1]IN THE HIGH COURT OF SOUTH AFRICA

2](CAPE OF GOOD HOPE PROVINCIAL DIVISION)

3]CASE NO 11821/05

4]In the matter between:

5]DEON STUART FRANK ***Excipient (Plaintiff)***

6]and

7]PREMIER HANGERS CC ***Respondent (Defendant)***

8]_____

9]JUDGMENT: DELIVERED 15 MAY 2007

10]_____

11]GRIESEL J:

Introduction

12]This is an exception noted by the plaintiff against the defendant's plea and counterclaim on the grounds that the said pleadings do not disclose a defence or a cause of action; alternatively, that they are vague and embarrassing. It raises legal issues of some complexity and I am indebted to counsel on both sides for the very full and helpful arguments submitted by them.

13]The claim arises against the following background: The plaintiff, Mr Deon

Stuart Frank, was a director and 50% shareholder in D S Frank & Associates (Pty) Limited (in liquidation) (*the company*). The company was placed in provisional liquidation by an order of this court on 6 July 2004, which order was made final on 17 August 2004. Prior to its winding up, the company conducted business in the engineering, production, maintenance and repair of specialised industrial and other related products. The defendant, Premier Hangers CC, which conducts business as a manufacturer and wholesaler of, *inter alia*, plastic hangers, was one of the company's customers. In the course of this business relationship, the company rendered specialised engineering services to the defendant from time to time, involving work to some of its moulds and related equipment. At the date of winding-up the defendant allegedly owed the company an amount of R238 927.58 in respect of such work.

14]On 11 November 2005, the plaintiff concluded a written agreement with the joint liquidators of the company in terms of which the liquidators purported to cede to the plaintiff 'the entire right, title and interest in and to any claim that [the company] has or may have in future' against certain debtors of the company, including the defendant. In return, the plaintiff undertook to pay to the liquidators 'compensation' of 10% of the amounts collected and received from the debtors concerned, after deduction of his legal

expenses.

The pleadings

15]Relying on this cession the plaintiff, on 17 November 2005, launched the present action against the defendant, claiming payment of the abovementioned amount of R238 927.58. The composite claim arises from nine separate transactions in respect of 'specialised engineering services' rendered and moulds supplied by the company to the defendant during 2002 and 2003. In each instance, the plaintiff alleges that the company had 'duly' performed the services in terms of the respective contracts and, accordingly, claims the full contract price.

16]In its plea, the defendant raises various defences *in rem* against the plaintiff's claims, based mainly on alleged defective, incomplete and/or late performance rendered by the company. The details of those defences are not relevant for present purposes. What *is* relevant, is the defendant's denial of the validity of the cession on which the plaintiff's claims are based and hence his *locus standi* to sue. In amplification of its denial, the main grounds of this defence are pleaded in the following terms:

'3.2 At all material times prior to 11 November 2005 and at the time of the execution of the cession on which Plaintiff relies herein ("*the*

cession"), Plaintiff and the joint liquidators of the Company were aware, or should reasonably have been aware:

3.2.1 Of all of the facts and allegations set out in Defendant's Counterclaim filed herewith; and/or

3.2.2 That Defendant had a claim for breach of contract against the Company greatly exceeding the amount of the claims purportedly ceded to Plaintiff ("*the Company's claims*"); and

3.2.3 In the event of the joint liquidators issuing summons against Defendant to enforce the Company's claims, Defendant would have instituted its Counterclaim, with the result that their own action would have been stayed; and

3.2.4 That at all material times there existed a mutuality of claims and/or reciprocity of debts between the Defendant's Counterclaim and the Company's claims and/or between the contractual obligations giving rise thereto; and

3.2.5 That upon judgment being granted in favour of Defendant in respect of its Counterclaim, the Company's claims would have been defeated and/or rendered ineffectual by virtue of the application of the principles of set-off and/or *compensatio*; and

3.2.6 That if the cession could be validly effected on the terms intended by Plaintiff and the joint trustees [*sic*– should be 'liquidators'], Defendant's Counterclaim could be rendered ineffective, inasmuch as Defendant would retain only a concurrent claim against the Company in liquidation whilst being obliged to defend Plaintiff's action for the Company's claims;

3.3 Plaintiff and the joint liquidators accordingly effected the cession fraudulently, or in bad faith, and with the intention and/or purpose of:

3.3.1 depriving Defendant of its right to raise its Counterclaim in reconvention; and/or

3.3.2 rendering Defendant's Counterclaim ineffectual.'

