REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 32633/2015

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

ARCTOCEL (PTY) LIMITED Applicant

And

FIRSTRAND BANK LIMITED Respondent

J U D G M E N T

MAKUME, J:

[1] In this application which served before me in the Urgent Court on Tuesday the 29th September 2015 the Applicant seeks an order interdicting the Respondent from placing any suspension, freeze or hold on the Applicant's bank account.

[2] The Applicant trades *inter alia* in scrap metal locally and internationally. Locally it brokers the purchase and sale of scrap metal and its international business is the export of scrap metal, aluminium and chrome. It also exports manganese and imports rice into the country.

[3] The export business is conducted through its two bank accounts which it holds at the Respondent's bank being current account number [62……..] and the CFC (Dollar) account bearing account number [0……..].

[4] On or about the 3rd September 2015 the Respondent suspended and froze the two accounts resulting in the Applicant not being able to access the funds deposited therein.

[5] The Applicant says that the freeze or the suspension of the two accounts was done unlawfully and without notice to it. The Respondent says that the Applicant was informed prior to the freeze or suspension and says that the Respondent is entitled to do so as a result of the Applicant's indebtedness to it in the sum of R83 million.

[6] The Applicant disputes it indebtedness to the Respondent and has instead instituted action in this Court under case number 31408/15 in which

action the Applicant claims payment from the Respondent of the amount of some R59 million based on misrepresentation.

[7] In the particulars of claim to that action the Applicant refers to two cessions it signed in favour of the Respondent the two deeds of cession concluded during July and August 2014 are to the following effect:

> "*(i) The cession and pledge in the amount of R5 000 000,00 in favour of the Respondent by the Plaintiff of any and all its rights in and to its call/special/fixed deposit held at the Defendant in account number [62…….] and any account or any subsequent/renewed account number to be allocated to the deposit, as well as noting of the Defendant's interest.*
>
> *(ii) The unlimited cession and pledge in favour of the Defendant by the Plaintiff if any and all of its rights in and to its call/special/fixed deposit held at the Defendant in account number [62……..] and any account or any subsequent renewed account number to be allocated to the deposit as well as noting of the Defendant's interest.*"

[8] The question before me in this matter is whether the Respondent may freeze or put a hold on the bank account of the Applicant. The Applicant argues that the Respondent should not be permitted to do so as this amounts to self-help and is an infringement of the constitutional right to its property.

[9] The Respondent argues that the Applicant concluded an unlimited cession in its favour which cession and pledge permits the Respondent to *inter alia* hold monies in the Applicant's accounts including monies still to be deposited therein as security for payment of amounts owing to it by the Applicant.

[10] It is common cause that the two deeds of cession were executed pursuant to the granting of credit facilities by the Respondent to the Applicant. Part of the facilities related to hedging transactions whereby the Applicant purchased cover against particular currency fluctuations. In July 2014 the Respondent had granted the Applicant a R40 million short-term pre-settlement facility in respect of derivative Forward Exchange Contracts ("*FEC*").

[11] On the 23rd June 2015 the Respondent addressed a letter to the Applicant wherein it recorded discussions that had taken place the previous day between their respective representatives. In the letter the Respondent says the following:

> "*As discussed the bank has a number of concerns with this facility which were discussed at length in the meeting and as such we require our facilities to be repaid.*
>
> *Our aim is settlement and we would like all facilities repaid within 30 days and all derivative trades moved to an alternative financial institution or cash collateralised within the same period for run down thereafter.*"

[12] Further meetings and correspondence was exchanged all aimed towards Applicant exiting its arrangement with the Respondent in an orderly manner. The 30 days afforded the Applicant in the letter referred to above

was extended further to accommodate the Applicant to novate its derivates to another financial institution and settle its indebtedness to the Respondent.

[13] The Applicant did not act in accordance with the discussions held between its representatives and that of the Respondent. Instead on the 20th and the 21st August 2015 Applicant withdrew US $600 000 and US $1 million from the bank account held with the Respondent leaving only a balance of US $20 000.

