REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG LOCAL DIVISION,

JOHANNESBURG

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

17/01/2020 [signature]

DATE SIGNATURE

CASE NUMBER: 12395/2017

In the matter between:

MERCHANT WEST CAPITAL SOLUTIONS (PTY) LTD	**Plaintiff**
And	
SAPPI SOUTHERN AFRICA (PTY) LTD	**First Defendant**
LORRAINE ALLISON HOLSHASEN	**Second Defendant**
NEIL EROL HOLSHAUSEN	**Third Defendant**
NLK FORESTRY CC	**Fourth Defendant**
MERCHANT WEST (PTY) LTD	**Fifth Defendant**

JUDGEMENT

MATSEMELA AJ

INTRODUCTION

1. The first Defendant have entered into a written agreement (SLA) in terms of which the fourth Defendant is to render certain services to the first Defendant. When a certain work has been done the fourth Defendant would present invoices to the first Defendant for payment.

2. On the 14 March 2012, 26 June 2012 and 13 June 2013 the fourth Defendant and the Plaintiff entered into a cession wherein the Plaintiff purchased certain invoices at a discount of 20%. The invoices purchased totalled R887 900.

3. It is common cause that Plaintiff presented those "ceded" invoices to the first Defendant for payment. The first Defendant when paying those invoices, he made certain deductions. After making those deductions only the amount of R39 999.43 (thirty nine thousand, nine hundred and ninety nine Rand and forty three Cents) was paid by the first Defendant to the Plaintiff. This amount was paid on 16 September 2016.

4. The following amounts were deducted by Sappi from the invoices appear from a schedule attached to correspondence, dated 12 December 2016 from Sappi's attorneys, being as follows:

   (a) R742 933.54 (seven hundred and forty two thousand, nine hundred and thirty three Rand and fifty four Cents);

   (b) R3 144.17 (three thousand, one hundred and forty four Rand and seventeen Cents);

   (c) R1 375.00 (one thousand, three hundred and seventy five Rand); and

   (d) R12 339.00 (twelve thousand, three hundred and thirty nine Rand);

   (e) R88 109.00 (eighty eight thousand, one hundred and nine Rand).

   (f) R2 812.50 (two thousand, eight hundred and twelve Rand and fifty cents)

5. The Plaintiff now claims payment from the First Defendant in the amount of R740 751.04 plus interest thereon and costs of suit. Thus, the quantum of Merchant West's claim is R740 751.04 (seven hundred and forty thousand, seven hundred and fifty one Rand and four Cents), which is R887 900.14 less the amounts from (b) to (f) above.

6. When the Plaintiff realised that it was short paid by the first Defendant. it legally pursuit the Second and Third Defendants. In regard to the Second and Third Defendant, Merchant West obtained default judgement against them on 7 August 2017.Pursuant to Merchant West having obtained default judgement against the Second and Third Defendants, a sale in execution was held on 12 June 2018 in respect of the Second and Third Defendant's movable property which realised the gross amount of R10 400.00 (ten thousand, four hundred Rand) and a net amount of R2 812.50 (two thousand, eight hundred and twelve Rand and fifty Cents).It was common cause that this amount of R2 812.50 was added by the Plaintiff to the total amount deducted as mentioned above.

7 It was argued on behalf of the Defended that the wrong amount was pleaded by the Plaintiff in the summons and therefore his claim must be dismissed. In **Spearhead Property Holdings Ltd v E&D Motors (Pty) Ltd 2010 (2) SA 1 (SCA)** the following was said

"[42] *It was argued before us that the basis for the appellant's claim for rectification set out in the pleadings, a bona fide error, was not established by the evidence and that the addendum referred to by Codron was similarly not pleaded by the appellant. The parties should, of course, define the issues in their pleadings so that they each know what case they have to meet to meet and should therefore, be limited to such pleadings. However, it is equally trite that since pleadings are made for the court and not the court for the pleadings, it is the duty of the court to determine the real issues between the*

parties and provided no possible prejudice can be caused to either, to decide the case on those real issues"

9 At the commencement of the trial I was addressed by counsel that it is common cause that Sappi was entitled to deduct from the invoices the amounts from (b) to (f).

The quantum of Merchant West's claim was fully ventilated by Merchant West's and Sappi's witnesses in the evidence before me. They testified in regard to the correct extent of the quantum of Merchant West's claim.

10 There was no need for the Plaintiff to amend its particulars of claim and all the Plaintiff has done was to set out he calculation of the quantum by means of viva voce evidence in court. which this Court also accepted.

11. The Defendant does not contend any prejudice in regard to the manner in which the Plaintiff has approached the issue of quantum. I cannot see how the Plaintiff can suffer any prejudice.

