

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NUMBER: 10334/2005

DATE: 13 NOVEMBER 2008

5 In the matter between:

THE STANDARD BANK OF

SOUTH AFRICA LTD APPLICANT

and

MAHMOUD MOHAMED FAKIER RESPONDENT

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JUDGMENT

GAUNTLETT, A J:

15 The plaintiff bank sues the defendant on a cession and
substitute factoring agreement by its client, Sago Industries
(Pty) Limited, previously Veron Trading (Pty) Limited ("Sago").
Sago supplied the defendant (whose citation has now been
amended by consent to read "Mahmoud Mohamed Fakier") with
20 trade goods on account.

The issues between the parties are narrow on the pleadings,
and narrowed further through the pre-trial process. The
essential dispute relates to the adequacy of notice of cession
25 given to the defendant as debtor. The notice reads thus:

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"14 September 2004 [etcetera]. We would like to advise that we have purchased and/or hold a valid cession of all amounts owed by you to Sago Industries (Pty) Limited.

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Accordingly, all amounts due by you must be made [sic] directly to us. May we stress that, only by paying directly to us, will you discharge your indebtedness. Payments to any other party will not constitute an answer to our claim for payment.

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....."

The evidence was brief. Mr Mark Seland, head of the debtor finance division of the bank, testified in support of the reduced quantum of the claim. He also explained the conversion of the Sago account from one effectively managed by Sago itself (from 2001 to 2004) to one in respect of which all amounts owing were to be paid directly to the bank by the debtor.

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His evidence was followed by that of the defendant, and Mr Dawood Ismail, who plays an important role in the conduct of the defendant's business. To the extent that this evidence was relevant, I deal with it shortly in due course.

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25 Counsel - to whom I am indebted for their comprehensive and

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very helpful argument - were agreed that what is central to the case is the meaning and effect of the notice of cession given initially by the bank to the defendant in its letter dated 14 September 2004. The defendant sought in his oral evidence to suggest that this notice only came to his attention in November of that year, but conceded under cross-examination that not only was this inconsistent with his evidence in a section 417 Inquiry, but also with his pleaded case. It was accepted in argument on both sides, that the defendant was first so notified by the bank by 30 September 2004.

Cessions effect transfers of personal rights between the parties to them. The problem arises in practice as regards the time when such transfers become effective against the debtor, who is not required to be a party to the cession, and may have no knowledge at all that it has been effected at the time of its conclusion. The solution has been sought, at least since the *denuntiatio* of Roman law, in the notification of the debtor (see Grosskopf, *Geskiedenis van die Sessie van Vorderingsregte* [Leiden LLD diss. 1952] 192). In Roman Dutch common law, notice was recognised as the means by which the cessionary can protect his interest (see Voet Comm ad Pand. 18.4.5, and generally Scott, *Law of Cession* [2nd ed 1991] 92 et seq).

When a debtor pays the cedent, notwithstanding notice, a

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difficult question of legal policy arises. On the one hand the debtor has sought to pay the debt. On the other hand, the cession has been traduced and payment has not been received by the true current holder of the right.

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In the present case, the bank has correctly accepted that it cannot claim certain payments made by the defendant prior to 30 September 2004, because it must rely on notice. But it does rely on its entitlement to receive payments in respect of 10 sums paid after receipt of the notice dated 14 September 2004 and received, as I have said, by agreement by no later than 30 September 2004. These sums fall into four categories: in respect of the latter three, as adumbrated in oral argument, further notices ensued, to which I shall later refer.

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It was not disputed in argument that if the bank's legal contentions are correct, it is entitled to judgment in the reduced total amount of R273 669,43. For reasons which will become apparent, it is not necessary to analyse the individual 20 make-up of this globular reduced total further.

The defendant has pleaded that the September 2004 notice "related only to amounts to Sago ... as at the date of notice, but did not make reference to amounts owing to Sago ... that 25 would become due after that date." Thus the defence is one of

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construction of the September notice: as counsel for the defendant accepted in oral argument, what the notice reasonably conveys to the reader in the debtor's position.

5 The current legal inquiry, it seems to me, is however somewhat wider than that: The debtor will be released, notwithstanding notice given to him, if in making payment to the cedent despite the notice he genuinely and reasonably believes the cedent to be his debtor (cf. Joubert et al Law of South Africa [2nd Edition
10 2003] para 48, in Volume 2, Part 2, and authorities collected in footnote 1).

Thus this posits an inquiry in turn wider than the notice itself, as to the relevant circumstances which would establish a
15 misconceived, but genuine and reasonable payment to the cedent.

In this regard, the defendant's evidence was even more unsatisfactory than his earlier hedging as regards the time period when he received the September 2004 notice. He said
20 that he expected Sago to pay the bank, when he continued to pay Sago notwithstanding the notice. He admitted that he had told the section 417 Inquiry, that he "did not take much notice of that", referring to the express legend on every invoice,
25 reading "this debt has been ceded to Standard Bank SA". He

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said furthermore that in reaction to the September notice, he took only two steps: he asked an assistant to “check with the bank”, while he himself established (he said) that nothing was in fact owing at the time to Sago.

