 22 January 2015, Hooyberg addressed a further email marked "*Extremely urgent*", and with reference to the "*Cession dated 30 June 2014 Debtors of Western Breeze Trading 43 (Pty) Ltd. / Windsharp Trading (Pty),*" to Engen's attorneys, wherein it stated, *inter alia*:

"... Instructions are that your client has yet again contacted another of our client's debtors, namely, Unitrans Supply Chain Solutions.

Instructions are that, on even date, your client demanded that payment of debt (that is now due, owing and payable) be paid directly to itself in terms of the cession of 30 June 2014.

Instructions are further that your client forwarded the very same generic letter dated 9 December 2014, that it sent to other debtors during December 2014, to Unitrans Supply Chain Solutions earlier today, and attached a copy of the cession dated 30 June 2014, thereto.

We submit that your client's conduct herein is mala fide, and clearly an attempt to engineer the demise of our client's businesses. We are amazed that your client continues to act in terms of and enforce the said cession despite:

- 1. Your confirmation that the said cession is null and void; and*
- 2. Your most recent advices on 14 January 2015, that your client does not rely upon the cession of 30 June 2014 but on an alleged earlier cession (which we are yet to be given a copy of, despite our request for same).*

Your client's conduct herein is not only unlawful, but is severely prejudicial to our client and its businesses going forward, and is causing our clients irreparable financial harm.

In light of the above, we demand that your client undertakes to immediately desist from contacting any of the debtors concerned, and forthwith informs those which it has contacted, especially Kobus Lock Transport; Unitrans Supply Chain Solutions; Imperial Managed Chain Solutions, and Monteagle Logistics Limited, by way of a written communication and/or publication that the debts must be paid forthwith to our clients in terms of the relevant service agreements.

Without the receipt of these funds, our clients will no longer be able to trade. Instructions are that the debtors have indicated, on no uncertain terms, that they refuse to pay the amounts that are currently due until such time as the dispute regarding the validity of the said cession is dispensed

with, alternatively they have received written confirmation from your client that the funds may be paid to our clients.

We accordingly require the written undertaking by no later than 12h00 tomorrow, 22 January 2015, and confirmation that your client has sent the appropriate letter to the debtors with an instruction that the debts are to be paid forthwith to our client. We further require a copy of the letter to the debtors to be sent to us by 12h00 tomorrow ..."

[19] On 22 January 2015, Engen's attorneys responded to this email and stated:

"Kindly find attached hereto the earlier cession dated 03 April 2012, given by your client which my client is entitled to rely upon unless you favour me with reasons why it cannot.

In the absence of such reasons, I am unable to give the undertaking, and call on you to favour me with your urgent response."

[20] On 23 January 2015, Hazel De Souza of Hooyberg attorneys e-mailed Engen's attorneys and stated that:

"Our instructions are to confirm that the cession dated 3 April 2012 is valid and that your client may rely upon same against the cedent named herein, namely Windsharp Trading (Pty) Ltd.

Kindly let us have your undertaking and confirmation that your client has addressed the relevant letter to the debtors of Western Breeze Trading 43 (Pty) Ltd, as a matter of urgency."

[21] On 26 January 2015, Engen's attorneys sent an e-mail to Hooyberg attorneys and requested that they forward a copy of the cession entered into between Western Breeze and Scania. This request was refused by Hooyberg on the basis that Engen had previously advised that it was not relying on the cession agreement dated 30 June 2014.

[22] On the same day, Engen's attorneys wrote to Hooyberg and Windsharp wherein it stated that Engen "*has not waived any of its securities and in particular has not cancelled the cession in question and that Engen is entitled to enforce the cession to the extent that the claim of the prior ranking cessionary is discharged which according to point 2.4 of your memorandum to my client dated 22 May 2014 was discharged on 1 November 2014*". Engen's attorneys further advised that they regarded the stance taken by Hooyberg regarding the alleged indebtedness to Scania as suspicious and requested a copy of the cession and a letter of confirmation from Scania that its debt, secured by the prior ranking cession had not been discharged. To this Hooyberg responded by saying that the submissions made by Engen's attorneys are disingenuous.

[23] On 28 January 2015, Hooyberg wrote to Engen's attorney's and advised *inter alia* that they failed to understand why Engen was refusing to provide the letter of the undertaking as Western Breeze is not indebted to Engen, that it has never traded with Engen nor has it ever stood as surety or guarantor in respect of the debt owed by any other party to Engen.

