REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 38117/15

24/3/2016

(1)	REPORTABLE: NO/YES
(2)	OF INTEREST TO OTHER JUDGES: NO/YES
(3)	REVISED.
(4)	Signature 24/03/2016 Date

DOLPHIN WHISPER TRADING (PTY) LTD **APPLICANT**

and

BORN FREE INVESTMENTS 568 (PTY) LTD **RESPONDENT**

Reasons for **JUDGMENT**

KHUMALO J

[1] In this Application the Applicant is seeking an order compelling the Respondent:

[1.1] to sign all necessary documents in order to effect transfer of two immovable properties into the Applicant's name;

IN THE ALTERNATIVE:

[1.1] to make payment in the amount of R2 000,000.00 (Two Million Rands)

[1.2] interest thereon at the rate of 9% a tempore more;

[1.3] an order declaring the immovable property executable in favour of the Applicant.

[2] The Applicant alleges his claim to have arisen from a written money lending transaction that the parties concluded on 18 June 2013, in terms of which the Applicant lent and advanced the Respondent an amount of R1 500 000.00 (One Million Five Hundrend Thousand Rand) and in turn as security for the repayment of the debt the Respondent registered a bond over its two immovable properties known as Portion 81 (Portion of Portion 11) , Registration Division IR, Mpumalanga Province and The remaining Portion of Portion 11

(Portion of Portion 7) of the farm Middelbult 235; Registration Division IR, Mpumalanga Province ("hereinafter rreferred to as "the properties") in favour of the Applicant.

[3] According to the agreement the money was advanced to the Respondent for a period of 12 months within which the Respondent was to repay it as an amount of R 2 000,000.00. On default the Applicant was entitled, either to hold the Respondent responsible for the repayment of the money or upon its election, without any further ado, to take transfer of the properties and give notice in writing to the Respondent of its election who will then sign the necessary documents for the transfer.

[4] After the lapse of a 12 months period, on 19 November 2014, J A Parsons ("Parsons") one of the two directors of the Applicant sent a letter, a notification of substitution of creditors directing the Respondent to transfer the property into the name of a company called Parsons Transport Holdings ("Parsons") instead of that of the Applicant,

[5] On 17 February 2015 the Applicant's attorneys sent a letter of demand to the Respondent notifying Applicant, inter alia, of the following:

> [5.1] that they were acting on behalf of the Applicant as well as of a company called Parsons Transport Holdings (Pty) Ltd ("Parsons").
>
> [5.2] that all the rights and obligations that Applicant had against the Respondent emanating from the loan agreement have been ceded /transferred to Parsons.
>
> {5.3] that as a result of Respondent's default, their clients were giving notice to the Respondent of their election, without further notice, to take transfer of the immovable properties and calling upon the Respondent and its director Mr Lamprecht to give effect to their election by signing the necessary documents at the offices of the Respondent's attorneys within 10 days of the notice from the date of the letter.

[6] Soon afterwards two sale agreements were presented to the Respondent for its signature as the transferor whilst bearing the name and signature of Parsons as the transferee. In terms of the two agreements the Respondent was selling to Parsons the immovable properties each at a purchase price of R750 000.00 to give effect to the loan agreement, Applicant being substituted for Parsons. On failure by the Respondent to sign the documentation the Applicant proceeded with these motion proceedings.

[7] In opposing the application the Respondent raised two substantive defences *in limine,* that:

> [7.1] The Applicant has divested itself of all its rights, title and interest it may have had in terms of the loan agreement;
>
> [7.2] the option to purchase the property without further payment and notice that is in the loan agreement is unenforceable as it constitutes a *pactum commissorium* which is void in South African Law.

[8] In its Replying Affidavit the Applicant simply just denied that it divested itself of the rights, title and interest it had in terms of the loan agreement, without addressing the letters substituting Parsons as the creditor and notifying them of the cession that were sent to the

Respondent and his attorney. It also denied that the loan agreement constitutes a *pactum commisorium*.

[9] Later in its heads of argument that were filed on 18 August 2015, the Applicant conceded that it has not dealt with the issue of *locus standi* in its Affidavits and undertook that should its *locus standi* remain in dispute it will apply to file a supplementary affidavit to substantiate thereon.