17]In the premises, so the defendant pleads, 'the cession is invalid, illegal, contrary to public policy and unenforceable'. In the alternative, the defendant claims that, should it be held that the cession is indeed valid, then, by virtue of the facts pleaded in paras 3.2 and 3.3, the defendant is entitled (a) to raise its counterclaim in reconvention to the plaintiff's claims; and (b) to set off any amount found to be owing by the plaintiff to the defendant in terms of such claim in reconvention against any amounts found to be owing by the

defendant to the plaintiff under the ceded claims. The defendant accordingly asks that the plaintiff's claims be dismissed with costs; alternatively, that judgment in respect of the plaintiff's claims be postponed until judgment on the defendant's counterclaim has been given.

18]In its counterclaim the defendant claims payment of a total amount of R499 445.77 as damages allegedly suffered by it as a result of the company's breach of its obligations in terms of the relevant contracts. After setting out the necessary factual allegations with regard to each individual transaction, the basis for the counterclaim is pleaded as follows:

'28. By virtue of the facts pleaded in paragraphs 3.2 and 3.3 of Defendant's Plea, and only in the event of the above Honourable Court finding that the cession pleaded by Plaintiff in paragraph 6 of its Particulars of Claim ("the cession") is valid and enforceable, Defendant pleads that:

28.1 Defendant's Counterclaim is reciprocal to Plaintiff's claim in convention and is enforceable against Plaintiff, who is in law obliged to defend same;

28.2 Plaintiff is therefore liable for the payment to Defendant of the aforesaid amount of R499 445,77, plus interest and costs.

29. In the alternative and only in the event of this Honourable Court finding that Plaintiff is not liable to pay Defendant the full amount of R499 445.77, plus interest and costs, Defendant pleads that, by virtue of the facts pleaded in paragraphs 3.2 and 3.3 of Defendant's Plea and only in the event of the above Honourable Court finding that the cession is valid and enforceable, it is entitled in law to raise its Counterclaim against Plaintiff and to an order declaring Plaintiff's claim in convention to be extinguished by virtue of set-off of Plaintiff's claim in convention against the aforesaid amount of R499 445,77.'

19]In essence, therefore, the defendant attacks the validity of the cession on the basis that the cession burdened its position as debtor in that it precluded the defendant from obtaining set-off of its counterclaim against the insolvent cedent.

The exception

20]In his exception to the counterclaim, the plaintiff avers that it was the consequences of the *concursus creditorum*, and *not* the execution of the cession, that deprived the defendant of its counterclaim against the company. The plaintiff accordingly denies that he became liable to defend the defendant's counterclaim against the company. Furthermore, since the defendant's counterclaim was not liquidated and payable prior to the establishment of the *concursus creditorum*, set-off of the defendant's counterclaim against the company's claims (as reciprocal debts) cannot occur. In these circumstances,

so it is contended, the defendant is not entitled to the relief sought in prayer (b) of the plea (i.e. a stay of proceedings), nor is the defendant entitled to raise its claim against the company as a counterclaim against the plaintiff. In any event, so the argument goes, the defendant as debtor is not entitled to institute a counterclaim against the cessionary which exceeds the amount of the ceded claim. For these reasons, the plaintiff contends that the defendant's plea does not disclose a defence and that its counterclaim does not disclose a cause of action.

21]The exception also raises a complaint that the defendant's pleadings are vague and embarrassing on the basis that it is uncertain from the pleadings whether the defendant's alleged counterclaims against the plaintiff arose prior to the commencement of the *concursus creditorum*. Clearly, if such claims only arose subsequent to the *concursus*, then the defendant could not rely thereon by way of set-off or counterclaim.

22]In order to succeed in its exception, the plaintiff has the onus to persuade the court that, upon every interpretation which the defendant's plea and counterclaim can reasonably bear, no defence or cause of action is disclosed. Failing this, the exception ought not to be upheld.[1]

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1 Erasmus *Superior Court Practice* (1994 with loose-leaf updates, Service 27) at B1–151 n 4; B–152 n 9; B1–153 n 1 and 3.

23]Although there is some ambiguity in the defendant's pleadings in this respect, I am satisfied that it is possible to read the plea and counterclaim as alleging that the defendant's alleged illiquid claims against the plaintiff did indeed arise prior to the commencement of the *concursus creditorum.* It follows, therefore, that the exception raised on the basis of the plea being vague and embarrassing cannot be sustained.

