IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

30/5/14

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

28/5/2014
DATE

SIGNATURE

30/5/2014

CASE NO 54182/13

STALCOR (PTY) LIMITED	**APPLICANT**
And	
CAWAC SOLUTIONS CC	**FIRST RESPONDENT**
AUCAMP CHRISTIAN	**SECOND RESPONDENT**
MICHIELSEN AND HOFMAN CC	**THIRD RESPONDENT**
THE SHERIFF OF THE COURT - BOKSBURG	**FOURTH RESPONDENT**

JUDGMENT

MALI AJ:

[1] This is an application to set aside the Deed of Cession concluded between the Applicant and the First Respondent on or about 8 March 2011. The Applicant' basis of its application is that the Deed of Cession entered into between the Applicant and the First Respondent, is of no value to the Applicant. Furthermore that the cession was not accepted by the Applicant and that the cession was cancelled by the Judgment issued in favour of the Applicant by the Regional Court on 29 August 2012

[2] The Applicant seeks relief against the first and second Respondents only. No relief is sought against the third and fourth Respondents.

BACKGROUND

[3] The First and the Third Respondent entered into an agreement in terms whereof the First Respondent was appointed to render service as a contractor on a construction project, for the Third Respondent. On or about 21 February 2005 the Applicant and the First Respondent represented by the Second Respondent concluded a Credit Facilities Agreement ("the Agreement") in respect of goods supplied by the Applicant to the First Respondent. The Agreement entailed the cession ("first cession") of the Book Debt of the First Respondent to the

("first cession") of the Book Debt of the First Respondent to the Applicant.

[4] On 8 March 2011 in order to reduce the commercial risk in the facility the Applicant and the First Respondent concluded another cession ("second cession"), the subject of this application.

[5] The significance of the second cession was to record the transfer of the First Respondent's right to the Applicant in respect of the amounts owed by the Third Respondent to the First Respondent. The effect of the cession was that the Third Respondent would pay R20.000.00 monthly instalment directly to the Applicant up until the First Respondent's liabilities to the Applicant were fully paid.

[6] The Applicant and the First Respondent opened a joint banking account wherein the debtors (including the Third Respondent) of the First Respondent were informed to make payments due to the First Respondent into the account.

APPLICANT'S CASE

[7] The Applicant submitted that the First Respondent breached the terms of the Agreement and failed to make payment due to the Applicant for goods supplied by the Applicant to the First Respondent under the credit facilities agreement. The arrears amounted to more than R290 385.98

(two hundred and ninety thousand three hundred ad eighty five rand ninety eight cents) together with interest and costs.

[8] Due to the breach by the First Respondent, the Applicant elected to cancel the agreement, and instituted legal proceedings against the First Respondent wherein the Applicant obtained a default judgment against the First Respondent. The default judgment was entered on 29 August 2012 by the Germiston Regional Court under case number CRC 46/2012. The Applicant submitted that the cession was therefore cancelled accordingly in terms of clause 24 of the agreement.

[9] Subsequent to the Applicant obtaining the judgment, the Applicant served a warrant of execution on 19 April 2013 and the First Respondent's movable property estimated to be valued in the sum of R70 000.00(seventy thousand rand) were attached.

[10] The First Respondent never disputed the judgment; however to avoid the removal of the movable property he agreed to make 2 (two) payments to the Applicant of R80 000, 00 (eighty thousand rands) each, the first payment to be made on or about 16 May 2013 and the second payment to be made on or about 12 June 2013. The first Respondent eventually paid the amount of R160 000.00 As a result of this agreement the Applicant argued that the First Respondent acquiesced to the judgment and therefore the acquiescence confirmed the cancellation of the second cession.

[11] The Applicant further submitted that after the First Respondent made the payment of R160. 000.00 The First Respondent then refused to make payment and relied on the terms of the second cession; namely that the Third Respondent was to effect monthly payments of R20 000.00 to the Applicant in order to extinguish the remaining liabilities arising from the Judgment.

[12] The Applicant argued that it never agreed to the second cession, and neither consented to the arrangements flowing thereof. The Applicant further argued that the First Respondent intended to resurrect the second cession which was never accented and would never had any effect due to the judgment and the fact that it was acquiesced by the First Respondent.

Applicant stated that the first respondent refuses to pay its debt because it alleges that the Third Respondent is liable for its debts to the Applicant on the basis of the cession. The debt has not been paid for a period of three (3) years.

[13] The Applicant further denies the existence of the second cession and does not wish to be beholden to the third party. The Applicant further seeks that the cession insofar as it may exist, be set aside and also that the Third Respondent makes no payment to the Applicant. The Applicant also seeks that the First Respondent makes the payment

directly through the mechanism of a sale in execution.

[14] The Applicant referred to **Trust Bank v Frysch**[1] wherein it was stated that for cession to come into existence there must be consensus between the cessionary and the cedent. In *casu* the applicant stated that it did not accept the transfer and therefore there was no consensus.

