

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

CASE NO.: 1183/2013

In the matter between:

UKUBONISWA LOGISTICS AND ENGINEERING CC

Plaintiff

And

JOHNSON CONTROLS AUTOMOTIVES SA (PTY) LTD

Defendant

JUDGMENT

BESHE J:

[1] Plaintiff in this matter is suing defendant for damages arising out of an alleged breach of an agreement that was entered into between the parties.

[2] Over and above its plea, defendant raised two special pleas.

[3] Following an agreement between the parties, I exercised my discretion in favour of authorising the separation of issues as agreed upon by the parties. I ordered that the second special plea be separated from the rest of the issues and that it should be adjudicated first.

[4] It is common cause that the parties entered into an agreement of carriage in terms of which plaintiff was to transport defendant's goods. It is as regards that part of the agreement that concerns the points of collection of goods and the destinations thereof that the parties seem to be at odds with each other. However that does not have a bearing on the special plea concerned.

[5] The point raised by the defendant by way of the special plea in question is that the plaintiff lacks the legal standing to institute the action in question against it by virtue of the fact that it executed a deed of cession in favour of the Eastern Cape Development Corporation (ECDC) and ceded all its rights to title and interest in and to all its debts and claims, in fulfilment of plaintiff's obligation to Eastern Cape Development Corporation.

[6] The existence of a deed of cession executed favour of ECDC (cessionary) by the plaintiff is common cause. In terms of the deed of cession plaintiff as the cedent, in fulfilment of obligations to the cessionary (ECDC) in respect of a loan "cedes to the Cessionary, unreservedly, all his right title and interest in and to all progress payments, money, other debts, and claims whatsoever nature due and to become due to it by the employer". In the deed of cession, the "employer" is given as defendant in this matter.

[7] In its reply to defendant's second special plea, plaintiff admitted the existence of the deed of cession as pleaded by the defendant. Denied that plaintiff was not vested with legal standing to advance the claim against the defendant. In amplification of the denial that it was not vested of a legal right, plaintiff pleaded that:

(i) In terms of paragraph 2.3 of the cessionary ECDC nominated the plaintiff as its authorised representative to collect and receive all payments relating to the contract in question.

(ii) That written consent was sought from and granted by ECDC to institute action against the defendant arising from defendant's alleged breach in termination of the contract in question.

[8] *Clause 2.3 of the Deed of Cession* provides that “the cessionary (ECDC) hereby nominates cedent (plaintiff) as its authorised representative to collect and receive all payments relating to this contract as referred to in paragraph 3.1 (which the parties agree should read 2.1) above from the employer in terms of a special power of attorney executed by the cedent in favour of the cessionary”.

[9] As regards second leg of plaintiff replication, correspondence between plaintiff and those representing ECDC is attached. The correspondence reveals that ECDC consented to plaintiff proceeding with legal action against the defendant. The relevant part of the letter ends with “All our clients’ rights in terms of the deed of cession are reserved”.

[10] There is no dispute regarding interpretation of the terms of deed of cession as being a complete cession by the plaintiff of its rights to recover any money from defendant to ECDC. Put differently ECDC holds a real right to claim the debt from the defendant. This has the effect of depriving the plaintiff of the legal standing to claim payment from the defendant in terms of or flowing from the agreement entered into between it and the defendant.

[11] *Mr De La Harpe* for the defendant submitted that *Clause 2.3 of the Deed of Cession* which nominates the defendant as cedent as the representative of ECDC to collect and receive all payment relating to the contract in question cannot be interpreted to be clothing the plaintiff with *locus standi* to sue the plaintiff in respect of the agreement. He argued further that this interpretation will entail that there is no cession to speak of. Which in turn will negate the cession entirely.

[12] I agree that the interpretation contended for by the plaintiff in its replication is untenable. It is only the cessionary who has a right to sue upon the contract as the party that has the legal standing to do so. This is a position that was affirmed in ***Standard General Insurance Co. Ltd v Eli Lilly (SA) (Pty) Ltd, (FBC Holdings (Pty) Ltd, 3rd Party) 1996 (1) SA 382 (W)*** where it was held that a plaintiff who has ceded his claim before the institution of action could not sue as agent for the cessionary. Further that the plaintiff had divested itself of its rights in respect of the claim. My attention to the matter of ***Standard General Insurance v Eli Lilly supra***, was drawn by *Mr White* who was acting on behalf of the plaintiff. He submitted that plaintiff was under the impression they could sue the defendant on the basis of *Clause 2.3* and the written consent granted to them by ECDC (the cessionary). He conceded, rightly so in view, that on the authority of ***Standard General Insurance*** and other authorities,¹ the two grounds are not sufficient to clothe plaintiff with the right to sue the defendant in respect of the agreement concerned.

[13] Even on the basis of the written consent of the cessionary to the cedent to proceed with legal action against the plaintiff, it could only do

¹ *Sentrakoop Handelaars Bpk v Laurens and Another* 1991 (3) SA 540.

so as an agent of the cessionary and not in its own name as rightly pointed out by *Mr De La Harpe* and conceded by *Mr White*.

[14] In the circumstances, defendant's second special plea falls to be upheld.

Accordingly the following order will issue:

- 1. Defendant's second special plea is upheld.**
- 2. Plaintiff's claim against the defendant is dismissed with costs.**

N G BESHE
JUDGE OF THE HIGH COURT

APPEARANCES

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Date Reserved : 22 August 2016
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