[24] On 29 January 2015 Engen's attorneys responded *inter alia* as follows:

"...whilst Western Breeze Trading 43 (Pty) Ltd did not bind itself as a surety, it did undertake in writing in favour of the client to settle the debt due by Windsharp Trading (Pty) Ltd and offered the cession as collateral security for its undertaking. Pursuant to favouring my client with the above undertaking/guarantee/indemnity, the cession was concluded ..."

[25] On 29 January 2015 Hooyberg sent a letter to Engen's attorneys and advised that they were busy compiling an urgent application on behalf of their client and asked whether they were prepared to accept service of the application on behalf of Engen.

[26] Western Breeze avers that when it was clear that the attempts by their attorneys to persuade Engen to provide an undertaking to desist from contacting its debtors and to inform the debtors of Western Breeze to pay their indebtedness to Western Breeze, were unsuccessful and they were facing bankruptcy due to what they described as Engen's unlawful and *mala fide* behaviour, it launched this application to this court.

[27] According to Western Breeze it has no obligations or indebtedness to Engen and accordingly Engen is not entitled to enforce the cession and/or collect the debts of Western Breeze until such time as it is indebted to Engen. Accordingly Western Breeze avers that Engen is attempting to collect the alleged indebtedness of Windsharp due to it from the debtors of Western Breeze in circumstances where the two entities (i.e.

Western Breeze and Windsharp); are entirely separate, and do not trade together but are individual companies. It avers that as a result of Engen's notice, many of the creditors of Western Breeze have refused to pay the amounts owed to it. Western Breeze avers that the amount that its debtors are refusing to pay it, is in excess of R1 350 000-00, and therefore constitutes a substantial amount of all its outstanding debts and that if it is not allowed to collect its indebtedness immediately, its business operations will close down and it will be wound up as it is unable to pay its creditors, including staff and suppliers.

Material non-disclosure

[28] Engen avers that when Western Breeze brought the application on an urgent basis that it knew it was not entitled to do so, that Western Breeze had only told half of the story and that it had failed to disclose the remaining facts that are material and relevant to the determination of the matter. In particular it was submitted by Mr Harcourt on behalf of Engen that Gaskell had failed to disclose his own letter dated 22 May 2014 which is inconsistent with its version as set out in the application. The letter (Annexure "C" to Engen's papers), which I shall deal with later on herein, is the restructure and payment proposal made by Gaskell to Engen.

[29] It is accepted law that an applicant who applies to court to obtain an order on an *ex parte* basis must in his/her conduct be beyond reproach. Such an applicant is required to place all relevant facts before the court. See **M V Rizcum Trader 4 M V Rizum Trader v Mantly Appledore Shipping Ltd** 2000 (3) SA 776 (C). Our courts have held that factors that could properly be taken into account include the urgency of

the matter and the conduct of the debtor in relation to his assets. A court will “*generally weigh the interest of the creditor and the debtor and, more particularly the prejudice that may be suffered by such creditor if he/she gives notice and the application is heard in due course. The factors that could be taken into account are not exhaustive. Each case will depend on its own particular circumstances.*” See **Berrange NO v Hassan and Another** 2009 (2) SA 339. Although ‘*the utmost good faith must be observed by litigants making ex parte applications in placing material facts before the court; so much so that if an order had been made upon an ex parte application and it appears that material facts have been kept back, whether wilfully and mala fide or negligently which might have influenced the decision of the court whether to make the order or not, the court has a discretion to set aside with costs on the grounds of non-disclosure. It should, however be noted that the court has a discretion and is not compelled, even if the non-disclosure was material, to dismiss the application or to set aside the proceedings.*’ See Herbstein & Van Winsen *The Civil Practice of the Superior Court of South Africa*, **Schlesinger v Schlesinger** 1979 (4) SA 342 (W) at 349; **Phillips and Others v National Director of Public Prosecutions** 2003 (6) SA 447 (SCA) 2003 (2) SACR 410 (at para 29). On a conspectus of the evidence I am on the whole not persuaded that the failure by Western Breeze to disclose the payment proposal and/or to provide further information about the financial status of Western Breeze was material and/or that the non-disclosure will have an influence on the decision of the court whether to make a provisional order or not. I am also satisfied that Engen has in any event not been prejudiced by the short notice as it was able to serve and file a preliminary answering affidavit in opposition to the relief sought timeously and it was

afforded the opportunity to file a substantive answering affidavit thereafter by agreement between the parties..