[14] It was these withdrawals that prompted the Respondent to address a formal latter of breach of the facility agreement to the Applicant. In a letter dated the 26th August 2015 the Respondent called upon the Applicant to rectify the fact that it was R18,7 million over its R40 million facility. This letter was followed by another one similar to that of the 26th August 2015 which is dated the 3rd September 2015 which reads in part as follows:

> "*Our letter dated 26 August requesting rectification of the breaches. These breaches have not been rectified nor have we received the information requested within the 5 (five) days granted to you.*
>
> *Accordingly we are entitled to exercise our right of closing out all un-matured contracts which we have with you netting as applicable, claiming immediate payment of the amount due and exercising our right of set-off of accounts. As an interim step we have frozen your accounts with us and hereby exercise our right under the above security documents in that all credit balances held with ourselves will be frozen until breaches of facilities are rectified or facilities are replaced or novated by another financial institution or information is provided to ourselves that allows us to review facilities.*"

[15] The Applicant did not bother to respond to that letter it instead issued summons against the Respondent which I have referred to earlier on. It is in the particulars of claim that for the first time the Applicant says that the two deeds of cession as well as the facility agreement it concluded with the Respondent are null and void and of no force and effect.

[16] In the founding affidavit the Applicant contends that it was induced into entering into the credit facility. In a letter by its attorneys dated the 6th September 2015 addressed to the Applicant's attorneys the Applicant says the following:

> "*In so far as you allude to the cession agreement as a basis for withholding amounts received into our client's current USD account you will appreciate that the cession agreement is premised upon a debt being due to your client and is an ancillary agreement linked to the facility agreement. As such if the facility agreement falls away so too must the cession agreement. In the circumstances the cession agreement cannot be relied upon to appropriate funds to your clients arising from a disputed facility and FEC agreement.*
>
> *In any event in so far as your client relies on the cession agreement for withholding funds in the current and USD (CFC) account they are separate accounts not subject to the cession agreement in respect of account number [62…….] referred to in the facility letter attached to the summons.*"

[17] My understanding when reading the last letter is that the Applicant does not place in dispute that cession agreements were entered into which are linked to the credit facility. In the founding affidavit at paragraph 6.12 the Applicant says that the credit facility agreement and the utilisation of the facility was made subject to a suspensive condition being that a limited and an

unlimited deed of cession and pledge be provided to the Respondent and that such cessions were not provided accordingly so the Applicant argues the credit facility agreements lapsed and are of no force and effect.

[18] Having said what it said in the founding affidavit the Applicant when told in the answering affidavit that in fact the deed of cession was executed on the 23rd April 2014 and a copy attached to the answering affidavit marked "ADS2" a strange and rather disingenuous response was made in the following words by the Applicant's director:

> "*We do not recall signing the cession 'ADS2' and did not have a copy thereof until the answering affidavit was delivered. A copy was never given to us.*"

[19] The deed of cession "ADS2" is critical and plays a major role in this matter and yet the Applicant wants this Court to believe that it never had it in its possession. If that is the case why was it mentioned in the founding affidavit?

[20] In the replying affidavit the Applicant attacks the right of Mr Stuart to have deposed to the answering affidavit on the basis that all that he says is hearsay and that he does not reveal the source of his information. I find that argument untenable. Mr Stuart is the in-house Legal Counsel in one of the divisions of the Respondent. He says upfront that what he has deposed to is within his personal knowledge. Besides this he openly says that in certain instances what he has deposed to is what has been told to him by other persons. He continues to name the sources of this information and attaches

confirmatory affidavits by such persons. I find nothing wrong with what Mr Stuart has said. This argument by the Applicant is not only technical but is frivolous and has no merit. It has not been proved that what Mr Stuart said is a lie. He has in fact stated what is common cause to a large extent.

[21] The Applicant argues that what the Respondent has done is self-help and has referred this Court to the Constitutional Court case of *Chief Lesapo v North West Agricultural Bank and Another* 2001 (1) SA 409 (CC). In that matter the Constitutional Court was asked to decide on the constitutionality of section 38(2) of the North West Agricultural Bank Act No 14 of 1981 ("*the Act*"). The facts briefly were that the Applicant Chief Lesapo who is a farmer had borrowed R60 000,00 from the Respondent bank to enable him to buy certain farming implements. The loan was made in terms of a written agreement pursuant to the provisions of the Act. When he fell into arrears with his payments the bank acting in terms of section 38(2) of the Act gave him notice to make good his arrears. He failed to make payment despite the notice whereupon the bank wrote a letter to the messenger of the court authorising him to seize and sell by auction movable property which the Applicant had pledged as security for the loan.

