IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 26243/2014

Date: 17 May 2016

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

17/5/2016 Pretoria
DATE ~~SIGNATURE~~

In the matter between:

SWIFT HUMAN RESOURCES CC

PLAINTIFF

And

HAMBA FISHARE BUILD (PTY) LTD

FIRST DEFENDANT

FRANCOIS KOTZE

SECOND DEFENDANT

FRANCOIS COLIN KOTZE

THIRD DEFENDANT

JUDGMENT

PRETORIUS J,

(1) In this action the plaintiff claims from the second and third defendants payment of an amount of R1 365 489.71 together with interest and costs, jointly and severally. The first defendant has finally been deregistered and is no longer a party to the action.

(2) The claim is based upon a written acknowledgement of debt ("AOD") executed by the defendants on 21 April 2011 in favour of the plaintiff. Due to the fact that the parties agreed on a number of common cause facts the only remaining issues the court has to decide is whether the defendants' indebtedness had been settled by Basil Read by virtue of payment received pursuant to a cession of book debts agreement entered into on 30 May 2011 and that the plaintiff received payment due to it by defendants, directly from Basil Read. The defendants abandoned the defence in respect of the National Credit Act.

(3) On 1 February 2011 the third defendant, as director of the first defendant, and the plaintiff concluded two agreements. The first agreement was for the hiring of temporary employment services and the second for the provision of credit by the plaintiff to the first defendant. The third defendant signed as surety in both the abovementioned agreements. The salient terms of the agreement between the plaintiff and defendants were that the plaintiff would provide the defendants with temporary employees to work at a

construction site for Basil Read at the Groot Geluk Mine. The employees provided by the plaintiff to the first defendant were to be used by the first defendant to fulfil its obligations in terms of the Basil Read contract. The plaintiff complied with its obligations, but the defendants could not comply due to Basil Read not paying the defendants for construction work done at Groot Geluk Mine.

(4) Mr Odendaal testified on behalf of the plaintiff that he was the area manager in 2011. The company supplied temporary workers to the first defendant at the request of the defendants. The company was thus a labour broker at the time. The temporary workers were supplied and then an invoice was sent every thirty (30) days to the client, which had to be paid by the client. The witness for the plaintiff, Mr Odendaal, conceded that he was not present when these two agreements were entered into between the plaintiff and the defendants.

(5) There was no contract to supply contract workers between the plaintiff and Basil Read Construction. It is common cause that the construction contract that the defendants had with Basil Read was in the amount of R25 million, as both the witness for the plaintiff and the defendants had testified.

(6) The defendants needed the credit facility from the plaintiff to enable them to perform in accordance with the obligations they had to Basil Read at the Groot Geluk Mine. Both the plaintiff and the defendants

testified that they had at all times been aware of the Basil Read contract.

(7) If regard is had to the correspondence between the plaintiff and the defendant it is clear that the defendants would only be able to pay in accordance with the agreements once Basil Read had paid the plaintiff. Mr Odendaal's evidence in this regard is that the plaintiff failed to institute action against the defendants in terms of clause 16 of the hiring of temporary services agreement. The reason, according to him, being that he trusted Basil Read to perform in terms of the contract.

(8) The first credit facility granted to the first defendant by the plaintiff was in an amount of R250 000, which was increased to R800 000. As the plaintiff threatened not to pay the workers as the defendants failed to pay the plaintiff, due to Basil Read not paying the defendants, the plaintiff and defendants signed an AOD on 21 April 2011. According to the AOD the defendants undertook to pay the claim amount before or on 31 May 2011. On 30 May 2011 the parties and Basil Read concluded a cession agreement, before the AOD was due on 31 May 2011 at 12h00.

(9) Mr Odendaal represented the plaintiff at the conclusion of this agreement. His evidence was that the cession was concluded as a result of the defendants' failure and or inability to pay the plaintiff as

agreed in the AOD. His evidence was that when the cession was concluded Basil Read had not paid the defendants, who in their turn was unable to pay the plaintiff for services rendered.

(10) Clause 2 of the Cession of Book Debts provides:

> *"The Company hereby cedes, assigns and transfers unto and in favour of the Creditor all of the Company's right, title and interest in and to the book debts of BASIL READ (together with all rights of action arising thereunder)* ***present and future, due and to become due to the Company, from whatsoever cause of debt arising and by whomsoever owing****."* (Court emphasis)

Clause 3 provides:

> *"This Cession shall endure for so long as the Company is indebted to the Creditor from any cause arising whatsoever."*

(11) Mr Odendaal conceded that all past debts owed by Basil Read to the defendants were ceded to the plaintiff in terms of the cession, which included the debts reflected in the AOD. According to Mr Odendaal's evidence a quantity surveyor was employed by the plaintiff to ascertain whether Basil Read still owed money to the plaintiff. The reliance by the plaintiff on the quantity surveyor's finding that Basil Read was not indebted to the first defendant in any amount was ill conceived. It is based on hearsay evidence, the quantity surveyor was not called to give evidence, neither was his report provided to the defendants and

the court. Therefore the plaintiff cannot rely on this report. The court will not deal with his report as it is not before court.

