

IN THE HIGH COURT OF THE REPUBLIC OF SOUTH AFRICA

NORTH GAUTENG, PRETORIA

2/8/2013

Case number: A 1100/2010

In the matter between

GENERAAL HENDRIK SCHOEMAN LAERSKOOL
Appellant

REGISTRAR OF THE NORTH GAUTENG HIGH COURT, PRETORIA PRIVATE BAG/PRIVAATSAK X67 JUDGE'S SECRETARY
2013 -08- 02
REGTERS KLERK PRETORIA 0001 GRIFFIER VAN DIE NOORD GAUTENG HOË HOF, PRETORIA

and

BASTIAN FINANCIAL SERVICES (PTY) LTD
Respondent

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED. ✓

DATE

SIGNATURE

JUDGMENT

BAM AJ

1. The respondent (Plaintiff in the court *a quo*) issued summons against the appellant (Defendant in the court *a quo*) on a written contract entered into between the parties on 2 September 1999, for the leasing of certain machines, a printer and five copiers. The parties will be referred to as in the court below. The plaintiff alleged that the defendant failed to adhere to the terms of the contract in that the defendant failed to effect any payment as agreed. In terms of the provisions of the contract the overdue amount owed by the defendant would bear additional interest at a rate equal to 4% per annum above the prevailing public quoted base rate of interest at which any one of the plaintiff's bankers would lend on overdraft. The plaintiff claimed as follows:

(a) Confirmation of cancellation of the agreement;

- (b) The defendant delivers the equipment to the plaintiff;
 - (c) Payment of the sum of R461 318 33 plus VAT;
 - (d) Interest on the aforesaid amount at the rate of prime plus 4% charged on overdraft facilities by the plaintiff's bankers from 1 October 2000 to day of payment;
 - (e) Costs of suite on the attorney and client scale.
2. Preceding the filing of the defendant's final amended plea, the matter came before the SCA in regards to certain special pleas raised by the defendant. The issue of the special pleas was disposed of by the SCA. The ruling went against the appellant dismissing the special plea in respect of the *locus standi* of the defendant.
3. In summary the defendant's plea amounts to the following. The defendant admitted that it entered into the written agreement as alleged by the plaintiff but pleaded that the plaintiff was represented by a certain Mr R Gagiano, representing AlentInello Technologies CC trading as MITA BRITS, allegedly the plaintiff's agent, and not Mr Haralambous as alleged by the plaintiff. The defendant pleaded that it simultaneously entered into a maintenance contract with the alleged agent of the plaintiff. Mr Gagiano removed four of the said machines in about September/October 1999 on the pretext that the machines became unserviceable, in that regard repudiating the agreement and it was accordingly not obliged to pay any amount to the plaintiff in terms of the agreement. In view of the finding of this court it is of no consequence to repeat the balance of the defendant's pleading. During the trial, after partly cross examination of the plaintiff's witness, Mr Haralambous, who conceded that the agreement had been ceded to Wesbank but claimed that it was subsequently re-ceded to the plaintiff, the defendant applied for leave to amend its pleadings by introducing a new special plea based on the allegation that the plaintiff had no *locus standi* as a result of the agreement having been ceded to Wesbank. The trial court refused the amendment. The plaintiff did not adduce any additional evidence pertaining to the alleged cession. The defendant then adduced the evidence of two employees of Wesbank regarding the

cession and alleged re-cession of the agreement to the plaintiff. The evidence entailed that no proof of such re-cession could be found. Counsel appearing for the plaintiff declined to cross examine the two witnesses on the basis that their evidence was irrelevant.

4. After having heard evidence the trial court found in favour of the plaintiff and granted an order compelling the defendant to pay to the plaintiff the amount claimed and *mora* interest. The defendant now appeals the said decision. In a cross appeal the plaintiff appeals the magistrate's decision not to grant the 4% interest claimed in prayer (d).
5. The defendant's main ground of appeal is based on the allegation in its amended plea arising from the evidence, that the plaintiff, at some stage prior to instituting the action, ceded the agreement to Wesbank and did not provide any proof that the agreement was re-ceded to it, thus it lacks *locus standi* to sue the defendant.
6. There can be no doubt that the agreement was in fact, probably at the time the defendant failed to comply with the provisions of the agreement in respect of the monthly payments, ceded to Wesbank. As alluded to above, this was conceded by Mr Haralambous. In this regard it is common cause that the plaintiff did not refer to any cession or re-cession of the agreement in its particulars of claim. It is further common cause that the plaintiff did not even attempt to explain the question of cession and recession raised by the defendant. As pointed out above the plaintiff's counsel elected to ignore the evidence adduced by the defendant about the apparent non-existence of the re-cession agreement.

