

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]

CASE NO: 7436/2009

12/3/2010

In the matter between:

VOLTEX (PTY) LTD

and

WERNER ANTON RAS

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE, YES/NO	
(2) OF INTEREST TO OTHER JUDGES: YES/NO	Plaintiff
(3) REVISED	
12/3/2010	Signature
DATE	SIGNATURE Defendant

JUDGMENT

MOTHLE A J

1. This matter comes to Court by way of an exception raised by the plaintiff against the defendant's counterclaim. It is apposite to state, succinctly, the background to the exception.
2. The plaintiff, a company duly incorporated with limited liability, issued summons against the defendant, a businessman, for payment of goods sold and delivered arising out of a written credit facility agreement (*"the agreement"*). The defendant pleaded to the summons admitting indebtedness to the plaintiff but denying the amounts claimed. The defendant also issued a counterclaim for

damages arising out of an alleged breach of the agreement by the plaintiff, for an amount of R1, 021 163.40. The plaintiff thereafter raised an exception to the defendant's counterclaim. The grounds of the exception are that the counterclaim does not disclose a cause of action.

3. In terms of Rule 23 of the Uniform Rules of Court, an exception may be taken to a pleading if it is vague and embarrassing or if it lacks averments necessary to sustain an action or a defence, as the case may be. It is the latter ground on which the plaintiff relies, namely, that the counterclaim filed by the defendant lacks the necessary averments to sustain a claim.
4. The action by plaintiff and the counterclaim by the defendant arise from the agreement. It is common cause that on or about the 3rd October and at Pretoria, the defendant, acting personally, executed the agreement to the plaintiff in terms whereof he agreed that if the plaintiff sold and delivered goods to him on credit, all such transactions would be subject to the plaintiff's terms and conditions of sale as specifically contained in the agreement.

5. It was part of the agreement that the defendant would cede in security for the debt, (*"in securitatem indebiti"*), to the plaintiff, his right, interest and claims to demand payment of book debts. The cession is part of the agreement, and is stated in clause 7 (a) thereof.
6. The defendant had entered into another agreement (*"the building agreement"*) with Robert Skinner Construction CC (*"Skinner Construction"*), for the supply and installation of electrical equipment for a newly constructed shopping complex at Groblersdal. The electrical equipment included a transformer of 830 KVA output equipped with a temperature trip and alarm. It is this transformer that the defendant sought to purchase on credit from the plaintiff.
7. The essence of the terms of the building agreement were that should the defendant fail to supply the goods and complete the installation on or before the 24th October 2007, the defendant would be liable to pay a penalty to Skinner Construction equal to R30, 000.00 per day for each day the works remain incomplete beyond the last mentioned date. It was further agreed that the Skinner Construction would be entitled to deduct such penalties from any monies due by it to the defendant. Further, the defendant would be expected to execute and complete the works described in the

building agreement in a proper and workmanlike manner and use only materials that are suitable.

8. The defendant ordered delivery of the transformer from the plaintiff on credit and thus became indebted to plaintiff as per terms of the agreement. The defendant alleges in the counterclaim that the plaintiff failed to deliver the transformer as agreed and thus caused him to suffer damages for non-performance as stated in the building agreement with Skinner Construction. The salient averments in the counterclaim captures, in essence, the cause of action for damages as follows:

- 8.1 On the 12th June 2007, the plaintiff issued a quotation to the defendant in respect of the order for the transformer as submitted by the defendant, which the defendant accepted. It was further agreed verbally between the defendant and the plaintiff's representative that the plaintiff would supply and deliver a new transformer before the 25th September 2007 which transformer would be in a proper working condition and the transaction executed in the terms and conditions of sale as specifically contained in the credit facility.
- 8.2 During or about September 2007, the plaintiff and the defendant verbally amended the contract between them by agreeing that the plaintiff would supply a temporary transformer on the 25th September 2007 since the transformer ordered by the defendant was not ready

for delivery. The supply of this temporary transformer would be effected pending delivery and installation of the new transformer as initially agreed with the plaintiff. The plaintiff would be responsible for all costs incurred and attributable to the defendant as a result of the delay.

