20/9/17

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, PRETORIA

CASE NO: A772/2014
CASE NO: 54182/2013

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED. ✓

20-9-2017

SIGNATURE DATE

In the matter between:

STALCOR (PTY) LIMITED Appellant

and

CAWAC SOLUTIONS CC First Respondent

AUCAMP, CHRISTIAAN HENDRIK MARTINS Second Respondent

MICHIELSEN & HOFMAN CC Third Respondent

SHERIFF OF THE COURT, BOKSBURG Fourth Respondent

J U D G M E N T

MSIMEKI J,

INTRODUCTION

[1] The appellant, applicant in the Court *a quo*, brought an application seeking an order:

> *"1. Setting aside the Deed of Cession concluded between the Applicant and the First Respondent on or about 8 March 2011;*
>
> *2. Ordering the third Respondent to cease all payments to the Applicant;*
>
> *3. Instructing the Fourth Respondent to proceed with the removal and sale in execution of the attached assets as instructed by attorneys for the Applicant;*
>
> *4. The First and Second Respondents be ordered to pay the costs of this Application on the attorney and own client (sic);*
>
> *5. No cost order be sought against the Third and Fourth Respondents save in the event of opposition to this Application*

in which case the Applicant will seek a Cost Order against them on the scale as between attorney and own client;

6. *Further and/or alternative relief."*

[2] The application served before Mali (AJ) who:

1. dismissed the application and;
2. ordered the applicant to pay the costs of the application on an attorney and client scale.

[3] The appellant brought an application for leave to appeal against the whole of the judgment of the Court *a quo*. Such leave was granted.

[4] The appellant, in its application for leave to appeal, enumerated approximately 23 grounds of appeal. In sum, the appellant seeks an order the terms of which are embodied in the Notice of Appeal which I have referred to in paragraph 1 above.

[5] The appellant, in short, contends that the Deed of Cession concluded between it and the first respondent on 8 March 2011 is of no value to it and the first respondent and that the cession was not accepted by the appellant. The appellant further contends that the cession was cancelled by the judgment of the Regional Court on 29 August 2012.

[6] The appellant wants the Court to order that the third respondent should stop paying the appellant while the fourth respondent should be instructed to proceed with the removal and sale in execution of the attached assets as instructed by the appellant's attorneys.

[7] The third and fourth respondents did not oppose the application in the Court *a quo*. Prayer 5 of the Appellant's Notice of Motion specifically stated that the cost order related to the first and second respondents only.

[8] There was an application on behalf of the first and second respondents for the condoning of their late filing of their Heads of Argument. Condonation is granted.

BACKGROUND FACTS

[9] The appeal concerns the credit agreement which the appellant and the first respondent concluded on 21 February 2005, the Credit Facility's Agreement ("the Agreement"). In terms of the agreement the appellant supplied goods to the first respondent to be used in the construction work which the first respondent had to do for the third respondent. The book debt of the first respondent was ceded to the appellant. The first respondent contends that the parties concluded another cession of debt on 8 March 2011 (the second cession) which, according to the first respondent, was to reduce the commercial risk in the facility. It is the first respondent's contention that the second cession was to transfer the first respondent's right in respect of the amount which the third respondent owed the first respondent to the appellant.

The effect of the cession, according to the first respondent, was that the third respondent would pay R20 000 00 in monthly instalments directly to the appellant until the first respondent's liabilities to the appellant were extinguished. The first respondent and the appellant, for the purpose, according to the first respondent, opened a joint banking account into which the debtors of the first respondent would effect payment of money that was due and payable to the first respondent. The appellant disagrees with the first respondent regarding the existence of the first and second cessions.

[10] The appellant contends that the first respondent breached the facility agreement and that that resulted in the appellant taking judgment by default against the first respondent on 29 August 2012 under Case number 46/2012. The arrears, according to the appellant, at the time, amounted to R290 385 98 together with interest and costs. The first cession, according to the appellant was cancelled.

[11] The appellant contends that it obtained judgment and served a warrant of execution on 19 April 2013 which resulted in the respondent's property valued at approximately R70 000 00 being attached.

