



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

10/11/16

Case number: 39042/2009

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHERS JUDGES: YES/NO
- (3) REVISED

10/11/16

DATE

SIGNATURE

In the matter between:

NEDBANK LIMITED

PLAINTIFF

And

PHILIP JOSEPH GENT

DEFENDANT

JUDGMENT

HUGHES J

[1] The defendant and Springs Car Wholesalers CC (the Dealer) entered into an agreement on 30 November 2005 termed a "Variable Rate Lease Agreement" (VRLA) where the defendant leased a new 2005 Renault Grand Scenic II Expression 2.0 motor vehicle (the motor vehicle).

[2] The financing engine was "The Motor Finance Corporation" (MFC) who had concluded a Master Discount Agreement dated 8 April 2003 (annexure B1 in the papers) with the Dealer to finance the VRLA of the defendant. Herein the Dealers rights title and interest were ceded to MFC. MFC in turn concluded a Master Discount Agreement (annexure B2) with Imperial Limited on 23 November 2001. In essence Imperial Bank Limited financed MFC to finance the Dealer and as such MFC's rights, title and ownership were in fact that of Imperial Bank Limited.

[3] As Nedbank Limited had acquired Imperial Limited's entire shareholding, MFC, Imperial Bank Limited and Nedbank Limited concluded an Addendum to the Master Discount Agreement on 27 September 2010. By doing so the rights, title, ownership and obligations were ceded from MFC, Imperial Bank Limited to Nedbank Limited.

[4] The plaintiff's, cited as Nedbank Limited, claims from the defendant payment for arrears in terms of the VRLA entered into with the dealer, for the lease of the motor vehicle financed by MFC. Imperial Bank Limited transferred its asset to Nedbank Limited on 1 October 2010.

[5] The plaintiff pleads that it derives its *locus standi* in terms of a number of cession agreement's which are covered by the VRLA between the Dealer and the defendant; the Master Discount Agreement 'B1' between the Dealer and MFC; the Master Discount Agreement 'B2' between MFC and Imperial Bank Limited and the eventual absorption of Imperial Bank Limited into the plaintiff, Nedbank Limited. The plaintiff pleads further that the defendant was notified of these cessions.

[6] The defendant disputes the locus standi of the plaintiff, the authenticity and validity of the VRLA, the proof of B1 and B2 and the cessions alluded to in B1 and B2, the defendant's knowledge of the cessions and the defective nature of the motor vehicle.

[7] The defendant from the outset submitted that B1 as an agreement between the Dealer and defendant facilitates a cession but it does not amount to a cession and it only provides formalities in order for the cession to take place. Likewise with B2 the agreement between MFC and Imperial Bank Limited.

[8] At the trial the plaintiff called witnesses whilst the defendant opted to close its case without adducing any evidence. I must point out that at the close of the plaintiff's case the defendant had sought absolution from the instances which I refused after a detailed judgment delivered. The entire case, in my view, relies on the interpretation of the two Master Discount Agreements B1 and B2.

[9] The defendant argues that for the plaintiff to succeed it would have demonstrated its *locus standi*; prove B1 and B2 and the cessions it relies on together with their notification to the defendant, as well as the authenticity and validity of the VRLA.

[10] Adv. Williams for the defendant premises his argument within the confines of the Master Discount Agreements B1 and B2. He argues that there has been non-compliance with section 2.1.2 and 2.2 (with its sub-paragraphs), in respect of B1 and sections 1.1; 1.3; 1.6 and 2 (inclusive of the sub-paragraphs) in respect of B2. His emphasis that B1 and B2 do not constitute cession agreements but merely, as set out in the section mentioned above set out the formalities to be adopted to give effect to the cessions coming about.

[11] The argument that the plaintiff has not proven B1 and B2 in my view holds no substance. Yes, the signatories to those documents were not called to testify however the documents are what they purport to be as submitted by the plaintiff. Whether they constitute cessions is another issue which I address below.