Can Engen place reliance on the restructure of debt and payment proposal made to it by Gaskell?

[30] Mr Riley, who appeared on behalf of Western Breeze and Windsharp, has submitted that the document relating to the restructure of debt and payment proposal which was sent by Gaskell to Engen was made on a without prejudice basis and that it should be struck out. He submitted further that the restructure of debt and payment proposal was sent by Gaskell to Engen to facilitate a settlement of the dispute between Windsharp and Engen. In the alternative he submitted that it was at worst a proposal that was not accepted.

[31] In **Lynn & Main Inc v Naidoo** 2006 (1) SA 59 (NPD) 65 at para [22] Tshabalala JP confirmed the principle that ‘... *as a general rule negotiations between parties, whether oral or written, which are undertaken with a view to a settlement of their disputes or differences are privileged from disclosure. This is so whether there are express stipulations that they shall be without prejudice or not*’. (See *Millward v Glaser* 1950 (3) SA 547 (W).) Indeed in **Jili v South African Eagle Insurance Co Ltd** 1955 (3) SA 269 (N) at 275 B, it was decided that:

‘No conclusive legal significance attaches to the phrase “without prejudice”. The mere fact that a communication carries that phrase does not per se confer upon it the privilege against disclosure for example where there exists no dispute

between the parties or it does not form part of a genuine attempt at settlement ... nor is a communication unadorned by that phrase always admissible in evidence, for it will be protected from disclosure if it forms part of the settlement negotiations.'

[32] The requirements for a statement to be “*without prejudice*” and inadmissible are as follows:

- (a) A dispute between the parties;
- (b) A communication (oral or written) containing both:
 - (i) An admission;
 - (ii) An offer to achieve a compromise;
- (c) Which is *bona fide* ('*genuine negotiations*'). See **Brauer v Markow and Another** 1946 TPD 344 at 350 – 5, Schikkard & Van Der Merwe Principles of evidence 2nd ed (2002) at 298 – 9.

[33] The following is evident on a consideration of the restructure of debt and payment proposal:

- 33.1 Western Breeze and Windsharp among others are parties to it.
- 33.2 The combined monthly diesel consumption of the businesses of Western Breeze and Windsharp is approximately R3 Million.
- 33.3 Scania holds a cession over the debtor's book of Western Breeze.
- 33.4 Scania's claim shall be settled on 1 November 2014 leaving Western Breeze with ± R900 000-00 per month of free cash flow.

- 33.5 Western Breeze shall utilise a portion of this free cash flow to assist in settling a greater portion of the historic debt of Windsharp to Engen, by allowing Western Breeze's debtors book to become available as additional security to Engen from 1/12/2014.
- 33.6 As from around May 2014, Western Breeze and Windsharp are in a restructuring process in terms of which their assets, debtors books, creditors and contracts are being sold, transferred and ceded to a new company ("Newco") in order to consolidate the two transport operations into one. The restructure shall be completed after the Scania debt is settled in full on 1/11/2014.
- 33.7 From 1/12/2014 a consolidated debtors book comprising that of the Western Breeze and Windsharp shall exist that may be ceded to Engen by the Newco, for a new facility with Engen.

[34] It is common cause that Engen rejected the proposal as recorded in the restructure of debt and payment proposal, refused the grant of the new facility to the Newco and persisted with its demand for immediate payment of its claim, failing which it would proceed with the winding up proceedings against Windsharp.

[35] On a consideration of the restructure of debt and payment proposal there is no suggestion that there is a dispute about the fact that Windsharp is indebted to Engen. In fact paragraph 2.6 clearly states that '*Windsharp is currently indebted to Engen in the sum of approximately R5 500 000-00 as at 31 May 2014*'. In paragraph 2.9.3 there is a request for time to pay off the debt and the rest of the letter explains where the income

will be found to make payment; and an offer of security for continued credit while the so-called historic debt is being paid off. I must agree with Mr Harcourt's submission that the letter amounts to no more than a request for an extension of time to pay without being sued i.e. a *pactum de non petendo*. See **HNR Properties CC v Standard Bank of SA Ltd** 2004 (4) SA 471 (SCA) at p 479 E - F. In the circumstances there is no basis upon which I can find that the use the letter is inadmissible on the basis that it was made on a without prejudice basis. There is therefore no reason why Engen cannot place reliance on the restructure of debt and payment proposal made to it by Gaskell.

