

NORTH GAUTENG HIGH COURT, PRETORIA

DATE: 18 June 2010
CASE NO: 520/2009

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
18/06/2010
DATE SIGNATURE

18/6/2010
NOT REPORTABLE

In the matter between:

NORTHERN ESTATE &
TRUST ADMINISTRATORS (PTY) LTD

PLAINITFF

AND

AGRICULTUREAL AND
RURAL DEVELOPMENT CORPORATION

DEFENDANT

J U D G M E N T

PHATUDI J

[1] The Plaintiff instituted this action as against the Defendant
claiming the transfer of shares ceded to them by Charles Andrew

Boyes (cedent). The shares claimed were purchased by the cedent from the Defendant.

[2] Mr Els, counsel for the Plaintiff, placed on record that assertions set out in paragraphs 1 to 6 of the Plaintiff's particulars of claim are issues of common cause.

[3] The allegations in paragraph 9 of the particulars of claim and assertions in paragraph 2.2 of the Defendant Plea remain in dispute. Mr Els submit that the court must determine as to whether

- 3.1. Cession agreement was concluded between the cedent and the Plaintiff and;
- 3.2. The agreement of sale of shares concluded between the cedent (Mr Boyes) and the Defendant was expressly cancelled alternatively tacitly.

[4] Mr Els applied in terms of Rule 39(11) for a ruling that the duty to begin in the first issue to be determined is that of the Plaintiff and to the Defendant in respect of the second issue. He further applied that I make a ruling that the Plaintiff shall have the right to call rebutting evidence on any issue in respect of which the onus is on the Defendant.

[5] I, after hearing arguments by both counsel, made a ruling to the effect that if the Plaintiff shall have called evidence on any such issues before closing his case, he shall not have the right to call any further evidence.

[6] Subsequent thereto, Mr Blignaut, counsel for Defendant, applied with no objection from the Plaintiff for amendment of paragraph 2.2.

[7] Andre Thomas (Mr Thomas), an admitted attorney, a director at a firm of attorneys and practising as such in the name and style Thomas & Swanepoel Inc (firm) testified that he is as

well a director at Northern Estate and Trust Administrators (Pty) Ltd (Plaintiff). The firm is a shareholder in the Plaintiff.

[8] Mt Thomas testified that Mr Boyes (the cedent) has been the firm's client for over a period of 10-15 years. He says that the cedent was indebted to the firm in the sum amounting to R150 000.00. In order to alleviate the debt burden from the cedent, an agreement was entered into wherein the cedent cedes his right to claim the title and interest against the transfer of shares from the Defendant, which he (cedent) purchased from the Defendant. It was further agreed that the cedent's account at the firm will be credited with an amount of R150 000.00.

[9] He further testified that a memorandum of agreement was drafted. A copy of the said agreement is annexed at page 14 of the Pleadings bundle. He is the author of the agreement and represented the Plaintiff in concluding same. He confirms the cessionary signature appearing on the document as his and for the cedent as that of Mr Boyes.

[10] He testified under cross examination that upon conclusion of the cession agreement, the original was filed in the "Master file" at the firm. He is the one with access to the master file.

[11] He says he did not know where the cedent got the money from in purchasing the shares from the Defendant. He was not involved with the drafting of offers to purchase the said shares.

[12] When confronted with a letter issued by the Firm dated 14 November 2008, purporting to be acting on the instructions of the cedent, he testified that he gave the litigation department instructions to cause issue of it. He acknowledged that he failed to inform the writer of the letter of the existence of the cession agreement. Plaintiff closed its case.

[13] Gerhard Esterhuizen (Mr Esterhuizen) testified that he is employed by the Defendant as a manager of Corporate Services and Finance department. He testified that the sale of shares

agreement was entered into on or about 31 May 2005 by and between the cedent and the Defendant. The cedent caused electronic money transfer of the purchase price to Defendant's chosen banking account.

[14] He says a decision was taken at the Defendant's board meeting held on 5 November 2008 to remarket the shares which included those purchased by the cedent. It was further decided to transfer the said shares to the members of the community. He says the cedent, even though he was not happy, informed the board that he will accept the decision on condition the said shares are transferred to the community and not sold to an individual.

[15] He, on the 11 September 2008, received a call from the cedent. His complaint was that the money ("refund") has been paid into the wrong account. He informed the cedent that he will attend to the matter once he is in his office. He then received a letter from the cedent as annexed at page 30 of the trial bundle. He instructed Mr Naude by endorsing the following words: "Please

transfer to a new account". The money was indeed paid to the cedent's banking account as is evident from the deposit slip annexed to the trial bundle.

[16] With regard to the meeting of 5 November 2007, Mr Esterhuizen testified that the cedent's attitude was that of accepting the decision of "remarketing" the shares on condition they are transferred to the community.

[17] Mr Els submits that the cedent ceded his right to claim the transfer of the shares he bought from the Defendant. The cession is valid. The Debtor is not obligated to be informed of cession.

[18] He further submitss that there was no express cancelation of the sale of shares agreement concluded between the cedent and the Defendant. He submits that cedent always wanted his shares and not the money. He submits that no cancellation of agreement was concluded at the board meeting of 5 November 2007. The cedent did not provide the Defendant with banking

details where the refund should be deposited into. He submits that if the cancellation of the agreement had been agreed on, it would have been discussed and minuted as such at the meeting. He lastly submits that the court should find in favour of the Plaintiff.