[10] Subsequently on 19 February 2016, a few days before the set down on 7 March 2016 the Applicant abandoned or waived the main relief that it was seeking, conceding to the *pactum commissorium* defence of the Respondent. The matter proceeded on 9 March 2016 only on the alternative relief sought, the monetary claim, against which the defence of the Applicant's *locus standi* also remained.

[11] The Respondent reiterated the defence at the beginning of the hearing by filing supplementary heads of argument highlighting also the attorney and client costs it was seeking which were to include costs of senior counsel as a punitive sanction for Applicant's persistence with its Application as it did. Applicant still did not respond or move for a motion to file further affidavits to address the prevailing issue of its *locus standi visa vis* the cession raised in the papers.

LEGAL FRAMEWORK

LOCUS STANDI & CESSION

[12] The onus, that is the duty to allege and prove *locus standi in judicio* rests on the party instituting the proceedings; See *Mars Incorporated v Candy World (Pty) Ltd* 1991 (1) SA 567 (A) at 575H-I; *Trakman NO v Livshitz* 1995 (1) SA 282 (A) at 287B-F. An objection taken in *limine* to the *locus standi* of a plaintiff or applicant, like an exception, must be dealt with on the assumption that all the allegations of fact relied upon are true; see *Kuter v South African Pharmacy Board* 1953 (2) 307.

[13] A cession divests the cedent (a creditor) of its rights against a debtor displacing its *locus standi* and subjecting the debtor to another creditor (cessionary).

[14] In ***Johnson v Incorporated General Insurance Ltd* 1983 (1) SA 318 (A),** the principles of cession are clearly defined as:

(a) an **act of transfer** (*oordragshandeling*); see also *Hippo Quarries (Tvl) (Pty)Ltd v Eardley* 1992 (1) SA 867 (A) at 873E-F;

(a) to enable the transfer of the right to claim (*translatio juris*) to take place;

© accomplished by means of an **agreement of transfer** (*ordragsoorenkoms*)

(d) between the cedent and the cessionary,

(e) arising out of a **justa causa**

(f) From which the intention of the cedent to transfer the right to claim and the intention of the cessionary to become the **holder of the right appears or can be inferred.**

(g) The *justa causa* is stated to be an **obligatory agreement** (*verbintenisskeppende ooreenkoms*) that is between the **debtor** and the **cedent** arising from, for example:

1. An agreement of sale; exchange; donation; or
2. A loan or settlement agreement and or payment.

[15] This is the obligation that is transferred to the cessionary when a cession is effected. The debtor is therefore an integral part of the cession as the obligatory agreement is in fact the *causa* of the cession agreement. For that reason notice to the debtor, even though it might be considered not necessary, is crucial, since he has to tender his performance to the cessionary (the new creditor) henceforth; see *Johnson v Incorporated General Insurances Ltd* 1983 (1) SA 318 (A) at 330H-331H. In *Lynn & Main Incorporated v Brits Community Sandworks CC* (348/2007) [2008] ZASCA 100 (17 September 2008) it has been held that 'a cession of rights is ineffective as against a debtor until such time as he has knowledge of it.' Notice, consequently completes (put the finishing touches to) the cession. Notice is consequently the way in which substitution of creditors is finalised.

[16] It was held in ***Botha v Fick* 1995 (2) SA 720 (A)** that *"mere consensus is sufficient to effect a cession" Also see Lawsa* 2nd, vol 2, para 6. It is as a result not necessary for the transfer agreement (Cession) to be in writing, but advisable. Once cession is effected, the cedent falls out of the picture, his *locus standi* being destroyed and the *vinculum juris* is between the debtor and the cessionary, unless if the cession is not of an interest in the claim but in the result of the litigation, whereupon the *locus standi* to sue will remain until the result is achieved; see portion 1 of 46 *Wadeville (Pty) Ltd v Unity Cutlery (Pty)*.

[17] A person that relies on a cession must allege and prove the contract of cession; see *Lief N O v Dettmann* [1964] (2) All SA 448 (A), 1964 (2) SA 252 (A). This can be done by the production in evidence of an apparently regular and valid cession, whereupon the evidentiary burden shifts to the party disputing the cession; see *Hippo Quarries (Tvl) (Pty) Ltd v Eardley* [1992] 1 All SA 398 (A); 1992 (1) SA 867 (A) 873.

