

REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Case No. 14073/2010

In the matter between:

ABSA BANK LTD

Plaintiff

and

INNOVENT RENTAL AND ASSET MANAGEMENT SOLUTIONS (PTY) LTD Defendant

JUDGMENT

MEYER, J

[1] The plaintiff seeks to amend its particulars of claim in various respects. The defendant objects to some of the proposed amendments on the grounds that, if they were allowed, they would introduce issues for trial and evidence which would not disclose a cause or causes of action or would render the particulars of claim vague and embarrassing.

[2] It is averred in the particulars of claim that the plaintiff and the defendant concluded a written main cession agreement during July 2008. This agreement

envisages the cession to the plaintiff of contracts which the defendant had concluded with its customers. In terms of its express terms, the defendant warrants in respect of each contract that it would by cession thereof pass to the plaintiff valid title to the goods forming the subject matter of each contract so that the plaintiff would become the owner of such goods. Consequent upon the conclusion of the main cession agreement, the defendant, on 3 November 2008, concluded two rental agreements with its customer, Africa Heritage Investments (Pty) Ltd ('the customer') in the form of a master rental agreement and two written schedules ('the lease agreements'). The defendant ceded the lease agreements to the plaintiff pursuant to the conclusion of their main cession agreement. It is averred that the defendant breached the main cession agreement in various respects. The plaintiff, in its main claim, seeks that the defendant repurchases the lease agreements in consequence of its alleged material breach or breaches of the main cession agreement. In its alternative claim, the plaintiff claims cancellation of the main cession agreement and the payment of damages to it in the event of the defendant failing to repurchase the lease agreements within the time ordered.

[3] The plaintiff *inter alia* seeks to introduce additional averments in terms of the proposed amendment of its main claim. The plaintiff avers that the defendant breached the main cession agreement and it sets out the alleged grounds which allegedly '... individually and/or collectively, constitute a material breach and/or breaches of the main cession agreement.' The plaintiff now seeks to introduce additional averments that the customer, apart from a few payments that it had made to the plaintiff, withheld payment of all other amounts owing under the lease agreements and that the plaintiff received no further payments; that the customer was liquidated during August 2009; that its

liquidators have not elected to determine the lease agreements as envisaged in s 37 of the Insolvency Act 24 of 1936 ('the Act') or, if they did, that the plaintiff had not accepted such 'repudiation' or, if the plaintiff has no alternative in law other than to accept it, that such repudiation was accompanied by the withholding of payment of the amounts due to the plaintiff in terms of the lease agreements. In its alternative claim, the plaintiff seeks confirmation of the cancellation of the main cession agreement and the payment of damages if it is found 'impossible' for the defendant to repurchase the lease agreements.

[4] The defendant's objections to the plaintiff's proposed amendments concern the plaintiff's averments relating to repudiation and to damages. Adv H Epstein SC, who appeared with Adv SS Cohen for the defendant, informed me at the hearing of this matter that the defendant was only pursuing its objections concerning the question of repudiation.

[5] Relevant presently is the defendant's first objection, which concerns the plaintiff's alternative averment that, in the event of it being found that the customer's liquidator determined the lease agreements, the plaintiff did not accept such repudiation. The defendant contends that there is no causal connection between the plaintiff's assertion that the customer's liquidators determined the lease agreements and a repudiation on the part of the customer's liquidators. This objection is premised on the contention that an election by a liquidator in terms of s 37 of the Act to determine a lease agreement does not constitute a repudiation. The defendant's second objection, which is also presently relevant, concerns the plaintiff's averment that if it has in law no alternative other than to accept the repudiation that such repudiation was accompanied by the

withholding of payment of the amounts due to the plaintiff in terms of the lease agreements. The defendant contends that there is no causal connection between an election by a liquidator in terms of s 37 of the Act to determine the agreement and the withholding of payment of the amounts due to the plaintiff in terms of the master rental agreement. The defendant's counsel submitted that the plaintiff only has recourse against the defendant as cedent in the event of a breach of the main cession agreement. Non-performance on the part of the customer does not, in the submission of counsel, afford the plaintiff any remedy under the main cession agreement *vis-à-vis* the defendant.