[12] The pinnacle of the plaintiff's case is that of cession and as such I am mindful of that enunciated by Nienaber JA in *Hippo Quarries (TVL) (PTY) LTD v Eardley* 1992 (1) SA 867 at 873E-F:

"Cession, it is trite, is a particular method of transferring a right. The transfer is effected by means of agreement. The agreement consists of a concurrence between the cedent's *animus transferendi* of the right and the cessionary's corresponding *animus acquirendi*. If a complete surrender of the right is not intended the transaction, however it is dressed up, is not an out-and-out cession. The aim is to discover the true intention of the parties to the disputed cession. That enquiry, like any enquiry into intention, is a purely factual one. If found to be feigned the simulation is disregarded."

[13] From the same court, Supreme Court of Appeal later in 2009, Mpati P had the following to say about cession in *Lynn & Main Incorporated v Brits Community Sandworks CC 2009 (1) SA 308 (SCA)* at para [6]:

"[6] It is trite that a cession is a method by which incorporeal rights are transferred from one party to another.¹ It is an act of transfer from a creditor, as cedent, to the cessionary, of a right to recover a debt (vorderingsreg) from a debtor.² Although it entails a triangle of parties, viz the cedent, cessionary and debtor, the cession takes place without the concurrence of the debtor.³ The transfer of the right is effected by the mere agreement between the transferor (cedent) and the transferee (cessionary).⁴ 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'.⁵"

[14] Turning to deal with the relevant cessions in this matter with the aforesaid in mind, I set out the relevant paragraphs of B1 to assist in illustrating why I conclude that in my view the plaintiff has not complied with sections 2.2.2.1 to 2.2.2.5 of B1 for a cession to have come to the fore. I set out the relevant paragraphs of B1 below:

2 Offer and acceptance

2.1 The Dealer may from time to time offer:

¹ Hippo Quarries (Tvl)(Pty)Ltd v Eardley 1992 (1) SA 867 (A) at 873E-F; Uxbury Investment (Pty) Ltd v

Sunbury Investments (Pty) Ltd 1963 (1) SA 747 (C) at 752A.

² Johnson v Incorporated General Insurances Ltd 1983 (1) SA 318 (A) at 330H-331H.

³ Lawsa 2nd, vol 2, para 6.

⁴ Johnson v Incorporated General Insurance, fn 3 at 331H.

⁵ Lawsa, fn 4, para 6.

2.1.1

Paragraph 2.1.2 states

2.1.2 "to assign the Dealer's rights and obligations under any or all of the Dealer Agreements to MFC by furnishing MFC with a completed application form furnishing details of the applicant who is to conclude a Dealer Agreement with the Dealer, a description of the Goods in question and other relevant information in relation to the transaction in question."

And

Paragraph 2.2 especially 2.2.2 states as follows:

2. 2 MFC may, in its sole discretion, accept or reject all or any of the Offers referred to in clause 2.1("the Offers").

2.2.1

2.2.2 If MFC is interested in pursuing a transaction in terms of clause 2.1.2 then:

2.2.2.1 " MFC shall indicate such interest by sending to the Dealer an application notification in terms of which MFC indicates its acceptance of the application referred to in clause 2.1.2 (on the terms and conditions set out in the application notification);

2.2.2.2 on receipt of the application notification, if the Dealer wishes to accept the terms embodied in such application notification, the Dealer shall within the time period stipulated in the application notification furnish to MFC a copy of the value-added tax invoice relating to the Goods in question;

2.2.2.3 on receipt of such value- added tax invoice, MFC shall, for and on behalf of the Dealer, prepare the appropriate Dealer Agreement and any other relevant ancillary legal documentation required by MFC to be concluded between the Dealer and the Dealer Client, and furnish the aforesaid

Dealer Agreement and any ancillary legal documentation to the Dealer for signature;