(12) There can be no doubt that the plaintiff was at all times relying on the terms of the cession as the letter from the plaintiff's attorney dated 27 June 2011 confirmed:

> *"Ek bevestig my instruksies vanaf my kliënt Swift Human Resources CC* ***om u hiermee in kennis te stel dat u mandaat as agent namens Swift vir die kollektering van enige gelde vanaf Basil Read in terme van klousule 6 van die sessie soos geteken is op 30/05/2011 waarvan 'n afskrif hierby aangeheg word vir maklike verwysing, gekanselleer word met onmiddellike effek****.*
>
> *U sal voortaan nie geregtig wees om enige gelde vanaf Basil Read te vorder nie, maar word u versoek om u samewerking te verleen aan Swift Human Resources CC ten einde u, Hamba se vordering teen Basil Read effektief deur te voer."* (Court emphasis)

It is thus clear that the plaintiff perfected the cession agreement and collected the money owed to it by the first defendant directly from Basil Read.

(13) In other words the defendants were forbidden from collecting money owed to it from Basil Read in terms of the cession. The plaintiff acknowledged this not only in the agreement of cession, but confirmed

it in this letter. The plaintiff was thus exercising its rights in terms of clause 6 of the cession. The result thereof is that any claims which the defendant had or may have had against Basil Read, had prescribed.

(14) The question thus arises whether the plaintiff can claim form the defendants in these circumstances where a cession exists. In South African law cession is the transfer of personal rights flowing from the book debts. The definition of book debts was set out in **Glaum NO v The Master**[1] as:

> *"...that a book debt is a debt arising in the course of business dealings which would or could, in the ordinary course of business, be entered in the ordinary book of accounts of a business."*

(15) In this instance it was specifically noted that both existing and future book debts were ceded. The effect of an absolute cession is that the cedent is divested of all the rights, as in this instance, to collect the book debts. In **Vivier v Waterberg Ko-op Landbou Bpk**[2] the court decided that as these rights vest in the cessionary, only the cessionary and not the cedent is entitled to sue for the enforcement of those rights. The effect of the cession is the ceded rights are immediately transferred to the cessionary.

(16) It is important to note that both existing and future book debts were

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[1] 1980(2) SA 600 C at 609 B-C
[2] 1956(1) SA 665 (T)

ceded, as stated clearly in clause 2 of the cession. This cession has a binding effect on the cedent from the date of the cession, which is 30 May 2011, a day before the AOD became due.

(17) The cedent is thus divested of all the rights ceded and these rights now vest in the cessionary and only the cessionary is entitled to sue for the money owing from Basil Read.

(18) The cession agreement was entered into on 30 May 2011, one day before the deadline in terms of the AOD. There can be no other interpretation but that the AOD was replaced by the agreement of cession if one reads the cession of book debts, particularly clauses 2 and 3 of the cession agreement.

(19) Therefor the plaintiff chose to rely on the cession and not the AOD. Mr Odendaal's evidence was that the cession agreement provided that all the rights ceded to claim any past debts owed to it by Basil Read and the right to sue Basil Read had been ceded. According to Mr Odendaal this included the amounts contained in the AOD. Clause 2 of the cession of book debts made it very clear that it included *"present and future, due and to become due"*. This was confirmed by the letter of 30 May 2011 forbidding the defendants to collect any money owed to it by Basil Read. In other words the plaintiff regarded itself as the only entity entitled to receive any payment from Basil Read instead of the defendants.

(20) Counsel for the plaintiffs' argument was that the cession merely served as security for the indebtedness of the defendant in terms of the AOD. That cannot be the true position if regard is had to the letter of 30 May 2011. It is clear from the letter that the plaintiff regarded itself as the entity to claim from Basil Read and neither this amount not the AOD was at any stage excluded from the cession. The plaintiff explicitly precluded the defendant from claiming any money from Basil Read.

(21) The defendants' case is that they are not indebted to the plaintiff as Basil Read had to pay the amount owing to the defendants to the plaintiff in terms of the provisions of the cession.