The validity of the cession dated 30 June 2014

[36] In my view the crucial issue to be decided in this matter is whether or not Western Breeze is bound to Engen in terms of the agreement of cession of debts which it concluded together with Windsharp on 30 June 2014 with Engen. This agreement is central to the main application. On a consideration of the events as they unfolded, it does not appear to be in dispute that the cession dated 30 June 2014 was concluded at the demand of Myrna Jacqueline Theresa Wilkinson ("Wilkinson"), a regional credit manageress in the employ of Engen. The evidence indicates that after having considered the restructure of debt and payment proposal which she received from Gaskell, she made it clear to Gaskell that without the second cession (i.e. of 30 June 2014), she would reject the written agreement of acknowledgement of debt and undertaking to pay dated 25 June 2014, and proceed to issue winding-up proceedings against Windsharp, as she was of the view that Western Breeze had been purchasing fuel on the Windsharp account and was in a stronger position than Windsharp to repay

Engen's claim. The approach adopted by Wilkinson and Engen cannot be faulted and considering the situation that Engen was confronted with, made clear economic sense. Engen wanted to secure payment of the amount owing by Windsharp to it at all costs.

[37] The inescapable conclusion on the evidence is that the cession dated 30 June 2014 was concluded as part of the restricted payment arrangements in respect of Engen's claim which was also consistent with the intention of Western Breeze to settle Windsharp's debt as is clear from the restructure of debt and payment proposal made by Gaskell to Engen which I have referred to hereinbefore.

[38] Mr Harcourt submitted that although Western Breeze now seeks to avoid the cession dated 30 June 2014 on the grounds that it is bad in law for lack of suretyship or alternatively because it was rendered conditionally as part of the restructure of debt and payment proposal, that the objective facts demonstrate and establish that the grounds for dispute raised by Western Breeze must fail as all the facts point to the conclusion that Western Breeze recognised the validity of the cession up until Engen elected to exercise its rights thereunder.

[39] Objective facts and conduct on the part of Western Breeze that clearly point to the fact that it must have and did recognise the validity of the second cession is to be found in the fact that in accordance with the cession agreement dated 30 June 2014 Western Breeze and Windsharp provided Engen with its debtors list without fail when requested to do so. It must be so that if Western Breeze and Windsharp genuinely disputed the validity of the cession dated 30 June 2014 then they would not have

furnished Engen with the requested details of their debts. There would have been no reason to provide this information if there was not a valid cession in existence. It must further be borne in mind that by this time Engen had already rejected the restructure of debt and payment proposal.

[40] It is telling that in its replying affidavit, Gaskell admits the validity of the cession of the book debts of Western Breeze to Engen and states that:

“para [25] The validity of the cession of the Applicant’s book debts is not in dispute. What is disputed is that the applicant is not indebted to the Respondent, and that it did not guarantee the debts of Windsharp. Accordingly there is no prejudice to the Applicant in copying its debtor’s book to the Respondent ...” (my underlying)

[41] In its ordinary sense paragraph 25 can only be read to mean that Western Breeze does not dispute the validity of the cession but rather disputes that Western Breeze has any debt owing to Engen.

[42] Surprisingly and for the first time during legal argument on 18 June 2014, Mr Riley submitted that the statement in paragraph [25] i.e. that the validity of the cession of the Western Breeze book debt is not disputed, was a typographical error. According to Mr Riley the sentence should have read “*The conclusion of the applicant’s book debts is not disputed*”. He stated that the error was realised when Western Breeze had received Engen’s heads of argument. He submitted that it must be a mistake as it has always been applicants case that the validity of the cession is denied.

[43] Whilst he was presenting argument on this crucial aspect, I asked Mr Riley why, if it was indeed a typographical mistake, this important issue was only being raised in argument and why Engen had not been advised in advance of this aspect. I further expressed my concern at why, at the very least, Western Breeze had not filed an affidavit explaining the mistake. I pause to mention that after the luncheon adjournment and because Mr Riley was experiencing problems with his throat and speaking, and when he indicated that he would not be in a position to finish his submissions on the day, it was agreed that the matter would be postponed for further argument.