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Neither answer impresses as regards the requirements of genuine and reasonable belief. His assistant was not called as to whether or not she indeed called the bank to clarify the notice received. Worse, the defendant did not suggest that he sought her out to ask her for a subsequent report on the inquiry he had, he said, delegated to her. And as regards the suggestion that he established that nothing was currently owing, this is hardly compelling in the context of the inquiry which has to be made; he ran an open account with Sago, he clearly intended to continue to make future purchases after the date of the notice, and thus he knew that at least future indebtednesses were bound to arise, in the ordinary course of things, shortly.

20 Shortly put, in the words of Murphy, J in Van Staden N.O. v First Rand Limited & Another 2008(3) SA 530 (T) at 539 D:

“A court will impute constructive knowledge to a debtor where it has unreasonably shut its eyes to the truth by not heeding indicators of that truth.”

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{See further Stannic v Samib Underwriting Managers (Pty) Limited [2003]3 All SA 257 (SCA)}.

5 Also unsatisfactory was the defendant's attempt to contend that he did not understand what a cession was. The first notice itself explains it: for present purposes, a sale of debts. The defendant has been in business for some 50 years, and in the automotive industry for the past 20, and he struck me as
10 an alert individual with commercial acumen. If he truly did not understand, he would in all probability have sought legal advice - particularly when the notice was followed by a final demand for nearly R1 million. He was unable to explain his failure to do so. In fact he showed again a disquieting
15 tendency to hedge and to suggest some sort of possibility that he may well have sought such legal advice, which I reject.

Thus for several reasons it is not in my view open to the defendant to rely only on the wording of the September notice
20 for the defence, that he genuinely and reasonably believed that any cession referred to applied only to future debts. I do not consider that the evidence given before me this morning, establishes that defence is genuine and I do not consider that his conduct in that regards is to be classified as reasonable.

I would come to the same conclusion even on a consideration simply of the notice of September 2004, in other words treating the inquiry before me as a matter of mere construction of the notice. Counsel for the defendant drew my attention to its lack of expressed futurity, in referring to "debts due". In my view, however, the language used is indicative of an encompassing category of debts, precisely without further sub-distinction regarding the time at which they had accrued. More shortly put, I believe that on a simple treatment of the language, this contemplates past, present and future debts. In this regard, reference should be had to the judgment in First National Bank of SA Limited v Lynn N.O. 1996(2) SA 339 (A) at 351 C to D, where this was noted:

15 "Due" does not necessarily mean "immediately payable", as reference to any dictionary reveals...
 "A debt is said to be due the instant that it has existence as a debt; it may be payable at a future time".

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Secondly it is in my view clear from the notice as a whole, in other words not merely the language used treated purely linguistically, that the notice was not confined to past debts. I have already quoted the terms of the notice, and it is quite apparent from the proceeding and subsequent sentences that

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the reference to debt was intended to encompass, and would reasonable have been so interpreted as encompassing, past and future, as well as any present debts. Thirdly, the construction I have suggested in my view arises not only as a matter of language, but also as one of wider context; the context was an open account, with the likelihood of future debts to be incurred.

Two things have been stressed time and again in this regard, firstly that, in the words of Lord Steyn in R v Daly, “in law context is everything”.

The second is that in the construction of legal and particularly commercial contractual documents, sense cannot reasonably be given without a proper contextual interpretation, in the course of which the court imputes to the reasonable reader a knowledge of the immediately relevant circumstances. Fourthly, no sensible, commercial purpose would in my view be served by the distinction which has been suggested on behalf of the defendant, namely between past and future debts. This, as I have stressed, was so particularly given the fact that an open and continuing account was being administered and there would have been no sensible commercial purpose for the notification would have confined itself in relation to past debts only. The terms of the underlying cession, of course, reflect

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this; the notice does not, with the amplitude it has, lend itself to that interpretation.

Some reference was made in argument to the wider explicit
5 terms of the cession by way of comparison, but it seems to me that this is not helpful for several reasons. The first is that the cession, of course, was not in any way attached to or referred to in the course of the notice (counsel for the defendant fairly
10 acknowledging that his argument would have been assisted in this regard had it been). Furthermore the defendant suggested in now way that the terms of the cession were known to him and that it impinged upon his understanding of the notice. Generally then the notice, to the extent that regard is to be had to it, must be considered in the light of its own wording,
15 viewed in the context as I have suggested it must be.

Thus I consider that whether the matter is approached on the slightly wider basis of ascertaining whether in all the circumstances it is evident that the defendant's payment to the
20 cedent, notice of the cession notwithstanding, was genuine and reasonable, or whether this inquiry is made with reference simply to the terms of the notice construed in context, the conclusion remains the same. This is that I consider that the plaintiff discharged the onus of proof (which I accept rested
25 upon it) of establishing knowledge on the part of the defendant

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that the cession had been effected, and that he was required, from 30 September 2004, to pay the bank.

It is unnecessary in the circumstances to deal with the further
5 notices of the cession in the subsequent communications by the bank and Sago to the debtor and which would have had particular reference or relevance, as I have indicated, to the latter three categories of sums claimed by the bank.

10 The order to be made according is as follows:

"The defendant is ordered to pay the plaintiff the
sum of R273 669,43, within interest *a tempore*
morae, and costs of suit. The plaintiff's witness, Mr
15 Millosevic is declared a necessary witness."

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GAUNTLETT, A J