Court File

**IN THE HIGH COURT OF SOUTH AFRICA**

**(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

CASE NUMBER: **10870/2008**

DATE: 12 DECEMBER 2008

In the matter between:

**MARCOM INTERNATIONAL**

**COATINGS GROUP (PTY) LIMITED** APPLICANT

and

**WILHELM PHILIPPUS FERREIRA** RESPONDENT

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**JUDGMENT**

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**BAARTMAN, A J:**

1. This is an application to set aside the order of attachment (**the attachment order)** granted on 8 July 2008 by Yekiso, J. The applicant sought and obtained the attachment order on an urgent and *ex parte* basis.

**BACKGROUND**

2. On 27 November 2007 the respondent instituted action against the applicant in the Cape Town magistrate's court, under case number 25143/07. The respondent alleged in his summons that he was an *incola* of this

Court and claimed an amount of R50 000 from the applicant. I do not find it necessary for purposes of this judgment to deal with respondent's cause of action.

3. The applicant is a company duly incorporated and registered in South Africa and is also a member of the Marmoram Group of companies. Two members of the Marmoram Group, namely Marmoram South Africa and Marmoram Dubai, ceded their claims against the respondent to the applicant, in order to enable the applicant to institute a counter claim against the respondent. On 4 March 2008 the applicant delivered a counter claim against the respondent based on the ceded claims.

4. The applicant claimed that agreements of cession were concluded as follows, (I quote from applicant's replying affidavit):

> *"An oral alternatively tacit, cession agreement was concluded between the Applicant and Marmoram Dubai simultaneously with the signing of the resolutions by Marmoram Dubai and Marmoram South Africa. In concluding the cession agreements between the Applicant and Marmoram*

*Dubai, Marmoram Dubai was represented by David Rhoodie, and the Applicant was represented by Mike Charles. Mr Rhoodie was in Dubai at the time and Mr Charles was in Cape Town. Marmoram Dubai agreed to cede its claim against the respondent to the Applicant and the parties have agreed that if the Applicant succeeds in its claim against the Respondent, any funds obtained by the Applicant from the Respondent will be off-set against the monies currently owed by the Applicant to Marmoram Dubai. In the event that more money is received from the Respondent than is currently owed by the Applicant to Marmoram Dubai, the excess funds will be retained by the Applicant as a loan from Marmoram Dubai to the Applicant.*

*Similarly, an oral, alternatively tacit, cession agreement was concluded between the Applicant and Marmoram South Africa to cede its claims against the Respondent to the Applicant. Both the Applicant and Marmoram South Africa were represented by Mike Charles who was in Cape Town at the time. Any funds received by the Applicant from the Respondent in terms of the cession, will be used to off-set amounts owed by*

*Marmoram South Africa to the Applicant."*

5. The applicant's counterclaim exceeded the magistrate's court jurisdiction, therefore the applicant brought an application to stay the proceedings in that court to enable it to institute action in this court. On 28 March 2007 the magistrate at Cape Town granted an order in terms whereof the proceedings in that court was stayed for a period of 60 calendar days.

6. On 2 April 2007, the respondent's attorneys, informed the applicant, (I quote from the letter):

> *"Our instructions are not to comprehensively respond to the aforesaid, but to advise that our client is and was on date of filing of your counterclaim, not residing either permanently or temporarily in South Africa, nor is our client further domicile within South Africa."*

7. On 8 July 2008, this court granted an order (the attachment order referred to above) in terms whereof it ordered (I quote only the section relevant to this application):

*"...That the respondent's claim against the Applicant for payment of the amount of R50 000 (Fifty Thousand Rand) which forms the subject matter of an action instituted by the Respondent against the Applicant in the Magistrate's Court for the district of Cape Town under Case Number 25143/07 is attached to found or confirm the jurisdiction of the above Honourable Court in proceedings to be instituted by the Applicant against the Respondent for the payment of the sums..."*

**ISSUES FOR DETERMINATION**

8. The issues for determination in this application are:

(a) Did the applicant conclude valid cession agreements with Marmoram Dubai and Marmoram South Africa?

(b) Should this Court confirm the attachment?

9. I deal below first with the validity of the agreements of cession and thereafter consider whether this court should confirm the attachment order. I accept that when the

order was granted, the respondent was a *peregrinus*.