24]In order to consider the validity of the substantive exception and the contentions underlying it, it is necessary first of all to examine the nature of the legal relationships between the various parties. This will be considered under the following headings, namely –

•the rights and obligations existing between the company and the defendant prior to winding-up;

•the effect of the winding-up of the company on the rights between the company and the defendant; and

•the effect of cession to the plaintiff of the company's rights vis-à-vis the defendant.

The rights and obligations between the company and the defendant

25]Although the plaintiff's claims are presented in the particulars of claim as liquidated contractual claims in respect of services 'duly' performed, it is apparent from the pleadings as a whole that the claims arise in respect of specialised engineering services rendered by the company to the defendant at its special instance and request. As such, the underlying contracts are instances of *locatio conductio operis*. In *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk*,[2] Jansen JA set out the following principles in relation to this type of contract:

2 1979 (1) SA 391 (A).

(a) As with contracts of sale, the obligations under *locatio conductio operis* are ordinarily reciprocal, with the result that the contractor's entitlement to receive payment is dependant on performance of its obligations.[3]

(b) Other than in circumstances in which the contractor specifically pleads for the payment of a reduced contract price, an employer is entitled to withhold payment for the contractor's services until such time as the latter has strictly and fully performed its obligations.[4]

(c) In addition to a right to withhold payment, the employer is entitled to counterclaim for any damages suffered by it.[5]

26]On the factual allegations contained in the defendant's pleadings, it must be accepted for present purposes that the company's entitlement to claim payment from the defendant was reciprocal to, and dependant on, due and proper performance of its own obligations under the contracts. Had the company, therefore, prior to liquidation, sued the defendant for payment in terms of the various contracts, the defendant would have been entitled to invoke the *exceptio non adimpleti contractus* and to withhold payment of the

3 At 418B–C.

4 At 419C–G.

5 At 435F–G.

contract price until such time as the company had fully performed its own obligations in terms of those contracts. In addition, the defendant could have instituted a counterclaim for damages as a result of the company's alleged defective performance. This raises the next question, as to how the supervening liquidation of the company affected this situation.

The effect of the winding-up of the company on the rights of the parties

27]As rightly pointed out on behalf of the defendant, the plaintiff's exception presupposes that a *concursus creditorum* results in an absolute and inviolable freezing of the liquidated company's estate with the result that there is no potential to set off illiquid claims or counterclaims. This argument overlooks the extensive body of law addressing the effects of the establishment of a *concursus creditorum* on executory contracts.

28]In this regard, it has long been recognised that executory contracts do not terminate automatically when a company is wound-up. Instead, the liquidator has an election whether to enforce or to repudiate the relevant contract. The legal position was summarised as follows by Vivier JA in *Nedcor Investment Bank v Pretoria Belgrave Hotel (Pty) Ltd*:[6]

29]'A trustee in insolvency, and thus a liquidator of a company in

6 2003 (5) SA 189 (SCA) para 6.

liquidation, is invested with a discretion whether to abide by or terminate an executory contract not specifically provided for in the Insolvency Act which had been concluded by the company in liquidation before its liquidation. Such an agreement does not terminate automatically on the company being placed in liquidation. The liquidator must make his election within a reasonable time. Should he elect to abide by the agreement the liquidator steps into the shoes of the company in liquidation and is obliged to the other party to the agreement to whatever counter-prestation is required of the company in terms of the agreement. Once the liquidator has accepted the benefits of the contract, he cannot limit the other party to a concurrent claim against the free residue of the estate for anything reciprocally due to it. The other party's claim then lies against the trustee who must meet it as an expense incurred in the estate's administration since his decision to abide by the contract is reached for the purpose of his administration of the estate.'

30]The question as to whether or not a liquidator has elected to abide by a particular executory contract is a question of fact and not a question of law. If that question of fact is to be decided by a process of inference, the conclusion drawn must be consistent with all the proved facts. Insofar as reliance is placed upon conduct of a liquidator as constituting an election to abide by the relevant executory contract, that conduct must be unequivocal.[7]

31]Based on the above analysis, it was argued on behalf of the defendant that the contracts on which the plaintiff's claims are based are executory contracts.

7 *Du Plessis & Another NNO v Rolfes Limited* 1997 (2) SA 354 (A) at 364F–G.