12. Clause 23.1 of the SLA states as follow:

"23.1 *No* ***cession,*** *delegation, assignment or sub-contract of all or any* ***of the rights*** *and/or obligations* ***of either party*** *shall be of any force or effect* ***unless and until the other party has consented thereto in writing,*** *except that Sappi will be entitled to do Sappi Limited or any subsidiary thereof...*[my emphasis]

13 In Brayton Carlswald (Pty) Ltd and Another v Brews 2017 (5) SA 498 (SCA) cession was described as follows :

"[9] *Cession has been defined as a bilateral juristic act in terms of which a right is transferred by agreement between the transferor (cedent) and transferee (cessionary). Generally, no formalities are required for the antecedent obligatory agreement or the act of cession. The parties may agree on the formalities with which the cession is to comply. A cession may thus be either express or tacit, or may be inferred from the conduct of the parties.*

While the cession does not have to be reduced to writing, the parties may may agree that the cession will only be valid if reduced to writing.

14 The legal issue to be decided herein is whether clause 23.1 of the SLA, constitutes a non variation clause also known as the Shifren clause.If it does whether or not the parties to the SLA did in writing consent to the cession.

15 The legal principles regarding non-variation or the Shifren clauses in contracts are well set out in the Appellate decision of **SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere 1964 (4) SA 760 (A)**. The parties in this case signed a lease agreement contained among others :

"11. *The tenant shall not have the right to sublet the said business premises or any portion thereof nor shall he have the right to cede this agreement to any person whomsoever without, in either event, the written consent of the owner first being had and obtained ...*"

"19. *Any variations in the terms of this agreement as may be agreed upon the parties shall be in writing otherwise same shall be of no force or effect."*

16 The court explained principles regarding the non variation clause and said that when parties have agreed to the terms of an agreement, they avoid further disputes by including a non-variation clause. This entails that the parties will be bound to the written terms on the agreement and that any oral variations will not be valid, thus eliminating disputes caused by oral variations. The court decided that the alleged oral agreement between the parties was void.

17 The facts or circumstances in the Shifren case are not too dissimilar to those obtaining in this case. It is clear from the Shifren case that where there is a non-variation clause, a requirement of written consent to a cession cannot or should not even be avoided by means of an actual agreement between the parties, let alone a waiver by one of them.

18 The principle in Shifren has consistently been reaffirmed by the Supreme Court of Appeal and remains good law see **Impala Distributors v Taunus Chemical Manufacturing Co.** 1975 (3) 273 at 277 (A-E)**; Brisley v Drotsky [2002] ZASCA 35**; **2002 (4) SA 1** at 10H-12F;

In **Kovaks Investments 724 (Pty) Ltd v F.C. Marais** (232/08) [2009] ZASCA 84 President Mpati says the following at paragraph 74

"[17] *A question that could be asked, legitimately so, I think, is whether a deviation from the performance of an obligation as required by a written agreement does not amount to a variation of the contract. In Neethling v Klopper*[11] *Steyn CJ reasoned that clauses (in written agreements) relating to the manner and time within which payment of the purchase price is to be made, generally fall under the category of material (wesenlike) provisions. As such, they cannot be varied or amended by oral (or tacit) agreement. ...*"

19 In similar case of **Bentel Associates International (Pty) Ltd and Another v Bradford Corner (Pty) Ltd and Another In re: Bradford Associates International (Pty) Ltd and Another v Bentel Associates International (Pty) Ltd and Another (11/47695) [2013] ZAGPJHC 45 (15 March 2013)** clause 19.1 of the contract between the parties provided as follows

"*Neither the employer nor contractor shall assign or cede his rights or obligations without the written consent of the other party, which consent shall not be withheld without good reason.*"

20 Then judge NF Kgomo comes to the following decision in paragraph 57

"[57] *When one considers the terms of the building agreement, which are in my view clear and unambiguous, the alleged cession or assignment of rights and obligations falls foul of clause 19.1 thereof."*

21 I have taken note of the language used in this agreement and I am satisfied that this is a non-variation clause. It is clear that the SLA envisaged that the parties to the SLA must consent to a cession in writing. It simply does not refer to a third party's consent. I therefore reject the argument by the Plaintiff that the third party must consent. The language used in this clause is very clear and unambiguous. It was also confirmed by the Defendant's witnesses. The fact of the matter is that the Plaintiff is not a party to the SLA and yet it would wish to prescribe to this Court what the intensions of the 1st and 4th

Defendant were when entering into the SLA. The Plaintiff was not a party to the SLA and has no personal knowledge of the purpose of the clauses and cannot simply attribute its own meaning thereto.