[44] When the proceedings resumed on 17 August 2015, Mr Riley sought leave to hand in a further affidavit which attempts to explain that paragraph 25 hereinbefore referred to was a typographical error. Needless to say Mr Harcourt objected to the handing in of the affidavit and submitted *inter alia* that the admission of the affidavit at that stage would be highly prejudicial to Engen and that Engen did not accept that the “admission” of the validity of the cession was a typographical error. After hearing argument, I agreed to admit the affidavit and advised that I would decide what, if any, weight at all to attach to this affidavit.

[45] On a consideration of the papers before me it is clear that Engen had prepared its papers and submissions based on the admission by Western Breeze of the validity of the cession. This must also have been clear to Western Breeze and its attorneys of record when it prepared its further papers. It is not in dispute that Engen’s heads of argument was served on the attorneys of Western Breeze on 13 April 2015. Nowhere

in the further papers filed by it, nor in its heads of argument does Western Breeze make mention that what is set out in paragraph 25 of its replying affidavit is a typographical error.

[46] When considering the submission that the use of the word ‘validity’ was a typographical error, which it is now sought to be withdrawn, it is necessary to have regard to whether or not the party seeking the withdrawal of such admission has given a reasonable explanation about how the typographical error arose. On a consideration of the affidavit, which was deposed to on 11 August 2015, it does not explain how such a mistake could have been made nor why it was made. No reasonable explanation is provided as to why the typographical error was not brought to the attention of Engen or its attorneys timeously before the hearing of the matter or at least immediately after Engen had filed its heads of argument. It is further significant that there has been no formal attempt on the part of Western Breeze to withdraw the admission.

[47] It is necessary to refer to the paragraph in the final answering affidavit of Engen so that the response of Gaskell in paragraph 25 of the replying affidavit of Western Breeze can be viewed in its proper context. In Engen’s final answering affidavit, Engen’s deponent states as follows:

“[28] As is apparent from the aforementioned e-mails Salem requested the debtors list of both applicant and the second respondent in accordance with the first respondent’s rights under the second cession and these were provided to her without fail. Most certainly had applicant and second respondent genuinely

disputed the validity of the second cession then they would not have furnished Salem with the required details of the debtors”.

[48] The paragraph specifically deals with the fact that after the cession agreement was entered into, Western Breeze and Windsharp had in accordance with the cession provided Engen with their debtors lists and further states that if Western Breeze and Windsharp really disputed the validity of the cession that they would not have provided Engen with details of their debtors. There can be doubt that there is a vast difference between the meaning of the words ‘*validity*’ and ‘*conclusion*’ in the context of what is contained in paragraph 28 of Engen’s final answering affidavit. In my view we are further dealing with deliberately different language if the word ‘*conclusion*’, is substituted with the word ‘*validity*’. I agree with Mr Harcourt that in the context in which it was made as a reply to what was stated in paragraph 28, the submission that it was a typographical error cannot be correct. I am satisfied that what was stated was quite intentional and what was meant to be conveyed is that although the validity of the cession was admitted, the cession cannot be enforced because there is no underlying indebtedness. In my view such a finding fits in with Gaskell’s statement at paragraph 8 of the founding affidavit of Western Breeze where he states that, ‘... *the applicant together with Windsharp, signed a memorandum of agreement with respondent whereby the applicant would cede its debtors book to the respondent in discharge of any present and future obligations it might have to the respondent (“the cession agreement”)*’.

[49] I am accordingly not persuaded by the argument on behalf of Western Breeze that when the word “*validity*” was used by Gaskell in paragraph [25] of his replying affidavit that it was a typographical error. The explanation provided on behalf of Western Breeze is neither reasonable or probable and the manner and circumstances under which the issue was dealt with, reeks of bad faith on the part of Western Breeze. All the indications are that the explanation that it was a typographical error is an afterthought.

[50] In **Bank of Lisbon and South Africa Ltd v The Master and Others** 1987 (1) SA 276 (A) Galgat AJA (in a judgment concurred in by Rabie CJ, Jansen JA, Corbett JA and Joubert JA), stated that: “*When book debts are ceded in securitatem debiti the cedent cedes to the cessionary the exclusive right to claim and receive from the existing and future ‘book debtors’ the amounts owing by them*”. It is accepted law that ‘*unless otherwise agreed, a cession in securitatem debiti results in the cedent being deprived of the right to recover the ceded debts, retaining only the bare dominium or a ‘reversionary interest therein ...’*’ See **Picardi Hotels Ltd v Thekwini Properties (Pty) Ltd** 2009 (1) SA 493 (SCA) at para [3]. It is further accepted that a cession of book debts is valid and binding even if the principal obligation has not yet come into existence when the cession is executed. The cession comes into immediate force between the cedent and the cessionary and the cedent (i.e. Western Breeze in the present case) has no *locus standi* to sue the debtor because the cession has come into force. See **African Cons Agencies v Siemens Nixdorf Info Systems** 1992 (2) SA 739 (CPD) at 743 A – 5. In **Picardi Hotels Ltd v Thekwini Properties (Pty) Ltd** *supra* Boruchowitz AJA held at para [14] in this regard that:

“[14] I am of the view therefore that an effective and unconditional transfer of rights occurred when the cession in securitem debiti was executed. The consequence is that the respondent was divested of the power to sue the appellant in respect of the unpaid rentals. In order to sue for the recovery of the ceded debts the respondent should have taken recession of them from the bank.”

[51] I am on the whole satisfied that on a consideration of the relevant portion of Clause 1 of the cession i.e. ‘... *whether it may be or may have been incurred by the cedent individually or jointly with others or by any firm in which the cedent has or holds or may hereafter have or hold any interest and whether it arises through any acts of suretyship, guarantee, warranty, indemnity or other undertaking signed by the cedent solely or jointly with others or otherwise, ...*’ that the deed of cession is an explicit original and unqualified undertaking by Western Breeze to stand good for the debt as principal. The cession provides that the undertaking is preceded by an undertaking “*for due performance and discharge of every obligation from whatsoever cause and howsoever arising*”.

[52] On a conspectus of the evidence I am satisfied that when Gaskell entered into the cession agreement with Engen, he intended that Western Breeze should stand good for Windsharp’s debts to Engen. In my view it must therefore be so that the second cession constituted a contract of guarantee because Western Breeze undertook as a principal to pay the debt together with Windsharp. See **List v Jungers** 1979 (3) SA 106

(A), **Carrim v Omar** 2001 (4) SA 691 (W) at para's 24 – 30. Accordingly there is no basis upon which Engen should be denied its rights to proceed to collect the debt owing by Windsharp from Western Breeze in accordance with the cession of book debts signed on 30 June 2014.

[53] On the evidence it is clear that Engen has accepted that it would only be entitled to act on the cession until such time as the alleged Scania debt has been discharged during December 2014. It is however clear that Western Breeze have at various times sought to circumvent their obligations on the basis of this alleged prior ranking cession in favour of Scania Finance. It is also so that Engen's efforts to obtain a copy of the Scania cession from Hooyberg, the attorneys for Western Breeze and Windsharp, have been unsuccessful. It is not exactly clear why there has been a reluctance to provide it to Engen. The truth of the matter is that the production of the alleged cession to Scania is directly relevant to the determination of the relief sought by Western Breeze and in respect of the counter-application by Engen. The Scania cession has legal consequences in relation to the first and second cessions. I agree with Mr Harcourt that if the Scania cession does not exist, does not have prior ranking or if the debt to Scania has been settled, then there is no basis upon which Western Breeze and Windsharp can avoid the consequences of the first and second cessions on the basis of the alleged prior ranking cession to Scania. In any event, should there indeed be a valid prior cession in favour of Scania, there is no reason why Scania cannot itself take up this issue with Engen.

Has Western Breeze shown that it has an identifiable interim right pending an action which is protectable by an interdict?

[54] A further question to be answered is whether Western Breeze has shown that it has an identifiable interim right pending an action which is protectable by an interdict? The requisites for an interim interdict is as follows:

- “(a) A right which, *“though prima facie established, is open to some doubt;*
- (b) *well-grounded apprehension of irreparable injury;*
- (d) *the absence of ordinary remedy.”*

See **Setlogelo v Setlogelo** 1914 AD 221 at 227.