This follows, so it was argued, from the fact that, at the time of the provisional winding-up, the defendant was withholding full payment to the company until such time as the services had been fully and correctly performed. Consequently, on the facts pleaded by the defendant, neither party had rendered complete performance at the date of the provisional winding-up.

32]The defendant further submitted that, in ceding the company's claims under the contracts to the plaintiff, the joint liquidators of the company must necessarily be taken to have elected to abide by the agreements. After all, so it was argued, the right that the liquidators had was to claim payment from the defendant if, and only if, they themselves had (a) elected to abide by the contracts in question and (b) fully performed the obligations that rested on the company.[8] Had they repudiated the agreements, they would not have been able to confer on the plaintiff the rights that form the subject matter of the claims herein.

33]The plaintiff's counter-argument was that the plea does not contain any allegations to the effect that the agreements in question were executory contracts or that the liquidators of the company did elect to abide by such contracts. The allegations contained in para 3.2.6 of the plea seem to suggest,

8 In this regard, it should be noted that the plaintiff does not seek to claim a reduced contract price in accordance with the principles set out in the *BK Tooling* case, *supra.*

on the contrary, that the contracts had been repudiated by the liquidators, because the defendant complains that it 'would retain only a concurrent claim against the company in liquidation whilst being obliged to defend plaintiff's action for the company's claims'.[9] Were the contracts relied upon by the defendant in fact executory contracts by which the joint liquidators had elected to abide, the claims of the defendant against the company would not be concurrent claims at all, but rather administration expenses in the estate, recoverable in full.

34]While the plaintiff's argument on this aspect is not without merit, the test on exception, as noted above,[10] is a strict one. In my view, the defendant's pleadings – on a proper interpretation thereof – contain sufficient allegations to justify the inference that the contracts on which the plaintiff relies are indeed executory contracts. Furthermore, the inference that the liquidators had elected to abide by such contracts is irresistible in view of the fact that the contrary inference would not have given rise to the rights being pursued herein.

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9 Quoted in para In its plea, the defendant raises various defences in rem against the plaintiff's claims, based mainly on alleged defective, incomplete and/or late performance rendered by the company. The details of those defences are not relevant for present purposes. What is relevant, is the defendant's denial of the validity of the cession on which the plaintiff's claims are based and hence his locus standi to sue. In amplification of its denial, the main grounds of this defence are pleaded in the following terms: above.

10 Para above.

35]The exception must accordingly be considered on the basis that the claims ceded to the plaintiff arise from executory contracts by which the liquidators had elected to abide. It follows from this approach that, had the liquidators sued the defendant on the claims in issue, the defendant would have had exactly the same rights as it would have had, had it been sued by the company.[11] After all, 'liquidation is not designed to endow the liquidator with "rights under the contract greater than those of the insolvent whose place he is taking"'.[12]

36]It follows, further, that – save to the extent indicated below[13] – the exception to the defendant's plea cannot be upheld. In reaching this conclusion, I have not found it necessary to consider one of the alternative arguments strongly relied on by the defendant, namely that a cession effected with the *mala fide* purpose of depriving the debtor of the procedural advantages of a counterclaim is invalid.[14]

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11 See para above.

12 *Thomas Construction (Pty) Ltd (In Liquidation) v Grafton Furniture Manufacturers (Pty) Ltd* 1986 (4) SA 510 (N) at 522F, quoting with approval from *Smith & Another v Parton NO* 1980 (3) SA 724 (D) at 729H.

13 Para below.

14 See eg Scott *The Law of Cession* (2ed) 1990 at 197–201; *Nedcor Bank Limited v Hyperlec Electrical and Mechanical Suppliers CC and three similar cases* 2000 (2) SA 880 (T) at 884E–G; *Corinth Properties (Pty) Ltd v First Rand Bank Limited* 2002 (6) SA 540 (W) at 546D and I–J. But cf also Van der Merwe *et al Contract – General Principles* (2ed) 2003 at 451 n 227; and *Goodwin Stable Trust v Duohex (Pty) Ltd & Another* 1998 (4) SA 606 (C) at 617B.