8.3 The defendant further alleges in the counterclaim that the plaintiff breached the agreement by:

8.3.1 Only delivering the temporary transformer referred to on 28th September 2007;

8.3.2 Effecting delivery of a transformer on the 12th October 2007 which did not comply with the agreed specifications, had a second hand generator and not manufactured according to the specific dimensions.

8.4 The defendant further avers that as a consequence of the plaintiff's breach of the terms of the transaction, the tenants in the shopping centre had to hire generators when the temporary transformer did not arrive on the 25th September 2007. Further that the actual transformer delivered by the plaintiff was not in accordance with the specifications, resulting in structural damages to the building during installation. The defendant could thus not complete the electrical installations in accordance with the building agreement concluded with the Skinner Construction and consequently the Contractor enforced the penalty clause as against the defendant.

9. The plaintiff's exception to the defendant's counterclaim is based on the ground that since the defendant has ceded his right to claim to the plaintiff in terms of clause 7 (a) of the agreement, he has divested himself of the right to sue and therefore "*there is no cause of action*". In essence, the plaintiff contends that in terms of the cession, the defendant has also divested himself not only of the right to claim debts and book debts, but also to sue for damages.
10. The attack on the counterclaim is not directed at the merits or content thereof, but on the basis that the defendant, through the cession, has divested himself of the *locus standi* to sue. While it is general practice that a party would raise a legal objection of *locus standi* in terms of a special plea, it is also permissible to do so by way of exception, **See Viljoen v Federated Trust Ltd 1971 (1) SA 750 (0)**.
11. The question raised by this exception is whether the cession in fact does divest the defendant of the right to sue the plaintiff for damages. The cession is an integral part of the agreement and is provided for in clause 7 (a) thereof.

12. Clause 7(a) of the agreement which provides for the cession reads as follows:

"7(a) The Applicant (reference to the Defendant) does hereby irrevocably and in Rem Suam cede, pledge, assign, transfer and make over unto and in favour of the creditor (reference to the Plaintiff), all of its right, title, interest, claim and demand in and to or claims/debts/ book debts of whatsoever nature and description and how so ever arising which the Applicant may now or at any time hereafter have against all or any persons, companies, corporations, firms, partnerships, associations, syndicates and other legal persona whom so ever (the Defendant's debtors) without exception as a continuing cover in security for the due payment of any sum of money which may now or at any time hereafter be or become owing by the debtor to the credit from whatsoever cause or obligation how so ever arising which the Applicant may be or become bound to perform in favour of the creditor."

13. The wording of this cession seems to be frequently in use concerning agreements of this nature. There are indeed instances where the courts have been seized with the interpretation of these same words (*"ipssissima verba"*) as used in agreements concerning rights ceded in *securitatem indebiti*.

14. In *Picardi Hotels Ltd v Thekwini Properties (Pty) Ltd 2009 (1) SA 493 (SCA)* the Court interpreting a contract containing a cession in *securitatem indebiti* couched in the same words as the agreement stated, amongst others:

"It is settled law that unless otherwise agreed, a cession in securitatem indebiti results in the cedent being deprived of the right to recover the ceded debt, retaining only the bare dominium or reversionary interest therein."

The Court further remarked in paragraph 14 of the judgment that:

"I am of the view therefore that an effective an unconditional transfer of rights occurred when a cession in securitatem indebiti was executed. The consequence is that 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 their bank."