[55] It is accepted law that the granting of an interim interdict pending action is an extraordinary remedy within the discretion of the court. It is further accepted that in exercising its discretion a court weighs *inter alia*, the prejudice to the applicant if the interdict is withheld against the prejudice to the respondent if it is granted. The courts have a wide discretion to refuse to grant an interim (or final) interdict ‘... (which) seems to mean no more than that the court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision’. See **Knox D’Archy Ltd v Jamieson** 1996 (4) SA 348 (A) at 361 H – I. Since I am satisfied that a valid cession exists which can be enforced by Engen, I am not persuaded that Western Breeze has a basis in fact or law for an interdict to restrain and/or to prevent Engen from acting in accordance with the terms of the cession. On the whole I am satisfied that should I grant the interim interdict to Western Breeze the effect thereof would be that I would allow Western Breeze to fail to uphold a valid agreement between itself and Engen, and in so doing strip Engen of its security and further allow Western Breeze to favour other creditors over Engen when on its own version Western Breeze cannot pay its debts. In

the circumstances I have decided to exercise my wide discretion against granting Western Breeze the interim interdict.

Condonation of the late counter-claim

[56] I now turn to deal with the issue of the condonation of the alleged late counter-claim. Western Breeze complains that Engen has brought the joinder-application and the counter-application on a semi-urgent basis without applying for condonation. Mr Riley has also submitted that the counter-application should have been filed simultaneously with Engen's preliminary answering affidavit.

[57] In regard to what has been described as the '*technical arguments*' raised on behalf of Western Breeze, it is necessary to point out that our courts have consistently held that the "*rules are for the court and not the court for the rules*". See **Standard Bank of South Africa Ltd v Dawood** 2012 (6) SA 151 (WCC) at para [12]. In **Mukaddum v Pioneer Foods (Pty) Ltd** 2013 (5) SA 89 CC Jafta J writing for the court held at para [39] that:

"Flexibility in applying requirements of procedure is common in our courts. Even where enacted rules of court are involved, our courts reserve for themselves the power to condone non-compliance if the interest of justice require them to do so. Rigidity has no place in the operation of court procedures ..." See also Herbstein & Van Winsen *The Civil Practice of the Superior Courts in South Africa* 3rd ed at pp 19 – 20. It is clear that the approach adopted by our courts is that the Rules of Court will be interpreted

and applied in a spirit that will facilitate the work of the courts and enable litigants to resolve their differences in as speedy and inexpensive a manner as possible. See **Chelsea Estates & Contractors CC v Speed-O-Rama** 1993 (1) SA 198 (SE) at 201G. Courts have a wide discretion to permit a late counter-application. See **Truter v Degenaar** 1990 (1) SA 206 (T) at p. 211. Rule 24 of the Rules of Court now makes provision for a court to permit a late counter-claim. See **Shell SA Marketing v Wasserman** 2009 (5) SA 212 OPD at 215 G – I.

[58] In considering the complaints by Western Breeze it must further be borne in mind that the deponent of the preliminary answering affidavit on behalf of Engen made it clear that due to the extremely short notice and the fact that he was not in a position to answer the application fully, that should the application not be dismissed for among other reasons for want of urgency, that Engen be allowed to supplement the affidavit. I am satisfied that it was clear from the outset that Engen had always reserved its rights to respond fully to the application. The fact that Engen would be allowed to file a further affidavit was also agreed to by the parties and was made an order of court. The fact that Western Breeze did not therefore simultaneously file its counter-claim with the preliminary answering affidavit is therefore understandable.

[59] In the present matter Engen filed its counter-application together with its substantive affidavit in opposition to the relief. There can be no basis for complaint on the part of Western Breeze. On the whole I am satisfied that this is in any event a case

where I should exercise my discretion in favour of condoning the late filing of Engen's counter-claim.

[60] In regard to the joinder of Windsharp to these proceedings, Mr Riley has submitted that the application amounts to an abuse of the court process. He submitted that Engen has presented contradictory versions of which entity is allegedly liable for payment of its debt. In this regard he argued that in the application by Engen for the winding-up of Windsharp in the Pietermaritzburg High Court, that:

1. Engen alleges that Windsharp is liable for the entire debt due to it and that it makes no allegations as to the indebtedness of Western Breeze to it in any amount or for any reason.
2. Engen makes no mention of the fact, as it alleges in this matter, that Western Breeze has given any security for the debts of Windsharp's account and is therefore indebted to Engen, as an afterthought.

[61] Erasmus, Superior Court Practice 2nd ed states at D1 – 126 that:

'Apart from the obligatory joinder of a party who has a direct and substantial interest in a subject matter of the litigation, a defendant may be joined under the common law on grounds of convenience, equity, the saving of costs and the avoidance of multiplicity action'.