The effect of cession of the company's rights to the plaintiff

37]I now turn to consider the exception to the defendant's counterclaim. In this regard, the effect of cession of the company's rights to the plaintiff is of cardinal importance. Ordinarily, the effect of cession is that the *rights* (and not the obligations) of the cedent are transferred to the cessionary. While a debtor is entitled to raise against a cessionary any defence *in rem* that he or she could have raised against the cedent, the question whether or not a debtor can, in addition, raise against a cessionary a counterclaim that it has against the cedent remains unclear in our law.

38]In *LTA Engineering Co Ltd v Seacat Investments (Pty) Ltd*,[15] the Appellate Division held – with reference to *D*.3.3.34 – that a cessionary was obliged to 'defend' the cedent where the cession was *mala fide*; that is to say, where it was purposively entered into with a view to preventing the debtor from instituting a counterclaim. In that case, a debtor sought a stay of judgment in favour of a cessionary so as to allow for a claim in reconvention against the cedent to become liquidated and capable of set-off against the cessionary. The court held in this regard:

15 1974 (1) SA 747 (A).

> *39]'It is as inequitable today as, e.g., in the fourteenth century, that a debtor should be prejudiced by a cession designed to circumvent its right of reconvention, where the cessionary is a party to that design.'16*

40]In the *LTA* case, the defendant only sought a stay of proceedings while pursuing its claim against the cedent; it did not seek to institute a counterclaim against the cessionary. In the circumstances, Jansen JA found it neither necessary nor desirable 'to consider fully the precise nature of a cessionary's duty "to defend the cedent" in the light of modern concepts and procedure'.[17]

41]In an erudite argument on behalf of the defendant, Adv *Van Helden* sought to persuade me that the cessionary's above-mentioned duty includes the duty to defend a counterclaim that the debtor may have against the cedent, even where such counterclaim exceeds the value of the claim by the cessionary. He relied in this regard on a careful analysis of certain *dicta* in the judgment of Jansen JA in the *LTA* case, as well as some of the common law authorities referred to therein. In my view, however, the weight of authority is against these submissions.

42]Van der Merwe *et al,*[18] in commenting on the *LTA* case, state that it is not

16 At 771A.

17 At 772C–D.

18 *Op cit* at 450–1 and authorities cited therein.

clear (and was not settled by the judgment in that case) whether the principle – namely that the *mala fide* cessionary is obliged to 'defend' the cedent – entitles the debtor to more than an order suspending the claim by the cessionary until such time as judgment is given in the debtor's claim against the cedent. With reference to a trilogy of cases[19] that followed on the *LTA* case, however, the authors express the view that –

> *43]'The rule does not entitle the debtor to bring the counterclaim against the cessionary, eg where the cedent has become insolvent.' 20*

44]Nienaber[21] crisply summarises the prevailing position as follows: The debtor who is sued by a cessionary can rely on a claim that he or she has against the cedent if such claim, at the time of cession, qualified for set-off against the ceded right. This follows from the proposition that cession is not to impair the position of the debtor. However, where the debt which is owed by the cedent to the debtor was still unliquidated at the date of the cession and hence incapable of supporting set-off, a debtor is not permitted to rely on set-off against the cessionary. Nor would the debtor be permitted to rely on a counterclaim which he or she had against the cedent but which was not yet ripe for set-off, either at the date of the cession or at the date when the action

19 *Munira Investments (Pty) Ltd v Flash Clothing Manufacturers (Pty) Ltd* 1980 (1) SA 326 (D); *Regional Factors (Pty) Ltd v Charisma Promotions* 1980 (4) SA 509 (C); and *Beukes v Claassen* 1986 (4) SA 495 (O).

20 *Loc cit* n 229. See also De Wet & Van Wyk *Kontraktereg & Handelsreg* (5ed) 1992 at 258 n 35.

21 2(2) Lawsa (2ed) 2003 para 51.

was instituted. This general approach is subject to the following qualification:

> *45]'The debtor is entitled to rely on a counter-claim that he or she has against the cedent in order to stay judgment on the cessionary's claim until the counterclaim has been disposed of, but only if the cession was made mala fide, that is if it was made by the cedent with the purpose of circumventing the debtor's reliance on the claim in reconvention the cessionary was aware of the cedent's motive.*
>
> *In these circumstances the debtor would not be precluded from invoking a future set-off. The cessionary, if shown to have conspired with the cedent to frustrate the debtor from raising a counterclaim by way of reconvention, is obliged to "defend" the cedent. The determination of the cedent's claim is deferred until the counterclaim has been decided. The cessionary has a vital interest in the outcome of that dispute. If the counterclaim is unsuccessful his or her claim, if proved, succeeds in full; if the counterclaim is successful, it will then have become liquidated and set-off will operate to extinguish or reduce the cessionary's claim against the debtor, even, it is submitted, where the cedent was not a party to the action. From the fact that the cessionary, because of his or her own bad faith, is obliged to suffer set-off, it does not follow, however, that he or she becomes liable for payment of any excess if the debtor's counterclaim against the cedent is proved to exceed the cessionary's claim against him or her: the cessionary is not a substitute debtor for the cedent and does not become liable for the latter's debt.'* [22]