22. To interpret the SLA in any other way would not make any commercial sense. It would negate the whole clause in the agreement if a third party would need to give its consent as contended by the Plaintiff and not the actual parties to the SLA. To interpret the words of clause 23.1 in any other manner would intrude in the contractual freedom of the Defendant.

23 The onus is on the Plaintiff and it must prove that there was in fact consent by the 1st and the 4th Defendant before there can be a cession which will be binding. On the facts of the matter, this is not possible and there simply is no compliance with the suspensive condition. The Defendant never gave any consent in writing for the cession of any debt. In my view the parties to the SLA must consent in writing.

24 The consent had to be obtained before the cession was entered into and not after the fact. "POC2" which is as alleged by the Plaintiff to be consent refers to a cession that was already entered into. The relevant part of "POC2" reads as follows:

"*We confirm that we have entered into an Invoice Discounting Facility NLK Forestry CC with registration number 2004/049048/23 of which invoice are purchase by ourselves and will then be forwarded to for payment. This arrangement may be confirmed with the following person: Neil Holshausen an active director of the company*".

25 Just based on this line there can be no question that consent for the cession was never obtained (from any party) before the first invoice discounting facility agreement ("IDA") was entered into.

26 In any event "POC2" only relates to the first IDA and not the last one, "POC8", which is dated 13 June 2013.Yet, the alleged cession of debts as claimed and stated in the Particulars of Claim related to the last IDA. Looking at the

evidence it is very clear that there was no attempt to give notice to the Defendant of this cession. It is my view that the reliance on "POC2" by the Plaintiff to illustrate consent to a cession is therefore flawed

27 In the Particulars of claim at paragraph 20, the Plaintiff states that the Defendant, duly represented by Ms Nortier, consented to the cession by signing "POC2". In the case of **Sun Packaging Pty Ltd v Vreulink 1996 (4) SA 176 (A)** paragraph 26 the following was said

"*In casu, the position is different. Difficulty in interpreting a document does not necessarily imply that it is ambiguous. (Standard Building Society v Cartoulis 1939 AD 510 at 516.) Contracts are not rendered uncertain because parties disagree as to their meaning. (Williston on Contracts, 3rd Ed, Vol. 4, para 601 (supplement). Council was probably right in saying that the letter is not a lawyer's contract. But this is no reason for interpreting it differently. For the reasons given, I do not find the meaning of clause 3 doubtful. Properly interpreted, it has only one meaning. It affords the appellant the right to terminate. This is what Mitchell AJ found. His conclusion that the amendment should be refused was therefore the correct one.*"

I agree with counsel for the Defendant that the said "POC2" does not contain any words referring to consent. The document, properly construed, does not constitute a consent to a cession of NLK's rights in the SLA as contemplated in clause 23.1 of the SLA.

28. It was contended by the Counsel for the Plaintiff, that Sappi had made payment to Merchant West of NLK' s invoices. At no stage did Sappi refuse to make payment to Merchant West of NLK's invoices because there were no invoices or statements submitted by Merchant West with the wording referring to Consent.

29 In this respect, the Plaintiff again takes issue with the Defendant's interpretation of the express provisions of the SLA. This evidence, being relevant evidence in regard to the interpretation of the Consent, militates against the interpretation contended for by Sappi. The principles established int the Shifren case are very clear. If the Plaintiff and the fourth Defendant have entered into a cession agreement, that cession is valid between the two.

It can never be enforced against the first Defendant. Sappi by paying those invoices did not create a valid cession between itself and Merchant West.

30. It is my view that the inherent probabilities of the case substantially favour the version of the Defendant for the reason stated above. It is my view that from the above it is clear that the Plaintiff did not prove its case on a balance of probabilities. The evidence, oral and documentary, simply does not correspond with the Particular of claim.

31 The Plaintiff has raised the defense of estoppel in heads of argument. It is trite that the courts will not venture into the issue of estoppel if it was never pleaded

32 Having said that the issues of, authority or ostensible authority and whether the Plaintiff can cede more rights than he had, become academic.

Order

Plaintiff's claim falls to be dismissed with costs.

MOLEFE MATSEMELA
ACTING JUDGE OF THE HIGH COURT
SOUTH GAUTENG LOCAL DIVISION

FOR THE PLAINTIFF	ADV L HOLLANDER
INSTRUCTED BY	SCHINDLERS ATTORNEYS
FOR THE DEFENDANT	ADV CJ WELGEMOED
INSTRUCTED BY	SHEPSTONE AND WYLIE ATTORNEYS

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