REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO: 2011/33953

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: Yes

21 September 2012
DATE SIGNATURE

In the matter between:

MALGORZATA JOLANTA ANTONIE Applicant

And

NOBLE LAND (PTY) LTD Respondent

JUDGMENT

C. J. CLAASSEN J:

[1] The applicant in this application (Antonie) seeks an order that she be substituted as the applicant in proceedings instituted by Gert Hendrik Johan Venter N.O. (Venter). On 20 September 2011 the latter, in his capacity as the duly appointed trustee of the insolvent estate of Alida Maria Kamffer (Kamffer), instituted motion proceedings against the

respondent (Noble). That application will be referred to in this judgment as the "main application".

[2] In the main application, which is still pending, Venter seeks payment of an amount of R180 000.00 plus interest and costs from Noble. Venter alleges that this amount is due and owing to the insolvent estate of Kamffer arising from a settlement agreement concluded between the estate, Noble, Kamffer and two other parties.

[3] Subsequent to the institution of the main application, and in January 2012, Noble applied for security for costs in the amount of R50 000.00 to be provided by Venter on the basis that the estate was insolvent. On 14 March 2012 Kgomo J granted such an order. The effect of the order is to stay the proceedings until it has been complied with.[1] It is unclear from the papers whether Venter complied with this order.

[4] The current application for substitution was launched on 19 April 2012. The need for such substitution arose after Venter and Antonie concluded a written agreement in terms whereof Venter ceded to Antonie all entitlement to the main claim against Noble. It is clear from this agreement that the claim which is ceded refers to "*...a claim for R180 000-00 plus interest and costs (*which*) has already been instituted against*" Noble in this court.

[5] Noble does not dispute the existence and/or validity of the cession although it is common cause that it was concluded without Noble's consent or approval. It is further common cause that the agreement was concluded after the main application had reached the stage of *litis contestatio*. As such a *res litigiosa* was ceded.

[6] Noble's opposition to the substitution is premised exclusively on the potential prejudice it may suffer if the substitution is granted without an additional costs order particularly in regard to those costs already incurred in the various legal proceedings instituted prior to this application. In this regard, Noble relies on a letter dated 10 May 2012 addressed to Antonnie's attorneys of record and written by its own attorneys of record, wherein the following is stated:

[1] See Rule 47(3) of the Uniform Rules of Court

> "Our client will consent to the substitution being made an order of court on the following conditions:
>
> 3.1 We receive, a written undertaking from Antonie, duly signed by her and the original delivered to us, that she shall, in the event that she does not obtain an order as prayed for in the Notice of Motion under the above-mentioned case number, by all the costs arising from such application from inception, including all the costs in connection with the security for costs immediately same become due and payable; and
>
> 3.2 **As part of the order to substitute Antonie** as the applicant in the above matter, it is recorded that 'Antonie shall in the event that she does not obtain an order as prayed for in the Notice of Motion under the above-mentioned case number, **be liable for all the costs arising from such application from inception, including all the costs in connection with the security for costs, and she shall pay same immediately same become due and payable**';
>
> 3.3 Your client, Antonie, by the costs of the application for substitution on the basis that same was served at the 11th hour and had we received more appropriate notice thereof, enabling us to give proper consideration thereto, we would have replied on the same basis as set out herein, without the need for delivering formal Notice to Oppose…" (Emphasis added)

[7] Antonie was not willing to supply the above-mentioned undertaking which prompted the continuation of the present application. Noble filed its answering affidavit and Antonie her replying affidavit.

APPLICABLE LEGAL PRINCIPLES

[8] The substitution of a party to litigation by another is a procedural matter.[2] It can either occur by virtue of an amendment to the pleadings, or an application under Rule 15 of the Uniform Rules of Court or in terms of the common-law. Rule 15 applies where the substitution of a party has become necessary due to a change of status of such party. Where, however, there is no change in status of a party involved, the court will, under its common-law power, grant an application for substitution involving the introduction of a new persona on being satisfied that no prejudice will be caused to the opposite parties which cannot be remedied by an order for costs or some other suitable order, such as a postponement.[3]

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[2] See **Brummer v Gorfil Brothers Investments (Pty) Ltd en Andere** 1999 (3) SA 389 (SCA) 410E – F
[3] See Erasmus *Superior Court Practice*, B1-118, and also the cases cited in footnotes 5 and 6 below

[9] The substitution sought in the present application does not involve a change in status. Rule 15 therefore does not apply. The substitution must accordingly be decided on the common-law principles applicable where a party is obliged to obtain the leave of the court to be substituted for another party involved in pending proceedings.