[19] In rebuttal thereto, Mr Blignaut submits that it is clear from Mr Esterhuizen's testimony, that he (Mr Esterhuizen) was under the impression that the "cancellation" was resolved on condition that the shares were to be transferred to the communities and for benefit of the members of the communities.

[20] He further submits that the cedent was the only witness who would have clarified the issue as discussed in the meeting of 5 November 2007. He submits that an inference be drawn on the cedent's failure to testify that the Sale of shares agreement was expressly cancelled at the meeting of 5 November 2007.

[21] In the alternative, Mr Blignaut submits that in the event I find that there was no express cancellation at the board meeting held

on 5 November 2007, then the cedent tacitly accepted cancellation by providing his banking details as set out in the letter dated 12 September 2008. He further thereto submits that the cedent was satisfied with the "refund". The cedent was only not happy about the money being paid into the account he did not prefer. He further submits that the cedent said nothing about the shares in the said letter. As a result thereof, he said an inference be drawn that the cedent regarded the sale of shares agreement as not being in force or effect.

[22] In my evaluation of the evidence tendered and submissions made on behalf of both parties, it is clear that the cedent and Plaintiffs concluded an agreement wherein the cedent ceded his rights, title and interest in and to the claim against the Defendant for the transfer of the shares as listed in the Plaintiff Particulars of Claim.

[23] The Defendant does not deny the signature attested on the memorandum of agreement (annexed "NT4") as those of the

cedent and cessionary. Mr Thomas testimony on the conclusion of the agreement remains uncontested.

[24] It is common cause that the Defendant was not informed of the cession prior to the institution of this action. In **LYNN & MAIN INC v BRITS COMMUNITY SANDWORKS CC 2009(1) SA 308 SCA**, referred to by Mr Blignaut, Mpati P held that 'notice to the debtor is not a prerequisite for the validity of the cession but a precaution to pre-empt the debtor from dealing with the cedent to the detriment of the cessionary'.

It is further held that 'cession takes place without the concurrence of the debtor.'

[25] The Defendant did not plead invalidity of the cession on the basis of the debtor not being made aware of its existence. I, on the basis set out herein above, find that the cession agreement concluded by the cedent and the Defendant as cessionary, valid.

[26] I agree with Mr Els that cancellation of an agreement is effected where there is a meeting of minds between the contracting parties and in absence thereto, no cancellation can be said to be effected.

[27] Mr Blifnaut refers me to **SEWPERSADH AND ANOTHER v DOOKIE 2009 (4) ALL SA 338 SCA** where the court found the respondent to have been well aware of what was required of him and further found no merit in his contention of the validity of the cancellation of contract. In **DATACOLOR INTERNATIONAL (PTY) LTD v INTAMARKET (PTY) LTD 2001 (2) SA 284 SCA**, the court held that 'where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract, he is said to "repudiate" the contract. Where that happens, the other party to the contract may elect to accept the repudiation and rescind the contract.'

[28] In applying the principle set out in **SEWPERSADH AND ANOTHER**, I find the cedent to have been aware of the "cancellation" of the sale of shares agreement concluded with the Defendant. According to the testimony of Mr Esterhuizen he was

under the impression that the cedent accepted the "cancellation" subject to the condition that the shares be transferred to the communities, as per discussion at the meeting of 5 November 2007.

[29] I further find the cedent to have accepted the Defendant's cancellation of the sale of shares agreement by causing issue of a letter informing the Defendant of the "correct" banking account in which payment (refund) should be made. The writing of the letter is, in my view, a fact relevant to (*facta probatia*) the express cancellation of the sale of shares agreement discussed on the 5 November 2007.

[30] Further thereto I, on the uncontested words "on condition the shares are transferred to the communities", draw an inference that the cedent accepted cancellation of the sale of shares agreement.

[31] The fact that the money was paid back to the cedent some months after the decision or cancellation of the agreement as at 5

November 2007, is, in my view, not an issue to rely on for “non-cancellation” of the agreement.

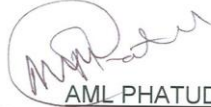
[32] The cedent has since (at most) 5 November 2007 being aware that the shares will be transferred to the communities and for the benefit of the previously disadvantaged communities. He, in my view, accepted the said cancellation subject to the said proviso. There is no evidence that the Defendant breached the cedent’s condition.

[33] I, as a result thereof, am of the view that the sale of shares agreement was concluded on the 5 November 2007 prior to the Plaintiff causing issue of the summons against the Defendant. The Plaintiff’s claim stands to be dismissed.

[34] It is trite law that costs follow the event. The Defendant succeeds in dismissing the Plaintiff claim. He, as a result thereof, is entitled to the costs occasioned by this action.

[35] I thus make the following order;

The Plaintiff's claim is dismissed with costs.



JUDGE OF THE NORTH GAUTENG HIGH COURT

Heard on: 1 June 2010

For the Plaintiff: Adv ELS

Instructed by: Messrs Naude & Brits Attorneys

For the Defendant: Adv Blignaut

Instructed by: Messrs Thomas & Swanepoel Attorneys

Date of Judgment: 18 June 2010