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22 *Id.* (footnotes omitted.) See also *Regional Factors (Pty) Ltd v Charisma Promotions, supra,* at 512B, where it was held that there is no authority indicating that a cessionary could be sued by way of counterclaim for an amount in excess of the cessionary's claim. Note however the doubts expressed about the *dictum* at 512E of the same judgment in *Beukes v Claassen, supra,* at 499D and in Lubbe & Murray *Farlam & Hathaway, Contract – Cases, Materials, Commentary* (3ed) 1988 at 679; and Van der Merwe *et al, op cit* at 451 n 229, with which doubts I respectfully associate myself.

46]Direct authority for the above approach is to be found in the judgment of Howard J in *Munira Investments (Pty) Ltd v Flash Clothing Manufacturers (Pty) Ltd*:[23]

> *47]'I cannot accept the defendant's submission that the decision [in the LTA case] can be regarded as authority for a counterclaim against the plaintiff in the form proposed. Whatever the precise nature of the cessionary's "duty to defend", it cannot have the effect of substituting the cessionary for the cedent as the person liable for payment of the alleged damages totalling R6 861.15 or any part there-of. The entire claim for damages remains a claim against the cedent, not the cessionary, and the judgment in the Engineering case contains no suggestion to the contrary. In particular, or set-off is only mentioned (in the passage at 772 quoted above) as a possibility "'by reason of the degree of identification of the cessionary with the cedent"'. In my respectful opinion the identification would have to be complete, for it is fundamental to the operation of set-off that both debts be due and payable by and to the same persons in the same capacities (see Wessels, Law of Contract in South Africa, Second Edition, paragraph 2514; De Wet & Yeats en Handelsreg, Fourth Edition at 245-246). The proposed counterclaim is based on the misconception that the cessionary's duty "to defend" renders it liable for payment of the damages in question. In my judgment it is bad in law and would be excipiable as such.'*

48]I respectfully agree with these views. Applying these principles to the facts of this case, it is clear that the defendant's counterclaims against the cedent

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23 Footnote 19 *supra* at 330D–E.

are, at this stage, unliquidated claims for damages. Had the defendant – prior to the cession – been sued by the liquidators, it would have been unable to apply set-off. At best, it could have applied for a stay of the liquidators' action pending proof of its counterclaim so as to allow set-off to take place. Cession of the liquidators' claim to the plaintiff cannot affect this position. While it is trite that cession of a debt cannot be allowed to *impair* the position of the debtor, it can equally not be relied on to *improve* the position of the debtor.

49]For the above reasons, I conclude that the defendant's unliquidated counterclaim against the plaintiff as cessionary is bad in law and does not disclose a cause of action. It follows from the foregoing that paragraphs 47 and 48 as well as prayer (*b*) of the plea are likewise excipiable and liable to be struck out. To that extent, I would accordingly uphold the exception against the counterclaim as well as the identified portions of the plea. In the result, it is not necessary to consider the further argument on behalf of the plaintiff, namely that it is in any event not competent for a debtor to institute a counter-claim that exceeds the claim of the cessionary.

Costs

50]This result means that the plaintiff is partially successful. He was accordingly justified in launching the exception. Conversely, however, the

defendant was largely successfully in resisting the exception insofar as it was directed against its plea. In the circumstances, I would regard it to be fair to award the plaintiff one-half of its costs in relation to the exception.

Order

51]For the reasons stated above, I would issue the following order:

1. **The exception is upheld in part, to the extent that the defendant's counterclaim as well as paragraphs 47 and 48 as well as prayer (b) of the plea are struck out.**

2. **The defendant is granted leave, if so advised, to amend its pleadings within 20 days from the date of this order.**

3. **The defendant is ordered to pay one-half of the plaintiff's costs in respect of the exception.**

52]_____

53]**B M GRIESEL**
Judge