**THE CESSION AGREEMENTS**

**Evidence of the Cession**

10. In general, there are no formal requirements for a cession to be validly concluded. The applicant had to prove the agreement of cession. The applicant alleged that, when it delivered its counterclaim on 4 March 2008, cession had taken place. The respondent did not seriously challenge the circumstances under which the applicant alleged that this cession took place. I am satisfied on the papers before me that the applicant did prove that it had entered into agreements of cession with Marmoram Dubai and Marmoram South Africa, as set out above.

**The Hippo Quarries & Skjelbreds Rederi Decisions**

11. Counsel for the applicant, in argument, relied on the decision of **Hippo Quarries v Eardley** 1992(1) SA 867 (A) for the proposition that the applicant concluded valid agreements of cession with Marmoram Dubai and with Marmoram South Africa.

12. Counsel for the respondent, holding a contrary view, relied on the decision of **Skjelbreds Rederi & Others A/S v Hartless (Pty) Ltd** 1982(2) 710, for the proposition that no valid agreements of cession were concluded. Both decisions involved the validity of cession agreements. I first deal with the **Skjelbreds** decision and thereafter with the matter of **Hippo Quarries**, in order to determine whether either finds application in this matter.

13. In the matter of **Skjelbreds Rederi**, the court *a quo* granted an order, on an urgent basis and *ex parte* basis, authorising the attachments of certain rights vested in the applicants. The court *a quo,* thereafter, refused an application to set aside the attachment order. Rabie, JA delivered the judgment in the appeal against that refusal.

14. Rabie, JA said the following about cession at 733 G to H:

> *"The first point to bear in mind about the agreement of cession, is the circumstances in which it was entered into. It is common cause between the parties that Freedom Tramping, being a peregrinus, cannot enforce its claim against Skjelbreds, also a peregrinus, in a South African Court, and that*

*Freedom Tramping itself cannot apply for an additional order to found the necessary jurisdiction. It is admitted by the Respondent, furthermore, that it was in order to overcome this jurisdiction difficulty that Freedom Tramping ceded its claim to the Respondent."*

15. Rabie, JA further found that the cession in that matter was designed to enable an *incola* to bring an action which the *peregrinus,* the cedent, could in law not do. This, the Court found was not allowed. The Court at 736 H to C held that:

*"In light of all the aforegoing, I am of the view that the written agreement of cession is not a true reflection of the real agreement between the parties thereto; that there was no real intention to enter into an agreement of cession; that what is stated by the parties to have been a cession was not in form only, designed to enable the Respondent, an incola of the court's area of jurisdiction, to institute proceedings in its name against Skjelbreds; and that the true agreement between the parties is one in terms of which the Respondent would act as Freedom Tramping's mandatory in enforcing*

/...

*Freedom Tramping's claim against Skjelbreds. Holding this view of the relationship between the parties, I consider it to be clear that the Respondent cannot claim an attachment order in order to found jurisdiction when the mandatory, on whose behalf it is acting, cannot do so."*

16. In the **Hippo Quarries** matter, Nienaber, JA found at 875 G that:

> *"A cession, otherwise valid, is in my view not assailable on the sole ground that the cessionary was to collect a debt for the ultimate benefit of the cedent."*

17. Nienaber, JA distinguished the facts in the **Hippo Quarries** matter from those in the **Skjelbreds Rederi's** matter as follows, at 875 G to 876 H:

> *"The present situation is of course a little more complex. Here the cession was effected, not merely for collecting purposes, but to convert an unsecured claim in the hands of one creditor into a secured claim in the hands of another. Does it matter? That question must be reconsidered in the*

*light of the second case cited by counsel for the defendant. Skjelbreds Rederi A/S v Hartless (Pty) Ltd (supra).*

*In Skjelbreds' case, one peregrinus (the creditor) ceded its claim against another peregrinus (debtor) to an incola. This was to enable the incola to do what the peregrinus creditor was in law incapable of doing, namely to attach an asset of the peregrinus debtor ad fundandam jurisdictionem. As in the present case it was agreed, though not disclosed in the document of cession, that the cessionary would account to the cedent for anything it managed to recover from the debtor. This Court held that this transaction was not a genuine cession because the parties in truth intended the incola to be the mandatory or nominee (and hence not a cessionary) of the peregrinus creditor to enforce the claim against the peregrinus debtor on the formers behalf. The attachment was accordingly set aside.*