(22) According to the plaintiff the main defence of the defendants is one of payment. The argument is that the defendants have to prove payment as the onus is on them to prove payment. This onus of payment is on the defendants throughout the case. The plaintiff relies on the finding by Olivier JA in **Nedperm Bank Ltd v Lavarack and Others**[3]**:**

> *"From these basic principles of law it follows logically, in my view, that where there are two obligations to be fulfilled by a debtor, he bears the onus of proving, not simply that a payment was made, but also of proving the necessary consensus regarding which debt was paid."*

[3] 1996(4) SA 30 (A) at 47 A

This is confirmed by the principles set out in **Italtile Products (Pty) Ltd v Touch of Class**[4] where Viljoen AJ found:

> *"Although I have myself also not found authority dealing with a case such as the present, where payment is admitted but there is a dispute regarding the debt for which it was intended, I have no doubt that the onus of proving, not only that payment was made, but that the debt in question was paid, rests upon the debtor. This is in accordance with the principle that it is the party making a positive averment who bears the onus of proof. Moreover, it seems to me that the very requirement that a debtor should prove payment of a debt, in itself necessitates proof that the debt in question has been paid and not simply that a payment has been made to the creditor."*

(23) According to the plaintiff the defendants had to prove which amounts were owing and which amounts Basil Read had paid. No party called a witness from Basil Read. Both Mr Odendaal and Mr van der Merwe, attorney for the plaintiff, testified that according to Basil Read no amount was outstanding and Basil Read was not indebted to the first respondent at all.

(24) Mr Odendaal was confronted with the fact that he had answered under oath to the defendants' Rule 35(3) notice that the plaintiff had only received one payment from Basil Read on 2 June 2011 in the amount

[4] 1982(1) SA 288 (O) at 290 H

of R380 975.71. This is clearly false as the plaintiff had received a total amount of R1 204 662.02 between 4 August 2011 and 2 December 2011 as can be seen from the bank statements.

(25) The plaintiff's counsel argued that it was trial by ambush as the plaintiff could not investigate the payments received by the plaintiff before trial. This argument cannot be entertained as true. It was the plaintiff who discovered the bank statements which clearly showed the four payments, namely:

"On 04/08/2011:	*R*	*314 487.22*
On 23/09/2011:	*R*	*334 249.65*
On 02/12/2011:	*R*	*183 453.21*
On 08/07/2011:	*R*	*372 471.94*
TOTAL:	***R***	***1 204 662.02"***

No further particulars in this regard had been requested by the plaintiff.

(26) Mr Odendaal testified that only the financial manager of the plaintiff could testify which payment related to certain invoices. The court was informed that due to the fact that the financial manager was in Cape Town, he would not be called to testify on behalf of the plaintiff. Counsel for the plaintiff tried to rehabilitate this evidence by Mr Odendaal, during re-examination, by trying to marry certain invoices with payments. It is Mr Odendaal's evidence that only the financial manager would be able to do this and Mr Odendaal's attempt is thus

only that, an attempt, and not evidence the court can take into consideration.

(27) Although the invoices were printed on a 2013 heading of the plaintiff, relating to 2011, I do not make any finding in this regard and I regard it as a neutral fact. The plaintiff did not succeed in proving that the payments were not allocated to the claim amount.

(28) The defendants admitted not making payments as they relied on the cession agreement. In this instance the reliance on the principles in **Abraham v Cassiem**[5] and **Italtile Products (Pty) Ltd v Touch of Class**[6] is not applicable as the defendants rely on the cession of book debts.

(29) I must agree with defendants' counsel that if there is a dispute about payments and its allocation the dispute will be between the plaintiff and Basil Read. The further *lacuna* in the plaintiff's case is that the financial manager was not called to explain how payments from Basil Read were allocated. I find that due to the cession of book debts the plaintiff cannot succeed in his claim.

(30) I must agree that the plaintiff failed to sue the correct party, namely Basil Read, as the defendants no longer had the right to sue Basil Read.

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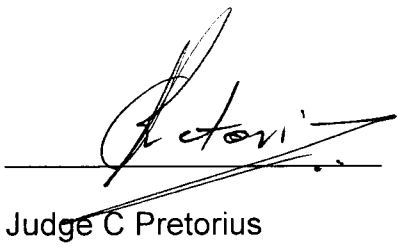
[5] 1920 CPD 568
[6] *Supra*

(31) In these circumstances the claim for payment cannot succeed and the plaintiff has failed to prove on a balance of probabilities that it is entitled to payment from the defendants.

(32) Therefor I make the following order:

1. The plaintiff's claim is dismissed with costs.



Judge C Pretorius

Case number	: 26243/2014
Matter heard on	: 16, 17 March 2016 and 21 April 2016
For the Plaintiff	: Adv R Grundlingh
Instructed by	: Snyman De Jager Inc.
For the Defendants	: Adv N Breytenbach
Instructed by	: Enslin & Fourie Attorneys
Date of Judgment	: 17 May 2016