ANALYSIS

[18] In challenging the *locus standi* of the Applicant on the basis of the cession, the Respondent had in its Answering affidavit, supplied the pertinent information that emanated from the Applicant which includes the Notices of the transfer and substitution of Parsons as the new creditor and subsequent agreements. The information suffices as ostensible proof of the Applicant's rights to claim against the Respondent having been transferred to Parsons. So besides carrying the onus to prove the *locus standi* as the party that has instituted the legal proceedings, Applicant also carries the evidentiary burden to establish facts that rebuts the apparent cession as established by the Respondent.

[19] Although *locus standi* must be clear from the Founding Affidavit, since the challenge of its legal capacity arose in the answering affidavit, the Applicant still had an opportunity to quell the challenge in its Replying Affidavits, using that to its advantage. Notwithstanding the opportunity and advantage and being privy to the information upon which the Respondent is challenging its *locus standi,* the Applicant failed in its Replying Affidavit to substantively

address the issue of the cession and its *locus standi.* Neither the contents of its notification letters nor the two agreements were explained. Instead Applicant persisted in a denial that is bare that it never divested itself of the rights therein.

[20] The Respondent therefore argued with reference to *Plascon Evans Paints v Van Reebeeck Paints 1994 (3) SA 623 (AD) at 634* that the issue falls to be decided on the Respondent's version, read together with those facts in the founding affidavit, admitted by the Respondents which facts Counsel argued lead to a conclusion that the Applicant was not the holder of a right; The two agreements and Notices were, inter alia, cited as proof as far as the Respondent is concerned of the Applicant having divested itself of the rights, title and interest of the claim against it. see *Portion 1 of 46 Wadeville v Unity Cutlery* [1984] 1 All SA 260 (A), 1984 (1) SA 61 (A)

[21] Applicant's Counsel argued that its denial that (the cession took place) it was divested of its right to claim raises a dispute of fact, therefore the matter must be referred to oral evidence. It also alleged that the two companies have the same directors and shareholders.

[22] For a matter to be referred to oral evidence the court must have found that a *bona fide* dispute on a material fact has been shown to exist; see *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163. There is no response on behalf of the Applicant that addresses the issues raised by the Respondent from which the court can be able to make out whether or not there is a genuine dispute of facts. The Respondent's bare denial on the cession is not supportable. (*Peterson v Cuthberts & Co, Ltd* 1945 A.D. 420)

[23] It is therefore due to the Applicant's failure to deal adequately with the Respondent's allegations that the court cannot determine the basis upon which Applicant denies that cession took place to make out whether or not a real dispute of fact exist. The Applicant had failed to discharge the evidentiary burden of showing that notwithstanding the two sale agreements and the notifications sent to the Respondent regarding the transfer of its rights arising from the loan agreement to Parsons, it still holds the right to claim from the Respondent.

[24] Applicant's allegations that it shares the same directors and shareholders with Parsons lacks substance, as no further details are provided to explain why that is mentioned or how does that affect the facts on cession as established by the Respondent. It is therefore logically unsustainable. The Applicant has as a result failed to discharge the onus to establish that it has the necessary *locus standi* to sue on the basis of the loan agreement, thus failing to make a case for the relief that it is seeking.

[25] The Applicant has also been very reckless in the manner that it responded to the contention raised by the Respondent. It must have foreseen that on its failure to prove its *locus standi* the application will be dismissed. It was also warned adequately by the Respondent of the costs sought in the event of it persisting with the Application without attending to the issue, it nevertheless proceeded on the same basis. Normally an order for costs on the attorney and client's scale will be made only when there is a special prayer for it or when notice has been given that the order will be asked for *Sopher v Sopher* **1957 (1) SA 598** (W) at 600 D-E; *Marsh v Odendeabrus Cold Strages Ltd* 1963(2) SA 263 (W) at 269 H

[26] Under the circumstances the following order is made:

THE ORDER

[26.1] The Application is dismissed with costs on an attorney and client scale that includes the costs of senior Counsel.

N V KHUMALO J

JUDGE OF THE HIGH COURT
GAUTENG DIVISION: PRETORIA

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