15. The principle as stated above does not necessarily hold for all contracts where there is a cession in *securitatem indebiti*. Each contract has to be interpreted as a whole in order to ascertain the intention of the parties. The clause providing for cession should not be interpreted in isolation. **See Coopers & Lybrand and Others v Bryant 1995 (3) SA 761 AD at 768G-H** as well as **Marigold Ice Cream Company (pty) Ltd v National Co-operative Dairies Ltd 1997 (2) SA 671 (WLD)**

at 677 AC. The need to apply the rules of interpretation of contracts was also endorsed in the **Picardi Hotels Ltd v Thekwini Properties (pty) Ltd** *supra* at 496F-497A. Both parties in this application agree that the issue raised by this exception is essentially one of interpretation.

16. In all three cases cited above, the Courts were called upon to interpret the full terms of the contract of cession in *securitatem indebiti*. In all three cases the cessionary was a third party (a bank). The present case is distinguishable from the three in that the cession in *securitatem indebiti* is between the plaintiff and the defendant and is provided for in the same agreement which gave rise to the action and counterclaim.
17. Applying a proper and reasonable construction to the terms of the agreement, it seems to me that the language of clause 7(a) does not expressly state that the cession would cover debts or book debts of the defendant arising between himself and the plaintiff. Further, it does not clearly state whether the cession in *securitatem indebiti* will include claims for damages by the defendant against the plaintiff, arising out of the very same agreement between them. However, a reading of sub-clause 8.2 and clause 10 of the agreement reveals that

provision has been made to deal with the claims that may arise between the parties. The following are the text of the relevant provisions:

8.2 *"The applicant acknowledges that the creditor is not the manufacturer of the goods. The applicant accordingly indemnifies and holds the creditor harmless against any claim that may be brought against the creditor in consequence of such goods being defective and causing any damage whatsoever, whether through accident or negligence, gross negligence or any other cause."*

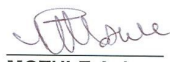
10. *"It is agreed that set-off shall operate automatically as a matter of law at the moment reciprocal debts between the creditor and the applicant come into existence and independently of the will of the parties and it shall not be necessary for either the creditor or the applicant to specifically raise set-off. Upon the operation of an automatic set-off aforementioned, the debts shall be mutually extinguished to the extent of the lesser debt."*

18. There is reference to indemnification and set-off as remedies provided for separately in the agreement to deal with claims arising between the parties *inter se*. It would appear to me that the parties could not have intended that the cession in *securitatem indebiti* referred to under clause 7(a), was to

include any claims for damages arising in the same agreement *inter se*.

19. The parties could not have intended to include personal claims under the phrase "*and other debts and claims of whatsoever nature*." It seems that the debts referred to are business debts which were due to the defendant by other parties, his debtors. **See Coopers & Lybrand and Others v Bryant supra**, where the same words used in a cession in *securitatem indebiti*, were found to exclude claims for damages.
20. It is trite that for the purpose of deciding an exception, a court must assume the correctness of the factual allegations made in the relevant pleading, unless such allegations are untrue or so impossible that they cannot be accepted. **See Van Zyl NO v Bolton 1994 (4) SA 648 (CPD) at 651 E**. Assuming that the counter claim has merit and the defendant has divested himself of the right to sue the plaintiff for damages as contended by the plaintiff, then in essence the plaintiff being the holder of the right to sue, becomes both the creditor and debtor to the claim for damages, a situation which in my view is untenable.

21. I therefore conclude that the cause of action for recovery of damages as a result of the alleged breach of the agreement by the plaintiff, is not part of the book debts or claims that were ceded in terms of Clause 7(a) of the agreement between both parties. The counterclaim as such is not excipiable as the defendant has not in my view divested himself of the right to raise it against the plaintiff.
22. In the premises, the exception raised by the plaintiff against the defendant's counterclaim cannot succeed. I accordingly make the following order:
1. The exception is dismissed;
 2. The plaintiff may, within 10 days from the date of this order file a plea to the defendant's counterclaim;
 3. The plaintiff is to pay the defendant the costs of this application.


MOTHLE A J

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