[12] It was the appellant's version that to avoid the removal and the selling in execution of the attached movable property, the first respondent paid R80 000 00 on 16 May 2013 and another R80 000 00 on 12 June 2013. The appellant wanted payment of R160 000 00 to be seen as acquiescing to the judgment by the first respondent and that this had the effect of cancelling the

second cession. However, the appellant contends that the first respondent, after payment of the R160 000 00 relied on the second cession and refused to effect payment of the balance and contended that the third respondent, according to the second cession, had to effect payment of the balance which the first respondent still had to pay at the rate of R20 000 00 per month. The second cession, according to the appellant, never came into being because, as it argued, it never agreed to its resurrection. The second cession, according to the appellant, never had an effect to the judgment which, in any event, according to it, had not been challenged by the first respondent.

[13] The appellant, insofar as the second cession could be said to exist, needed same set aside. The appellant needed an order that the third respondent be stopped from paying the balance which ought to be paid by the first respondent. It was the appellant's contention that the first respondent needed to pay the balance through the mechanism of the sale in execution. First, it is surprising why the third respondent should be barred from paying the balance if what the appellant wanted was the payment of the balance which was still due, owing and payable to it by the first respondent. Secondly, it is not clear why payment of the balance only had to be through the mechanism of the sale in execution when the third respondent was duly paying the balance at the rate of R20 000 00 per month. If the idea was to get the balance which, in any event, was being paid by the third respondent, it becomes very difficult to understand why the third respondent ought to be stopped from paying. As to where the money came from, in my view, ought not to be an issue as payment is payment. This insistence on payment of the

balance by the first respondent when the third respondent was paying, in my view, demonstrates an ulterior motive on the part of the appellant.

[14] Given the facts of the matter, the validity of the second cession on the strength of which payment was being effected, to me, ought not to have been an issue.

[15] It does not appear to be in issue that the first and third respondents concluded an agreement in terms of which the first respondent was to render service as a contractor on a construction project for the third respondent. It is also not in issue that to this end, the first respondent, on 21 February 2005, obtained goods and or materials, on credit, for the construction project from the appellant.

[16] The first respondent contends that two cessions of debt were concluded by the appellant and the first respondent. The first respondent argued that in terms of the second cession, concluded on 8 March 2011, the first respondent ceded its right, title and interest in and to all its book debts to the appellant. The book debts, according to the first respondent, included the monies that the third respondent owed the first respondent.

[17] The first respondent failed to understand the appellant's contention that no second cession came into existence when the appellant in the last sentence of paragraph 10 of its founding affidavit in so many words state that:

"In March 2011, and in order to reduce the commercial risk in the facility, the second cession was concluded on or about 8 March of that year".

[18] It was argued on behalf of the first and second respondents that the appellant's case clearly demonstrated that two cessions of debt were concluded by the first respondent and the appellant. The fact that the argument on behalf of the appellant changed to say that no second cession was resurrected or that same never came into being, according to the first respondent's contention, did not help the appellant which had to stand or fall, by the case that it made in its founding affidavit. There is indeed merit in this contention and submission. Evidence demonstrates that the second cession came about at the instance of the appellant. How the appellant can recant this is beyond comprehension.

[19] It was argued on behalf of the first and second respondents that the appellant in a letter dated 9 May 2011 stated that:

> *"Before any supplies can be made to CAWAC Solutions, we need written confirmation from you that all monies owing to CAWAC Solutions will be paid into the joint account".*

The statement, in my view, is simple and understandable. As correctly submitted on behalf of the first and second respondents, the third respondent was duly informed and instructed to make payments into the joint account of the appellant and the first respondent. The third respondent obliged. This could only have evidenced the conclusion of the second cession. The third respondent paid R80 000 00 in instalments of R20 000 00 per month into the

joint account. Payment, as evidence has it, was never refused by the appellant. The amounts of R61 905 97 and R18 094 03 were effected on 6 and 8 June 2013 respectively. The appellant received the payments and this is not denied.

[20] The first respondent contends that despite the existence of the second cession and the proposals for a full and final settlement, which the appellant rejected, the appellant forced the first respondent to effect payment referred to in paragraph 19 above. As if this was not enough, according to the first respondent, on 13 June 2013, the appellant's attorneys addressed a letter to the first respondent advising it that the appellant was not accepting payments from the third respondent and that the appellant was further not accepting any cession of obligations vesting upon a third party. Regard being had to the fact that the third respondent had already paid R80 000 00, this, in my view, did not make sense.