[22] The Constitutional Court in upholding the decision of the High Court in declaring the provisions of section 38(2) of the Act unconstitutional said the following at page 417 paragraph [19]:

> "*As discussed above the ordinary way of securing execution in settlement of debts due is through the court process and the seizure of*

> *property against the will of a debtor in possession of such property for that purpose without an order of court amounts to self-help. This is an infringement of section 34. It would be unacceptable to construe section 34 in such a way that it permitted self-help which infringed a person's property rights provided that such self-help was carried out in such a way that it precluded a dispute from being raised by the debtor. This would in fact be an a fortiori case where the section ought to operate in protection of the rule of law underlying its provisions.*"

[23] The underlying principle decided in *Lesapo's* case is understandable and is correct however not only are the facts in that case distinguishable but also the principle in the present application involves an agreement of cession not a statutory provision as in *Lesapo's* case.

[24] In *LAWSA* Volume 3 cession is defined as a bilateral juristic act whereby a right is transferred by mere agreement between the transferor termed a cedent and the transferee termed a cessionary.

[25] The Applicant in executing the unlimited cession immediately transferred the personal right it had over its funds held in the bank account identified in the deed of cession to the Respondent. In the *Lesapo* matter the pledged article remained in the possession of the debtor and was seized without a court order which act is rightly described as self-help and thus unconstitutional.

[26] The Applicant argues further that the Respondent in freezing the Applicant's account is applying set-off under circumstances where it could not because there is a dispute about the debt which accordingly is not liquid. In

support of this argument counsel for the Applicant referred me to the decision in *Ackerman Ltd v Commissioner SARS* 2011 (1) SA 1 (SCA). In that matter the seller Ackerman Ltd sought a deduction from SARS in terms of section 11(a) of the Income Tax Act of an amount comprising contingent liabilities which formed part of the purchase price to the purchaser Pepkor. The Appeal Court in dismissing the appeal said the following at page 7 paragraph C:

> "*It is trite that set-off comes into operation when two parties are mutually indebted to each other and both debts are liquidated and fully due.*"

[28] The Applicant further referred this Court to the decision of *Maharaj v Sanlam Life Insurance Ltd and Another* 2011 (6) SA 17 (KZD). In that matter Sanlam succeeded in its claim to set-off what was due to the cessionary on payment of the proceeds of a policy. The set-off amount was in respect of money due by the cedent to Sanlam.

[29] The two cases are in support of the Applicant's contention that set-off can only take place or is permissible where the debts sought to be set-off are liquidated. Applicant contends that the Respondent's claim of R83 million is unliquidated on the basis as set out in their action under case number 31408/15. In my view this submission is without merit. The amount due to the Respondent needs no adjudication. It was spelled out in the letter of demand and the amounts in the Applicant's account are known and identified.

[30] The Respondent argues and correctly so that the mere fact that the Applicant has been deprived of access to funds is no different to the position of any debtor who cedes or pledges an asset as security for a debt. There is in this case no need for the Respondent to perfect is security prior to executing it for the security is already in its possession. This is different from a notarial bond which first requires to be perfected to enable the creditor to take possession. In the present case the pledged security is already in the possession of the Respondent.

[31] In its answering affidavit and in the heads of argument the Respondent says that it will hold no more than the amount due being R83 million in trust and not appropriate it until the action instituted by the Applicant shall have been finalised. The Respondent says and correctly so that if this application is granted the Applicant will continue to deplete the funds therein as it had already commenced and this will result in the disappearance of the Respondent's security.