[15] The Applicant argued that the Respondent says that the Applicant appeared to have accepted the cession by allowing the Third Respondent to make payment to its banking account. In this regard the Applicant stated that the account wherein the Third Respondent made payments is the joint account between the Applicant and the First Respondent. The payments made by the Third Respondent could not be construed to be acceptance of cession by the Applicant. The instruction to the Third Respondent to pay the Applicant were communicated by the Applicant through a letter. The letter is addressed to the Third Respondent and it reads as follows:

"We hereby wish to confirm that we are the steel supplier of Cawac Solutions. In accordance with the supply of material to Cawac Solutions, we have opened a joint bank account, copies of which are attached hereto. Before any supplies can be made to Cawac Solutions , we need written confirmation from you that all monies owing to Cawac Solutions

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[1] 1 1977 (3) SA page 565

Please note that should any monies be paid over directly to Cawac or into another bank account, we will still hold you responsible for payment until the monies reach KMG."

The Applicant submitted that the purpose of the letter related to the supplies and not to other debts and that the joint account was opened before the litigation and that the same cancelled everything. The Applicant therefore submits that the existence of the joint account is not consistent with cession.

[16] Based on the above submissions the Applicant seeks an order to set aside the Deed of Cession and the related prayers as stated in in the introduction above.

RESPONDENTS' CASE

[17] The First and second Respondent submitted that the First and the Third Respondent entered into an agreement in terms whereof the First Respondent was appointed to render service as a contractor on a construction project, for the Third Respondent. On 21 February 2005 the First Respondent obtained goods/ and or materials for the construction project on credit from the Applicant.

[18] The payment terms included cession of Book Debt and Suretyship on behalf of the Applicant. On 8 March 2011 on the Applicant's insistence

behalf of the Applicant. On 8 March 2011 on the Applicant's insistence the parties concluded the second cession in terms whereof the First Respondent ceded the right, title and interest in and to all the book debts of the First Respondent. In terms of the Deed of Cession the parties agreed that this cession and pledge would be of force and effect until the First Respondent's liabilities to the Applicant had been paid or otherwise discharged. The First Respondent' Book Debts included the monies owed by the Third Respondent to the First Respondent.

[19] The First and Second Respondent's counsel argued that the second cession, entered on 8 March 2011 exists between the Applicant and the First Respondent. He further argued that the Applicant's argument submitted during the hearing differs with the one set out in the Applicant's founding affidavit and in its heads of arguments. In support of this argument he referred to paragraph 3 of the Applicant's heads the applicant wherein it is submitted that the agreement was entered into on 21 February 2005, and due to breaches by the First Respondent it was cancelled.

[20] The Respondents counsel referred to paragraph 10, last sentence of the Applicant's founding affidavit wherein the Applicant averred that "*In March 2011, and in order to reduce the commercial risk in the facility, the second Cession was concluded on or about 8 March of that year*".

[21] The Counsel further argued that the Applicant in its founding affidavit

confirms the existence of the second cession, however alleges that it has been cancelled due to the judgment against the First Respondent. The Counsel further referred to paragraph 26 of the Applicant's founding affidavit which reads as follows:

[22] *"In correspondence of 25 April 2013, Christie (who was not aware of the second Cession at that point) was dealing with the Cession of Book Debts which was contained in the Agreement. This cession had been cancelled as a consequence of the cancellation of the Agreement by the Applicant's judgment. ....."*

[23] The counsel also referred to paragraph 27 of the Applicant's founding affidavit reading*"..... it will be argued that at this stage, both the First and Second Respondent were aware that the Applicant did not consent to a* ***resurrection (my emphasis)*** *of the second Cession".*

[24] The Counsel argued that the above averments by the Applicant make it clear that the Applicant accepted the second cession but during the hearing the Applicant submitted that the second cession was not accepted at all. Of importance is that the second cession was concluded at the instance of the Applicant. The Respondents' counsel further submitted that it was a matter of procedure that the applicant should stand or fall by the case made in its founding affidavit.

[25] The Respondents counsel further submitted that the Applicant failed to address the Regional Court on the fact that the parties entered in to a Deed of Cession, on the Applicant's proposal. The agreement was that the cession and pledge would be of force and effect until all the First Respondent's liabilities to the Applicant had been paid or otherwise discharged. In essence the First Respondent's argument is that in the event that the Regional Court was appraised of the Deed of Cession, the Regional court would have made reference to the cession.

[26] The Respondent's counsel also referred to the extract of the letter quoted in paragraph 13 above and submitted that the letter is a clear acceptance and instruction to cession. The letter is dated 9 May 2011. The relevant extract of the letter reads as follows:

"Before any supplies can be made to Cawac Solutions, we need written confirmation from you that all monies owing to Cawac Solutions will be paid over into this joint account..."

[27] The Respondents' counsel further argued that on 9 May 2011 the First Respondent in compliance with the Applicant's instructions quoted above addressed the letter to the Third Respondent informing the Third Respondent to make payments to the joint account of the Applicant and the First Respondent.