*There are similarities between Skjelbreds' case and the current one. There, too, the cession was intended to serve a secondary purpose for the ultimate benefit of the cedent; no consideration*

*was given for it; and the cessionary was under a duty to account to the cedent for any proceeds recovered as a result thereof.*

*But there are significant differences. Perhaps the most glaring one is this: in that case the ostensible cession was devised to circumvent a legal impediment or disability – a peregrinus is disqualified in law from attaching the property of another peregrinus ad fundandam jurisdictionem.*

*In the present case there was no legal disability. This cession was devised to capture Hippo's debtor in the net of plaintiff's suretyship. In Skjelbreds case the cession was designed to achieve what, as a matter of law, the cedent was unable to attain, i.e. the attachment; here the cession was designed to achieve what, as a matter of fact, the cedent was incapable of doing, i.e. resorting to someone else's suretyship."*

18. I am of the view that the facts in this matter are similar to those dealt with by the court in the **Hippo Quarries** matter and therefore the *ratio* of that matter is applicable to this matter.

**Genuine intention to cede and valid cession**

19. In this matter, Marmoram Dubai and Marmoram South African intended, with the cession of their claims, to enable the applicant to institute a counterclaim against the respondent in the magistrate's court proceedings referred to above.

20. The applicant would account to Marmoram Dubai and Marmoram South Africa, the cedents, in the event that it collected any money from the respondent. A cession, otherwise valid, is not assailable on the sole ground that the cessionary was to collect the debt for the ultimate benefit of the cedent. (See the quote from **Hippo Quarries** matter above).

21. Christie, at 466, in the Law of Contract, 4th edition, 2001 at 466 says:

> *"The Court will investigate the true nature of an allegedly simulated cession that is carried out in an attempt to outmanoeuvre a defendant, but if the intention to cede is genuine and the motive or*

*purpose is not unlawful, immoral or against public policy the cession will be valid."*

22. At the time of the cession, the respondent was an *incola* of this court. Therefore, the parties were in law entitled to have concluded the agreements of cession. In my view, it is not immoral or against public policy for members of a group, in this matter the Marmoram Group, to cede their respective claims to a member of the same group to enable that member to institute a counter claim in pending proceedings. I am of the view, that the parties to the cession agreement, genuinely intended to enter into agreements of cession and that valid agreements of cession were concluded.

23. I am satisfied that the parties to the cession intended to and achieved a lawful result. The respondent was an *incola* of this court. Therefore, there was no reason to attempt to subvert the law.

**ATTACHMENT TO FOUND OR CONFIRM JURISDICTION**

24. Having found, as I did, that the applicant concluded valid agreements of cession, it follows that the applicant properly obtained the attachment order. Erasmus, in the

commentary on the Superior Court Practice at 17 says that:

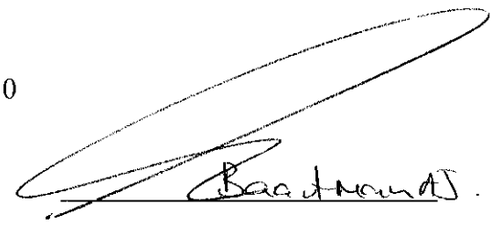
> *"(i) Where an incola wishes to sue a peregrinus and no other ground to exercise jurisdiction (ratio jurisdictionis) exist, an attachment is necessary to found jurisdiction. An incola may apply for attachment ad fundandam jurisdictionem even if he sues a cessionary from a peregrinus. The agreement between the parties must, however, be a genuine cession reflecting the real intention of the parties and not a mere agreement between principal and agent.*
>
> *(ii) Where an incola wishes to sue a peregrinus and another ground to exercise jurisdiction (ratio jurisdictionem exist), an attachment is still necessary to confirm and strengthen the jurisdiction already possessed by the court."*

[25] I therefore find that the applicant is entitled to confirmation of the attachment order. I make the following order:

(a) The application for the setting aside of the attachment order, granted on 8 July 2008, is dismissed.

(b) The attachment order is confirmed.

(c) Defendants are ordered to pay the cost of the application.



**BAARTMAN, A J**