[10] Antonie's application to be substituted, as I have alluded to, arises from the cession agreement concluded between her and Venter after *litis contestatio*. In this regard, Leach J (as he then was) in Van Rensburg v Condoprops 42 (Pty) Ltd 2009 (6) SA 539 (ECD) held as follows:[4]

> "It is accepted by both sides, correctly, that where a cession of a claim takes place after *litis contestatio,* the cessionary cedes **not his or her interest in the claim, but in the result of the litigation**, and that, as the subject-matter of the cession is *res litigiosa,* the cession itself does not transfer the right to prosecute the action to the cessionary. That right only accrues when the court substitutes the cessionary as plaintiff, the requirement that the substitution be approved by the court being designed to ensure that the defendant is not prejudiced." (Emphasis added)

[11] The court exercises a discretion when adjudicating upon the question whether or not it should grant such substitution. In exercising such discretion judiciously, the court will have to take into account whether any party will suffer real or potential prejudice if the order is granted. As stated earlier, in the present case, Noble does not oppose the granting of the substitution provided an appropriate costs order is included making Antonie liable for all costs incurred since the inception of the main application, should it ultimately be dismissed.

EVALUATION

[12] Under common-law there is no provision for the automatic backdating of a party's liability for costs incurred prior to the order for substitution, as is provided for in Rule 15. The question to be decided in this instance is whether or not the mere granting of the order of substitution will render Antonie liable for all costs since the inception of the main application.

[4] Paragraph [3]

[13] As stated earlier, the causa for the substitution results from the cession agreement. Due to the absence of any prior or subsequent consent to the cession agreement by Noble, no privity of contract exists as between Antonie and Noble arising from it. The costs incurred in the legal proceedings prior to this application were as between Venter, acting on behalf of the insolvent estate, and Noble. Should Noble ultimately be the successful party, it would, as a creditor of the insolvent estate, be entitled to lodge a claim against the insolvent estate for payment of the costs incurred prior to the substitution. This would, of course, have been the position even if there had been no substitution. On what basis then can the possible prejudice Noble may suffer pursuant to the proposed substitution be cured?

[14] This is not a case where the new debtor "stepped into the shoes" of the old debtor by operation of law such as would occur in the case of the debtor merging with another.[5] The legal effect of a cession after *litis contestatio* is that it terminates the proceedings instituted by the cedent, with the corollary that the substitution of the cessionary, as the new plaintiff or applicant, must be regarded as the institution of new proceedings.[6] Applied to the facts of the present case it would in effect result in a bad debtor (the insolvent estate) to be substituted by a potentially more credit worthy debtor (Antonie, assuming she is not insolvent). The substitution will, for all intents and purposes, benefit rather than prejudice Noble with regard to any future costs order granted in its favour. As from the date of the order of substitution, Noble can look to a potentially credit worthier debtor rather than an insolvent estate, for its costs if successful. This benefit does not, however, apply to the pre-substitution costs incurred by Noble.

[15] The order for security for costs I have referred to still stands. However, should the substitution be ordered, the benefit to Noble of that order suspending litigation until security has been provided, is rendered nugatory: Venter is no longer a party in the main application. To the extent that Venter has not yet provided such security, the substitution will result in a loss of the benefit Noble derives from the order for security for costs. On the assumption that the amount of R50 000.00 had been paid, a stale mate position would arise: the Registrar will not be able to release it to either Noble or the

[5] See **Tecmed (Pty) Ltd and Others v Nissho Iwai Corporation and Another** 2011 (1) SA 35 (SCA)
[6] See **Silhouette Investments Ltd v Virgin Hotels Group Ltd** 2009 (4) SA 617 (SCA), as explained by Brand JA in **Tecmed**, supra, at para 20

estate in the absence of any costs order issued by this court entitling anyone such funds. Whichever way one looks at the current position, the hands of this court are tied while the security for costs order is in force. I am unable to issue an order that is irreconcilable with the order of Kgomo J.

CONCLUSION

[16] For the reasons set out above I find myself unable to further adjudicate this application while the order granted by Kgomo J is still valid and enforceable. It follows that Antonie cannot succeed.

[17] In the result:

a. No order is made on the application.

b. The applicant is ordered to pay the costs of this application.

THUS DATED AND SIGNED ON 21 SEPTEMBER 2012 AT JOHANNESBURG

C. J. CLAASSEN
JUDGE OF THE HIGH COURT

Counsel for the Applicant: Adv R. Shepstone
Counsel for the Respondent: Adv L. Hollander

Attorney for the Applicant: Michael Popper & Associates Inc
Attorney for the Respondent: Rapeport Inc

Date of Argument: 2 August 2012