2.2.2.4 after signature of the Dealer Agreement and any relevant ancillary legal documentation, the Dealer shall forward to MFC the original completed Dealer Agreement and any relevant ancillary legal documentation in question, as well as the original value-added tax invoice relation to the Goods which are the subject matter of the Dealer Agreement;

2.2.2.5 on receipt of the documentation referred to in 2.2.2.4, the Dealer shall be deemed to have assigned to MFC, which shall be deemed to have accepted the Dealer's rights and obligations under the Dealer Agreement in question, at the price agreed upon in writing between the Dealer and MFC in respect of such transaction." [That underlined is my emphasis]

[15] The aforesaid paragraphs of the Master Discount Agreement B1 cover how one would give effect to the cession of the Dealer's rights to MFC. In essence these sections illustrate the formalities to be adopted which culminate in a cession having taken place. In particular to assign the Dealer's rights and obligations to MFC, section 2.1.2 specifically states that 'a completed application form' containing details of the applicant (in this instance it would be the defendant), the description of the goods (in this instance the motor vehicle) and information on the transaction be furnished to MFC. The Master Discount Agreement B1 goes further, in sections 2.2.2 and 2.2.2.1 to 5, by setting out the reciprocal duties upon MFC to indicate its interest and acceptances, by way of sending an 'application notification' to the Dealer, the Dealer on this application notification then furnishes MFC with the value-added tax invoice certificate. A Dealer agreement prepared by MFC is completed between Dealer and Dealer client and this together with the value-added tax invoice is forwarded to MFC. This completes the process and the Dealer's rights are deemed to be assigned to MFC.

[16] The VRLA constitutes the value-added tax invoice and the Dealer agreement concluded between the Dealer and the defendant as Dealer client

as alluded to in section 2.2.2.3 to 5 is in the form of MFC contract Acc. No: GENTPJ05113737 (MFC Contract). This does not detract from the non-compliance on the part of MFC and the Dealer in respect of that set out in sections 2.2.2.1 and 2.1.2 respectively, to conclude the cession.

[17] On my assessment, there is no *application notification* from MFC of its interest to the Dealer in terms of 2.2.2.1 and there is no completed application form which was supposed to be furnished to MFC as required in 2.1.2 *supra*. As I have alluded to above there is compliance with 2.2.2.2 on the part of the Dealer, as a value-added tax invoice in the form of the VRLA was transmitted to MFC and the Dealer agreement was also transmitted to MFC. Section 2.2.2.4 makes provision for the original Dealer agreement together with the original value-added tax invoice to be transmitted to MFC. In this instance evidence was adduced by the plaintiff that in fact fax transmissions of that required were transmitted to MFC. Even so, this ultimately resulted in the defendant taking delivery of the motor vehicle as MFC agreed to finance the deal. Thus the fax transmission was sufficient to render substantial compliance.

[18] In light of that set out above I am of the view that there was however substantial compliance with the formalities set out in the Master Discount Agreement B1. The intention of the parties to engage in a cession is borne out by the agreements (that is exhibit B, the MFC Contract, the VRLA and B1) together with the conduct of the role players. In my view, the intention to cede between the Dealer and MFC was established by the plaintiff and as such this is sufficient to conclude that there was a cession between the Dealer and MFC. See *Marcus v Stamper and Zoutendijk* 1910 AD 58 at 75.

[19] The crux of Adv. Williams' argument as regards the Master Discount Agreement B2 centres around the fact that the agreement places emphasis on written approval of Imperial Bank Limited to MFC and in furnishing the interest rate in writing as well. Thus the cession which is the cornerstone of plaintiff's case, so the plaintiff's argument goes, has not been

proven before this court. Additionally having failed to prove the cession from the Dealer to MFC they have failed to prove the cession from MFC to Imperial Bank Limited.

