

NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG, PRETORIA)

Case No: 36409/2011

Date heard: 20/02/2012

Date of judgment: 13/04/2012

In the matter between:

Amplisol (Pty)Ltd

APPLICANT

and

Gerhard Van Der Merwe Attorneys

RESPONDENT

JUDGMENT

DU PLESSIS J:

Based on the contention that the respondent, a firm of attorneys, is unlawfully collecting debts from the applicant's debtors, the applicant applies for declaratory, interdictory and related relief. The application concerns the "Unifer Loan Book", a collective name for a large number of debts that respective debtors owed to Absa Bank Ltd (Absa) and to two other entities¹. In terms of a written contract Absa appointed a company called Maravedi Credit Solutions (Pty)

¹ The interest of the other two entities is insignificant and the parties primarily referred to Absa as being the creditor.

Ltd (Maravedi) to collect the Unifer Loan Book on Absa's behalf. (i shall refer to this written contract as the "Maravedi contract".)

Maravedi in turn appointed the respondent² to collect, among other debts, the Unifer Loan Book. This was done by way of a written contract dated 20 November 2009 ("the collections contract").

On 4 August 2010 Absa and the two other entities sold, with effect from 30 June 2010, the Unifer Loan Book³ to the applicant (i shall refer to this sale as "the Unifer sale"). In terms of the written Unifer sale Absa and the other two entities ceded their rights in the respective agreements comprising the Unifer Loan Book (their rights as creditor against the respective debtors) to the applicant. The Unifer sale was subject to suspensive conditions that of necessity also applied to the cession.

After the Unifer sale the applicant notified the respondent thereof and of the cession. The applicant also sought to enter into a collections agreement pertaining to the Unifer Loan Book with the respondent. These negotiations came to nought. On 28 February 2011 the applicant's attorneys wrote to the respondent and requested it to hand over to the applicant the files pertaining to those debts that had been sold to the applicant⁴. The respondent refused and still refuses to hand over the files. The refusal prompted this application. The respondent contends, first, that its instructions from Maravedi to collect the relevant debts have not been terminated. In the second place it contends that it has a right of retention over the files as Maravedi still owes it fees in respect thereof.

² I have pointed out that the respondent is a firm of attorneys.

³ Certain debts were excluded. I shall return to that.

⁴ The respondent was on 8 December 2010 sent a list of the relevant files.

The applicant initially brought an urgent application seeking an order compelling the respondent to hand over the files. By agreement the court hearing the urgent application made an interim order regulating, pending this matter, the parties' relevant conduct pertaining to the collection of the Unifer Loan Book.

I shall now deal with each of the orders that the applicant seeks.

In the first place the applicant seeks an order declaring that, pursuant to the Unifer sale, it became the owner of the debts known as the Unifer Loan Book. At the risk of being pedantic, I point out that the question is not whether the applicant became the owner of the relevant debts. The question is whether, pursuant to a valid cession, it became the creditor of each of the debtors comprising the Unifer Loan Book. In a nutshell, did Absa and the other entities cede their rights as creditors to the applicant?

Clause 3.1 of the written Unifer sale provides that the "Vendors hereby sell, cede and assign and the Purchaser purchases and accepts the sale,

cession and assignment, with effect from the Effective Date but subject to the fulfilment of the Suspensive Conditions ..." the rights of each of the sellers against each of the debtors comprising the Unifer Loan Book. The effective date under the Unifer sale was 30 June 2010. It follows that, once the suspensive conditions had been fulfilled, the applicant became the creditor of each of the debtors with effect from 30 June 2010⁵.

In the founding affidavit the applicants avers that all the suspensive conditions have been fulfilled. On its own evidence the respondent initially sought to enter into an agreement with the applicant to collect on its behalf the Unifer Loan Book. On its own evidence Maravedi confirmed to the respondent that the applicant is entitled to receive collections made in

⁵ A suspensive condition is fulfilled retrospectively.

respect of the Unifer Loan Book. Despite the fact that the respondent has for some time been aware of the Unifer sale and despite the fact that the respondent's conduct shows that it knew about and accepted the cession, there is in the answering affidavit a practically bald denial that the suspensive conditions have been fulfilled. The respondent bases the denial thereon that it has not had an opportunity to inspect the documentation pertaining to the fulfilment of the conditions. The applicant attached to the replying affidavit written confirmation by Absa that all the conditions have either been fulfilled or waived. The respondent did not seek to respond thereto and that resolves the factual dispute, to the extent that the respondent's denial created such. For reasons that will become apparent, I shall

nevertheless pay more attention to the fulfilment of one of the suspensive conditions.