[62] Our courts have held that a party may be joined if it can be shown that the party sought to be joined *'... has a direct legal interest and not merely a financial interest*

*which is only an indirect interest in such litigation. Such direct interest has been stated to be limited to cases of joint owners, joint contractors and partners and where the other party has a direct and substantial interest in the issues involved and the order which the court might make.’ See **United Watch & Diamond Co v Disa Hotels** 1972 (4) SA (CPD) 409 at 415 E – F. In **Henri Viljoen (Pty) Ltd v Awerbuch Brothers** 1953 (2) SA 151 (O) Horwitz AJP, after analysing the concept ‘direct and substantial interest’ concluded that “... an interest in the right is the subject matter of the litigation and ... not merely a financial interest which is only an indirect interest in such litigation.”*

[63] In the further affidavit of Gaskell, filed on behalf of Western Breeze, he states that, *“there is no need to join Windsharp, as it is a separate entity and that neither it nor Western Breeze are shareholders, nor subsidiaries of each other. He states further that neither entity controls the other, either directly or indirectly, nor does Windsharp have any interest in the subject matter of the urgent application as it is not affected thereby, either directly or indirectly.”*

[64] In the restructure and payment proposal to Engen, Gaskell states that *“the Gaskell family have always operated and conducted two distinct transport operations, one from 106 Van Moolmam Street, Vryheid, Kwazulu Natal, being the Windsharp business which has a number of general transport clients and the other from Melmoth, being the Western Breeze business which is a specific forestry transport business that has as its core client, Mondi Ltd”*. He states further at 2.2 in the restructure and payment proposal that *“Windsharp uses approximately R1.8 million of diesel per month*

and Western Breeze uses approximately R1.2 million per month, a combined diesel consumption of approximately R3 million per month”.

[65] When the restructure of debt and payment proposal and the Gaskell purchases of diesel from Engen are read together then the following is apparent:

1. That Windsharp and Western Breeze are two of several companies and entities which are controlled by the Gaskell family;
2. That Gaskell is the common director and common controlling mind of both Western Breeze and Windsharp;
3. That all the companies and entities under the Gaskell group have the common interest of providing for the financial advancement of the Gaskell family;
4. That Western Breeze was using Windsharp's facility with Engen to meet its own fuel requirements in circumstances where neither of them were making payment to Engen;
5. The indications are that the merger which was proposed and envisaged in the restructure of debt and payment proposal had already commenced as far back as October 2013 as the diesel purchases show a rise up to R3 million which is in accordance with Gaskells's admission to Engen.
6. The commercial interest of Windsharp and Western Breeze are indetical and the issues appear to be intertwined.

[66] I am satisfied that on the totality of the evidence, Engen has shown on a balance of probabilities, that Windsharp does indeed have a direct legal interest in these proceedings and that Windsharp should therefore be joined. In so far as the argument is concerned that Engen has failed to mention that Western Breeze was indebted to it in the liquidation application of Windsharp and that this has resulted in a dispute of facts which has resulted in this matter being referred to oral evidence, I do not agree that anything turns on the submissions made in this regard and it accordingly falls to be dismissed.

[67] Even though Mr Harcourt has urged me to make a cost order against Western Breeze and Windsharp on an attorney and client scale, I am not persuaded that I should do so.

[68] In the result I make the following order:

1. The application by the applicant is dismissed with costs.
2. It is ordered that Windsharp Trading (Pty) Ltd is hereby joined as second respondent.
3. The applicant and second respondent are directed to furnish the first respondent with copies of their debtor's book for the period 01 September 2014 to 28 February 2015 or the last day of the calendar month prior to this Order, whichever is the later, including the name and physical address of each debtor and the amounts outstanding by each debtor as at the accounting months-end of the book during that period.

4. The applicant and second respondent are directed to furnish the first respondent with a copy of the alleged cession agreement concluded with Scania Finance Southern Africa (Pty) Ltd.
5. The applicant is direct to forthwith disclose to the first respondent full details of all receipts of payments from its debtors received after 09 December 2014 supported by vouchers and Bank statements of the account into which such funds were deposited.
6. The second respondent is directed to forthwith disclose to the first respondent full details of all receipts of payments from its debtors received after 09 December 2014 supported by vouchers and Bank statements of the account into which such funds were deposited.
7. The applicant and second respondent are interdicted and restrained from passing off any of the debtors' of the second respondent as those of the applicant and vice versa.
8. The costs of the counter-application shall be paid by the applicant and second respondent jointly and severally, the one paying the other to be absolved.

RILEY, AJ