[21] The total outstanding balance as at 25 September 2013, the date on which the first respondent deposed to its answering affidavit was approximately R50 385 98. This was not denied by the appellant.

[22] It is important to note that the appellant acknowledges that the credit facility included a cession of book debts. However, on behalf of the appellant, it was argued that the cession was cancelled or lapsed. The question which immediately springs to mind is whether this is in fact correct. The facts of the matter are such that it is unnecessary to answer the question. Plainly, the

third respondent was stopped from paying the balance which, according to the first respondent, would long have been paid in full by the third respondent. Evidence demonstrates this.

[23] The argument, on behalf of the appellant, is that even if a cession document was drawn up in 2011, same was overtaken by events and that same was never accepted by the appellant. Evidence, in my view, negates this.

[24] The argument that the first respondent now wants to enforce the second cession and shift the obligation to pay the money that it owes the appellant to the third respondent and that the appellant does not want to avail itself of the second cession, in my view, is not a sound one. The appellant's attitude seems to me to demonstrate ulterior motive on its part. If not, the debt would long have been extinguished. Why would the appellant refuse to receive the money from the third respondent if it wanted the money to be paid to it and the debt extinguished one may ask.

[25] On behalf of the appellant, the Court was referred to the work of Susan Scott, 'The Law of Evidence' 2nd Edition, in which the case of **J Mc Neil v Insolvent Estate of R Roberts (1882) 3 NLR 190-193** is cited. In the case the Court said:

> *"Rights of action are, we are told, ceded by any expression of intention for the purpose of the ceder and the cessionary".*

The Court was also referred to **Trust Bank of Africa Ltd v Frysch 1977 (3) SA 562 (A) at 575A** where Holmes JA said:

> *"I pause here to observe that there is a necessary implication that the bank accepts the cession, otherwise there would not be the transfer referred to in the clause of the NCR's title to and interest in the hire purchase agreement".*

It was, as a result, argued that the appellant's unequivocal non-acceptance of the cession could not be disputed. It was further argued that the intent was absent meaning that no cession existed with the result that the appellant could not be forced to accept payments from the third respondent. The arguments, in the light of the tendered evidence, cannot be correct.

[26] It was further argued on behalf of the appellant that the Court *a quo* should have dismissed the contention that the appellant accepted the second cession through the giving of the banking details to the third respondent. I find no fault with the Court *a quo's* finding of fact which, in my view, is not wrong. Evidence, in my view, supports the finding.

[27] The argument that the appellant did not have to institute action or take other steps against the third respondent is, in my view, correct. This, because it was not necessary as the appellant was receiving payment until it stopped it by telling the parties that it no longer wanted to receive payment from the third respondent. This is the decision that the appellant made and should bear the consequences. The decision removed the necessity to institute action against the third respondent.

[28] The appellant takes issue with the fact that the Court *a quo* found that the cancellation of the second cession would be detrimental to the first respondent and argues that the appellant is the one who will be affected if the cession of 8 March 2011 is not set aside. I find this strange if regard is had to the appellant's behaviour which led to its conclusion. The appellant's behaviour, in my view, is contradictory. The appellant complains of the first respondent's dilatory approach in paying the balance still owing and payable while it in fact caused the delay.

[29] The submission on behalf of the appellant is that justice demands that a debtor against whom judgment was obtained should pay its debts to the creditor. While this is correct, it is also correct that payment of the debts does not only have to be effected by that person as the law allows someone else (a third party) to make payment as long as payment is made in the name of or on behalf of and in respect of the debtor's indebtedness to the creditor..

[30] The argument on behalf of the first and second respondents is direct and to the point.

[31] *In limine,* it was argued on behalf of the first and the second respondent that the appeal will have no practical effect. This, because the amount forming the balance due, owing and payable at the time of the first respondent's answering affidavit was R50 385 98. The amount, according to the first, second and third respondents was and is available for payment merely upon the appellant's acceptance thereof. The payment has been

tendered in full by the first, second and third respondents. The appellant's insistence that the fourth respondent proceeds with executing the first respondent's attached assets, to me, does not make sense. It was argued that the appeal would have no practical effect and should be dismissed with costs. The argument seems to have merit.