Clause 2.1.4 of the Unifer sale provides that it is a suspensive condition thereof that "Absa Bank Limited obtains the written consent from Maravedi to the assignment of ...⁶ its rights and obligations under the Maravedi Agreement to the Purchaser, alternatively if Absa Bank Limited confirms by written notice to the Purchaser that it is unable to procure such assignment to the Purchaser, the execution by Absa Bank Limited and the Purchaser of the Vendor Services Agreement more fully contemplated in clause 2.3 below Clause 2.3 of the Unifer sale provides: "To the extent that Absa Bank Limited cannot procure the assignment of the Vendors' rights and obligations under the Maravedi Agreement to the Purchaser as notified in writing by the Vendors to the Purchaser... the parties agree that they will negotiate a written agreement in terms of which Absa Bank Limited will attend to the collection of the Unifer Loan Book on behalf of the Purchaser until 30th November 2010." The essence of this "condition" is that Absa would endeavour to procure Maravedi's continued services to collect the Unifer Loan book failing which Absa would continue until 30 November 2010 to collect the

⁶ In the Unifer sale the word "the" appears here. The evidently is a typographical error.

Unifer Loan Book. The clear implication is that Absa would until the said date continue to allow Maravedi to do the collections in the terms of the Maravedi contract. The significance of the date 30 November 2010 is apparent from clause 1 of the Unifer sale that defines that Maravedi Agreement as one that expires "on or about 30 November 2010". In the papers the applicant avers that the Maravedi contract expired on 30 November 2010.

From the above it follows that it was not a true condition that Absa had to procure Maravedi's permission to cede its rights and assign its obligations under the Maravedi contract to the applicant; it was a term of the Unifer sale. Reading the relevant clauses as a whole, the parties to the Unifer sale agreed that Absa would endeavour so to cede and assign its rights and obligations. If it failed, the Unifer sale would not fail because the Maravedi contract terminated on 30 November 2010.

In its opposing papers the respondent sought to deny, in the face of the applicant's allegation, that the Maravedi contract terminated on 30 November 2010. The point, however, is that the parties to the Unifer sale contracted on the agreed basis that the Maravedi contract terminated on 30 November 2010. Whether it actually so terminated is beside the point because the "condition" contained in clause 2.1.4 read with clause 2.3 was only to operate until 30 November 2010. After that date the Unifer safe was to proceed whether Maravedi consented or not.

It is concluded that Absa and the other entities duly ceded their rights under the Unifer Loan Book to the applicant and that, at least from 30 November 2010, the applicant was entitled to collect the individual debts owing to it as a result of the cession.

As to the declaratory order that the applicant seeks it is of note that in terms of the Unifer sale the applicant bought the "Unifer loan book owned by the Vendors as at the Effective Date {30 June 2010) to the exclusion of the Excluded Accounts". (I have added the words in italics and also the underlining.) The "Excluded Accounts" are also defined in the Unifer sale. The fact that certain debts were excluded from the Unifer sale must be reflected in the declaratory order.

The applicant also seeks a declaratory order that the respondent "has no rights in respect of the Unifer Loan Book". The further orders that the applicant seeks are all ancillary to this declaratory order in that they seek that the respondent accounts to the applicant, hands over the relevant files to the applicant and desists from interfering with the applicant's collection of the relevant debts. It is convenient to deal simultaneously with the applicant's entitlement to all these orders.

The respondent's case in essence is that its collections contract with Maravedi has not been cancelled. Accordingly, it contends, it is entitled to continue collecting the Unifer Loan Book under that collections contract. In argument Mr Erasmus for the respondent submitted that when it entered into the collections contract with the respondent, Maravedi acted as agent for the creditor, Absa. Accordingly, the argument continued, the collections agreement limited Absa's rights as creditor under the Unifer Loan Book. Absa could thus, so it was argued, only cede to the applicant, its rights as creditor subject to the respondent's rights to collect the relevant debts.

The collections contract itself does not show that Maravedi acted as an agent for Absa when it appointed the respondent to collect the Unifer Loan Book. There also is no evidence of such an agency. On the contrary, the evidence shows that Absa appointed Maravedi and that

Maravedi in turn appointed the respondent as attorneys.

In any event, the Unifer Loan Book comprises a multitude of contracts between Absa and each of the relevant debtors. Absa's rights as creditor under those agreements were ceded to the applicant. The respondent was not in terms of any of those contracts appointed to collect the relevant debts. Its appointment was made in terms of a separate agreement (the collections contract). The collections contract did not limit any of Absa's rights as creditor against its debtors. Therefore, it is with respect not so that the collections contract limited the rights that Absa ceded to the applicant.