[28] The Third Respondent made payments to the Applicant based on the

abovementioned instructions by the Applicant in acquiescence with the terms of the cession between the parties. The Third Respondent paid a total amount of R80 000.00 for four consecutive months commencing on 31 May 2013 to the joint account per the Applicant's instruction

[29] The First Respondent submitted that it made payments to the Applicant in the amount of R61, 905.97 and R18, 094.03 on 6 and 8 June 2013 respectively. The First Respondent further submitted that it made payments because it was pressurised by the Applicant despite the terms of the second cession and the First Respondent's numerous proposals for a full and final settlement which were rejected by the Applicant.

[30] The First Respondent further submitted that on 13 June the Applicant' attorneys addressed the letter to the First Respondent advising that the Applicant does not accept payments from the Third Respondent and does not accept any cession of obligations vesting upon the First Respondent to a third party. This is after the Third Respondent had made some payments as submitted above.

[31] The total outstanding capital balance due and payable to the Applicant as at 25 September 2013, at the date the First Respondent deposed to its answering affidavit was approximately R50 385.98.The Applicant did not dispute this submission by the First Respondent.

[32] The Respondents 's counsel concluded by submitting that the Applicant

had made no case against the First and the Second Respondents and the application should be dismissed with costs.

THE LAW

[33] **THE LAW OF CESSION**[2] page 23, refers to the case of **J McNeil v Insolvent Estate of R Robertson**[3] which stated that

"Rights of action are, we are told, ceded by any expression of intention for the purpose of the ceder and the cessionary.

[34] The Applicant's actions *inter alia,* occasioning the second cession and sending letter with banking details and warnings to the Third Respondent is more than enough to prove expression of intention that the Applicant accepted the cession. The Applicant's latter stance to 'cancel' the cession by informing the Third Respondent who was making payments subsequent to the judgment on regularly is found insincere, detrimental to the First Respondent and not to be in the interests of justice.

EVALUATION

[35] In respect of the submissions made by the Applicant with regards to the payments made by the Third Respondent to the abovementioned joint account I do not agree with the Applicant. I say so because it is not

[2] 2nd Edition by Susan Scott
[3] (1882) 3 NLR 190 193

disputed that the supplies made to the First Respondent by the Applicant were for the purposes of enabling the First Respondent to use the same to carry out the Third Respondent's project. Therefore the debt which was serviced by the Third Respondent is related to the second cession.

[36] The Applicant addressed a letter to Absa bank with clear instructions that the bank should enable it to view and transfer payments. It is my considered view that the Applicant had absolute control over the joint bank account. Nothing inhibited the Applicant to transfer the payments made by the Third Respondent to its banking account. No explanation offered by the Applicant as to the purpose of the joint account between the Applicant and the First Respondent if it is not related to the cession. Furthermore it is the Applicant who addressed the letters regarding the payment instructions to the Third Respondent.

[37] It appears that the Applicant admits to the existence of the second cession, though at times it says it was not accepted. In the event that there was one, it has been cancelled by the judgment. To this submission the Applicant did not refer to any authority. The Applicant did not dispute that the second cession was concluded on the Applicant's instance with a view to reduce the commercial risk in the facility. This is the cession sought to be denied by the Applicant now. Furthermore the Applicant stated that the cession has no value to the Applicant. Having regard to the fact that the debt which is a subject of the cession was

more than the amount of R290 385.98 (two hundred and ninety thousand three hundred ad eighty five rand ninety eight cents) together with interest and costs; as a result of some payments made by the Third Respondent in terms of the cession the debt as at 25 September 2013 had been reduced to R50385.98 I do not see how the second cession holds no value for the Applicant.

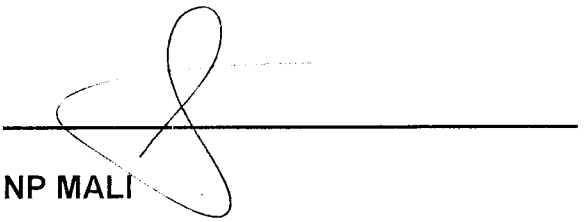
[38] It is my view that if the Applicant did not instruct the Third Respondent against making payments, the debt would have been extinguished by now; and this Application would not have been necessitated. Just on the basis that the Applicant prays for the cancellation of the cession because it is of no value, this argument fails.

[39] Having regards to the Respondent's counsel submission regarding the procedure, namely that the Applicant should stand or fall by the averments on its affidavit I am in agreement with the Respondents counsel; the Applicant's argument should follow the Affidavit.

[40] The Applicant's omission to disclose that there was a cession in existence and did not pray for the cancellation of the same when it applied for default judgment is unfortunate as the Regional Court would have pronounced upon the second cession. I fully agree with the Respondent that this application has no basis.

[41] In the result , I make the following order:

1. The application is dismissed.
2. The applicant to pay costs on attorney and client scale.



NP MALI

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

FOR THE APPLICANT:	ADV C D ROUX
INSTRUCTED BY:	MARKRAM INC ATTORNEYS
FOR THE RESPONDENT:	ADV HC BOTHA
INSTRUCTED BY	CHRISITIE ATTORNEYS
DATE OF HEARING:	6 March 2014
DATE OF JUDGMENT:	23 May 2014