[6] S 37(1) of the Act *inter alia* provides that '[a] lease entered into by any person as lessee shall not be determined by the sequestration of his estate, but the trustee of his insolvent estate may determine the lease by notice in writing to the lessor...' S 37(2) provides that '[i]f the trustee does not, within three months of his appointment notify the lessor that he desires to continue the lease on behalf of the estate, he shall be deemed to have determined the lease at the end of such three months.'

[7] The following *dictum* by Friedman J in *Smith and Another v Parton* NO 1980 (3) SA 724 (D), at p 729B – C, demonstrates the untenableness of the defendant's legal contentions:

'In a manner of speaking, any party to an executory contract can "elect" whether to carry out his obligations or to repudiate the contract but, of course, should he wrongfully repudiate it the other party may be able to compel performance specifically; so too with a trustee, but with the one exception to which I have referred and that is that, if the trustee decides not to perform, the other party cannot, because of the *concursum*, compel performance by the trustee but must content himself with a monetary claim either for performance or for damages for non-performance of the insolvent's contractual obligations, as the case may be. To state the so-called rule that if the trustee does not elect to affirm

the contract he is taken to have abandoned it, is to say no more than that the trustee who does not affirm the contract must be taken to have abandoned it since the other party is unable to compel performance on his, the trustee's, part. Once one accepts, therefore, that the only real basic principle is that the contract survives the insolvency, then it seems to me to follow inevitably that the accrued right to cancel survives. Where the creditor decides after insolvency to exercise his right of cancellation, he is not thereby enforcing a right against the insolvent estate and in that way altering the order of things as established by the *concursum*; he is simply notifying the trustee of his election to exercise a right which he has and which has survived insolvency.'

[8] A decision on the part of a liquidator not to carry on with the execution of a lease agreement may accordingly constitute a repudiation of that contract. See: *Thomas Construction (Pty) Ltd (in liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1988 (2) SA 546 (A), at pp 566I – 567A. The other contracting party has an election in the event of an unlawful repudiation of the lease agreement to disregard the repudiation and keep the contract alive - in which event it remains liable for and must render its counter-performance and it may prove a concurrent claim for damages in lieu of performance - or it may accept the repudiation - in which event the lease agreement is cancelled and a concurrent claim for the loss which it has suffered because of the breach may be proved. See: Sharrock *et al*: *Hockly's Insolvency law* 8th Ed 2006, para 7.2.4.

[9] The defendant's contentions are also irreconcilable with the express wording of clause 6.2 of the main cession agreement, which reads:

'If any Customer alleges that it has any claim as referred to in 6.1 and/or withholds payment of any amount owing under a contract the Bank shall have the right to require the Cedent to repurchase the contract upon the terms and conditions provided in 7.2 hereunder.'

[10] The defendant's counsel submitted that there are no lease agreements to repurchase by the defendant if they had been determined by the liquidator. This submission, in my view, goes beyond the ambit of the defendant's grounds of objection. See: *Squid Packers (Pty) Ltd v Robberg Trawlers (Pty) Ltd* 1999 (1) SA 1153 (SE), at p 1156D - F. This question *inter alia* places the meaning of clause 7.2 of the main cession agreement in issue, the provisions of which clause entitle the plaintiff to require the defendant to 'repurchase' a contract in certain circumstances.

[11] The defendant has not established '...that the amended pleading will (not might) be excipiable' if the plaintiff's proposed amendment is allowed. See: *Krischke v Road Accident Fund* 2004 (4) SA 358 (W), at 363A – B.

[12] In the result:

1. The plaintiff is given leave to amend its particulars of claim in accordance with its notice in terms of Rule 28 dated 19 January 2011.
2. The defendant is ordered to pay the plaintiff's costs of this application for leave to amend.

P.A. MEYER
JUDGE OF THE HIGH COURT

1 September 2011