The question really is whether there is any reason why the applicant is in law bound to the collections contract to which it is no party. As a general proposition personal rights flowing from a contract bind only the parties to the contract. There are exceptions, but the respondent did not show that any of those exceptions apply here and that the applicant is somehow bound by the terms of the collections contract.

As a general rule an attorney's mandate is terminable at any time. Mr Erasmus referred me to authority⁷ for the proposition that, where the holder of a mandate has a distinct interest therein that he, and no one else, carries out the mandate, the mandate is not freely terminable. The proposition does not apply here: Apart from its entitled to remuneration, the respondent has no distinct interest that the Unifer Loan Book must be collected. I have not been referred to authority for the proposition that a mandatory's hope of earning remuneration renders the mandate not freely terminable. What is required for the first proposition, is a legal interest in

⁷ See *Van Niekerk v Van Noorden* (1900) 17 SC 63

the subject matter of what has to be done under the mandate.

In the opposing papers the respondent contends that it is by virtue of a lien entitled to retain possession of the files until Maravedi has paid its remuneration. Mr Erasmus did not advance this argument but, properly, referred me to authority that an attorney's lien in respect of documents is a debtor creditor lien that operates only as between the relevant debtor and creditor.⁸

A last remark may not be out of place. Whether Maravedi has properly terminated the respondent's mandate does not appear from the papers. The respondent alleges that Maravedi owes it money. That need not be and is not decided in this case. The contractual relationship between the respondent and Maravedi does not affect the applicant's right to collect money from its debtors.

I have pointed out that the applicant brought an urgent application for relief similar to that sought in this application. The parties agreed to an order that regulates the interim position pending this application. The costs of the urgent application were reserved. The respondent contends that the applicant must pay those costs because it did not obtain the order it sought there but only the order made by agreement. The contention is ill founded. By agreeing to a sensible interim solution, the applicant did waive its rights to the relief it actually sought. The result of this application vindicates the applicant's contention that the respondent must deliver the files to it and must desist from collecting the Unifer Loan Book. In my view the costs of the urgent application must follow the result of this application.

In this application the applicant sought costs against the respondent on a scale as between

⁸ Amler's Precedents of Pleadings, p. 226.

attorney and own client. The relief was sought on the basis that, in the course of the dispute between the parties, the respondent notified debtors that the applicant was acting fraudulently by asserting that it is the cessionary of Absa. Coming from an attorney who should have known better than to vilify an opponent, the conduct was reprehensible indeed. As a mark of this court's disapproval the respondent should in my view be ordered to pay the costs as between attorney and client. The applicant was represented by senior counsel and his costs should in my view be allowed in view also of the importance of the matter. I may add that the respondent was also represented by senior counsel who, in its case, was assisted by junior counsel.

In the result the following orders are made:

1. It is declared that the applicant is the creditor in respect of the debts known as the Unifer Loan Book as defined in the Unifer Loan Book Agreement annexed to the founding papers as Annexure "AS3".
2. It is declared that the respondent has no rights in respect of the Unifer Loan Book as defined in the Unifer Loan Book Agreement annexed to the founding papers as Annexure "AS3".
3. The respondent is ordered, to the extent that it has not done so, to render a full account to the applicant within 30 (thirty) days of date of this order of all collections performed by it from 1 December 2010 in respect of the Unifer Loan Book as defined in the Unifer Loan Book Agreement annexed to the founding papers as Annexure "AS3"
4. The respondent is ordered, to the extent that it has not done so, to deposit all moneys collected by it in respect of Unifer Loan Book as set out in paragraph 3 above in a bank

account pending an action to be instituted, if necessary, by the applicant against the respondent for payment of all moneys collected by the respondent as aforesaid.

5. The respondent is interdicted from interfering with the applicant's collection of debts forming part of the Unifer Loan Book as defined in the Unifer Loan Book Agreement annexed to the founding papers as Annexure "AS3".

6. The respondent is ordered within 10 (ten) days of date of this order to deliver to the applicant any documentation in its possession pertaining to the Unifer Loan Book as defined in the Unifer Loan Book Agreement annexed to the founding papers as Annexure "AS3".

7. The respondent is ordered to pay the costs of the urgent application brought under this case number on 25 October 2011.

8. The respondent is ordered to pay the costs of this application, to be taxed as between attorney and client, including the costs of senior counsel.

B.R. du Plessis Judge of the High Court

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