[20] In my view, there was a clear intention to cede between MFC and the defendant from the signed MFC Contract. It's convenient to point out that the MFC Contract signed by the defendant at the dealer's premises makes provision for the transfer of MFC rights and obligations to another party at paragraph [18] which states as follows:

"[18] ...You agree ...that we may transfer our rights and /or obligations to anyone, in which case you agree to hold the Goods on behalf of, and to fulfil your obligations to, such other persons."

[21] With the aforesaid in mind, this MFC Contract in itself, in my view, would amount to the notification to the defendant as signatory to the contract of MFC's future intention to cede and this defence raised by the defendant being overly technical must fail. See *Lynn & Main Incorporated v Brits Community Sandworks CC supra at para [16]*. This then covers MFC having notified and stated its intention, to the defendant, of a cession, to be in the future.

[22] Now as regards the dealer and the defendant. The VRLA and the MFC Contract signed by the defendant are to be taken as one as stated in the VRLA by virtue of the paragraph below which appears in the MFC Contract :

"We the Lessor let to you the Lessee, who lets from us, the goods described below ("the Goods") upon the conditions of this agreement ("this Agreement"). This Agreement includes this Schedule and the folder of standard terms and conditions."

[23] As both the VRLA and the MFC Contract taken as one, that being the case, in the definitions section of the MFC Contract there is the use of the word “us” this, in my view, is indicative that the schedule signed between the defendant and “us”, the reference to “us” must only denote the Lessor. The conclusion to be reached in this instance is that the defendant was informed and notified by the Dealer and MFC of the intended cessions, by way of the MFC Contract and VRLA combined.

[24] There was delivery of the motor vehicle to the defendant which amount to compliance as required for the cession of ones rights, title, interest and ownership, in this instance, in the motor vehicle. See *Absa Bank Ltd v Myburgh 2001 (2) SA 462 (W) at 466A-C*.

[25] The Master Discount Agreement B2 between MFC and Imperial Bank Limited sets out at paragraph 1.3 the intentions between the parties of the cession of MFC's rights and obligations in terms of the Dealer agreement and the MFC agreement. As set out below:

“1.3 It is intended that the Bank will, from time to time, purchase from MFC all the rights and obligations of MFC in terms of the Dealer Agreements and in terms of the MFC Agreements (collectively “the Discounted Agreements”)...”

[26] As stated in *Marcus supra*, as long as the intention to cede is genuine and proven then cession is deemed to have taken place. In this instance, by way of the Master Discount Agreement B2 the intention to cede to my mind was evident of a cession, genuine and proven. The addendum to the Master Discount Agreement B2 makes provision for the transfer from Imperial Bank Limited to the erstwhile plaintiff, Nedbank by the plaintiff attaining Imperial Banks entire shareholdings.

[27] In conclusion I duly find that indeed the relevant cession has taken place and as such the defendant is liable to pay the plaintiff in respect of the claim as set out in the particulars of claim and verified in the certificate of balance attached.

[28] The costs are to follow the result; provision of the scale thereof is set out in the MFC Contract being an attorney and client scale.

[29] Consequently I make the following order:

[1] The defendant, PHILIP JOSEPH GENT, is ordered to pay the plaintiff, NEDBANK LIMITED, an amount of R149 680.74.

[2] Interest on the amount in prayer 1 at the rate of 6.761% per annum, compounded monthly, from 21 August 2015 to date of final payment;

[3] Costs of the action, including all reserved costs, to be taxed on a scale as between attorney and client.



W HUGHES J

JUDGE OF THE HIGH COURT, GAUTENG DIVISION, PRETORIA

APPELLANT'S REPRESENTATIVES

ADVOCATE	:	ADV. R RAUBENHEIMER
INSTRUCTING ATTORNEY	:	VEZI & DE BEER INCORPORATED
C/O	:	EHLERS INCORPORATED

RESPONDENT'S REPRESENTATIVES

ADVOCATE	:	ADV. D L WILLIAMS
INSTRUCTING ATTORNEY	:	MANFRED JACOBS ATTORNEYS
C/O	:	MEGAW VAN JAARSVELD ATTORNEYS