[32] In the matter of *Bock and Others v Duburoro Investments (Pty) Ltd* 2004 (2) SA 242 (SCA) the court in dealing with the meaning of a pledge document which read as follows:

> "*Immediately or at any time thereafter irrevocably and in rem suam or at its discretion to realise the securities or to take over the securities at the bank's election at a fair value.*"

identified three legal principles or concepts at play therein and described them as follows:

(a) The right to dispose of a pledged article without the intervention of a court order, commonly known as *parate execute*;

(b) The contractual right of taking over a pledged article by the creditor, a *pactum commissorium*;

(c) The *quasi* conditional sale whereby the creditor may upon default take over a pledge at a fair price.

[33] His Lordship Harms JA in the *Duburoro* matter concluded as follows at page 248 paragraph [9]:

> "*An agreement whereby a creditor may keep a pledge upon the debtor's default at a fair price then determined is similar to a conditional sale. Such an agreement is valid and in relation to the pledging of shares known since 1892 it does not differ much in kind from a lex commissoria or forfeiture clause which typically permits a creditor to keep what was received from a debtor in the event of the cancellation of an agreement.*"

[34] Similarly in upholding the appeal against a ruling by the trial court which had held that a deed of cession clause was contra bonos mores and constituted a classic "*parate execute*" clause the Supreme Court of Appeal in the matter of *Bank of Athens Ltd v Van Zyl* 2005 (5) SA 93 (SCA) held that *parate execute* has long been acceptable under the common law provided that the terms of the agreement authorising the procedure are not unconscionable or incompatible with public policy (see *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 13J-14A).

[35] The Applicant concluded the facility agreement as well as the cession fully conscious of the risks therein particularly in view of the volatile Rand/Dollar exchange and to now come and ask this Court to find that the Respondent by securing its financial risks is acting unreasonable is to say the least being disingenuous. It is trite law that given the rule of interpretation that promotes validity rather than invalidity and the presumption that parties to a contract intended it to be implemented in a lawful manner the deeds of cession have to be construed in a sense consistent with the common law having regard to the commercial transactions of this nature.

[36] The Applicant wants to have access to the funds and has not furnished or tendered any security for its indebtedness to the Respondent. The principle governing the granting of interim relief is that if serious doubt is shown in the facts or case of the applicant then the Applicant should not succeed.

[37] The Applicant has not been open to the court by not disclosing the contents of the deeds of cession and later simply disavowing knowledge or of the existence of the deeds is in my view central to the demise of the Applicant's case.

[38] The Respondent by putting a hold on the funds in Applicant's bank account is not carrying out any form of *parate execute*. It is exercising its contractual right and holding the funds "*in securitatem debiti*" and to the extent

that the Applicant contends that the Respondent should not exercise its right to security merely because the Applicant has at the last moment decided to raise a dispute as to its indebtedness such contention is in my view misplaced.

[39] The Applicant's standpoint in challenging the validity of the facility and the cession agreement is in my preliminary view heading for stormy seas for as it was said by Nugent AJA in the matter of *De Beer v Keyser and Others* 2002 (1) SA 827 (SCA) at page 835:

> "*A court will be even more reluctant to hold that a clause in an agreement is void for uncertainty where the agreement is no longer executory but has been partly performed.*"

At paragraph [16] on the same page the judge expands on this concept as follows:

> "*The validity of an agreement does not depend upon whether the obligations have been described with such linguistic precision that their ambit is ascertainable solely by reference to the language in which they are couched. It suffices that their ambit is capable of being identified by recourse to admissible extrinsic evidence.*"

[40] The balance of convictions in this application in my view is in favour of the Respondent. The Respondent will suffer irreparable harm if this application is granted for it is most likely to lose the security it presently has on the other hand the Applicant has access to two other bank accounts through which it has recently been conducting its business.

[41] Accordingly the Applicant has failed to make a case and I remain unpersuaded that it is entitled to the order as prayed and I make the following order.

ORDER

[42]

42.1 The application is dismissed.

42.2 The Applicant is ordered to pay the Respondent's costs of this application which shall include the costs of two counsel.

DATED at JOHANNESBURG on this the day of OCTOBER 2015.

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M A MAKUME
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING	29 SEPTEMBER 2015
DATE OF JUDGMENT	OCTOBER 2015
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