The argument by Mr Cohen appearing for the appellant, that the concession made by Mr Haralambous, was not a really a concession but a general consideration, has no substance. Mr Klopper pointed out that Mr Haralambous' concession is clearly

consistent with the letter (page 670) addressed to Wesbank, reflecting the situation about the cession.

7. It was argued by Mr Klopper for the defendant that, in terms of the provisions of Rule 6(5)(c) of the Magistrate's Court's Rules, it was mandatory for the plaintiff to state in its particulars of claim the name, address, and description of the cedent at the date of the cession, as well as the date of the cession. This argument is sound. The onus in this respect was on the plaintiff. See *Lief NO v Dettmann* 1964 (2 SA 252 (A) and *Johnson v Inc General Insurance* 1983 (1) SA 318 (A).
8. In this matter the plaintiff in any event had ample opportunity, after the concession made by Mr Haralambous during cross examination, to attend to and address the issue. It dismally failed to do so.
9. It is trite that a cession agreement divests the cedent of her or his rights against the debtor. See *Skjelbreds Rederi AS v Hartless (Pty) Ltd* 1982(2) SA 710 (A). The only evidence of the cession and re-cession of the agreement was the concession, an admission on behalf of the plaintiff, made by Mr Haralambous that there was in fact a cession and his allegation of re-cession. There can be no doubt that the alleged re-cession must have been in written form. The latter allegation by Mr Haralambous was contested by the defendant and no written proof was adduced by the plaintiff. By ceding an agreement the cedent divests itself of the right to sue on that agreement. See *Picardi Hotels Ltd Thekwini Properties (Pty) Ltd* 2008 ZASCA 128, and *Bank of Lisbon and South Africa Ltd v The Master and Others* 1987(1) SA 276 (A) at 294C.
10. In view of the fact that it was obligatory for the plaintiff that the issue of cession should have been addressed in its particulars of claim and the plaintiff's failure to produce the

re-cession agreement, or explain its failure in that respect, was, in my view, fatal to the case of the plaintiff. The plaintiff failed to prove that it had *locus standi* to institute the action against the defendant.

11. The defendant was in law entitled to amend its plea at any stage before judgment. In the circumstances one would expect that the defendant would have moved for an amendment in respect of the issue of cession. The fact that counsel for the defendant might have anticipated, before Mr Haralambous' concession that there was or could have been a problem with the cession of the agreement, is of no consequence. It follows that the magistrate was wrong in not granting leave to the defendant to amend its pleadings, whether it would have been in the form of a special plea or otherwise.

12. From the evidence it appears that the defendant did not have a defence on the merits. This, however does not avail the plaintiff.

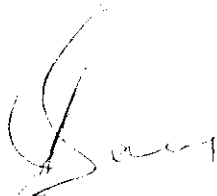
13. The record filed by the defendant consists of 8 volumes plus. It is clear, and it was conceded by Mr Klopper, that more than 50% of the record contains irrelevant matter. Both counsel were requested to address us on the issue. There is no acceptable explanation why defendant's attorney of record did not comply with Practice Rule 8.3 of this division regarding the inclusion of irrelevant matter. The record was unnecessarily burdened with about 500 pages of irrelevant paperwork directly against the stern warning contained in the said practice rule. In terms of the provisions of Practice Rule 8.4, this court may, *mero motu*, or upon application by one of the parties, make an appropriate punitive costs order. In my view it will be appropriate in this matter to make such a punitive costs order.

14. I therefore propose that the defendant should succeed with its appeal and that the plaintiff's cross appeal

be dismissed. Accordingly I suggest that the following order be made.

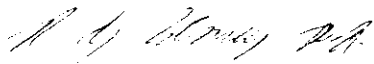
Order

1. The appellant's appeal succeeds.
2. The respondent's cross appeal is dismissed.
3. The order of the trial court is substituted by the following: The plaintiff's claim is dismissed with costs.
4. The respondent is ordered to pay the costs of this appeal.
5. The appellant is disallowed 50% of its fees for preparing the appeal record.



A. J. BAM ACTING JUDGE OF THE HIGH COURT

I agree, and it is so ordered.



N. V. KHUMALO JUDGE OF THE HIGH COURT

01 August 2013.