[32] The first and second respondents supplementary affidavit discloses that the parties now agree that the amount of R50 385 98 is still outstanding. The appellant's statement of payment (annexure CAW25 to the affidavit) shows that the amount of R50 385 98 was still owing on 31 October 2013. The third respondent was requested by the appellant to refrain from making any further payments to it in September 2013 even though all previous payments from the third respondent had been accepted by it. The appellant was duly advised that all it needed to do was to accept the money which would be paid to it.

[33] The third respondent paid R20 000 00 twice into the Trust Account of its attorney. The third respondent confirmed this by emails on 15 October 2013 and 25 November 2013 (see: Annexures CAW 26 and CAW 27) to the supplementary affidavit of 10 February 2014. Effectively, R40 000 00 in cash is available. The difference of R10 385 98 was tendered by the first respondent in the supplementary affidavit. The appellant's approach, therefore, serves no purpose. The appellant's insistence, as correctly contended by the first, second and third respondents, is an exercise in futility serving only to run up costs. The respondents in the supplementary affidavit

correctly intimated that they would ask for costs on a primitive scale. There is indeed merit in this.

[34] It was submitted on behalf of the first, second and third respondents that no case was made out by the appellant for the relief sought in prayer 1. Evidence demonstrates this.

[35] The appellant in respect of the second prayer, in effect, as correctly argued on behalf of the first, second and third respondents sought an interdict against the third respondent without satisfying any of the requirements for the relief. There is merit in the submission. Again evidence demonstrates this. The appellant, again, failed to make out a case for the relief sought. Thirdly, the appellant sought an order instructing the fourth respondent to proceed with the removal of the attached assets and to sell them in execution as instructed by the appellants attorneys. Evidence demonstrates that this was unnecessary. No case, according to the argument on behalf of the first and second respondents, was made out for the relief sought. There is again merit in the submission. Fourthly, the appellant asked for costs on the scale as between attorney and own client. Evidence has shown that it is the appellant who must pay such costs. The appellant's conduct warrants this.

[36] The second respondent, significantly, was not joined in the Regional Court matter. It was, accordingly, argued on behalf of the first and second respondents that no case of whatsoever nature was made out against the second respondent. It was further argued that regardless of the success or

not by the appellant, the appellant should pay the second respondent's costs. I agree.

[37] For completeness sake I need to refer to **Section 16(2)(a)(i)** read with **Section 16(2)(a)(ii) of the Superior Courts Act 10 of 2013**. The section reads:

> *"APPEALS GENERALLY*
>
> *16.....*
>
> *(2)(a)(i)* *When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal, may be dismissed on this ground alone.*
>
> *(ii)* *Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs."* (my emphasis).

(See: **Legal Aid South Africa v Magidiwana and Others 2015 (2) SA 568 (SCA) at [1]-[4]**).

[38] Insofar as it concerns payment of a debt by a third party the Court was referred to the relevant law by the first and second respondents Counsel. This, as I said above, is permissible. There was nothing wrong, with the third respondent discharging the first respondent's debt. It is also significant to remember that the third respondent benefitted from the second respondent's work. It was, however, only necessary to indicate that payment by the third

respondent was for and on behalf of and in respect of the first respondent's arrear indebtedness to the appellant in the amount of R50 385 98 together with the R80 000 00 which was accepted by the appellant. This is what happened in this matter according to evidence. (see: **Froman v Robertson 1971 (1) SA 115 (A) at 124F-125B and 126H-127A**; **Commissioner for Inland Revenue v Visser 1959 (1) SA 452 (A) at 457G-458C**; Christie, 'The law of Contract in South Africa', 6th edition at 422-423).

[39] It was argued on behalf of the first and second respondents that if the appellant rejects performance by the third respondent it would be doing so at its own peril. (See: Christie, 'The law of Contract in South Africa', 6th edition).

[40] It was argued on behalf of the first, second and obviously the third respondents that the appellant failed to make out a case in the Court *a quo* and in this appeal. There is merit in the argument. Indeed, the application and the appeal should never have been brought in the first place. The Court *a quo* correctly dismissed the application with costs. The appeal, in my view, should fail.

ORDER

[41] **I make the following order:**

The appeal is dismissed with costs on the scale as between attorney and client.

M. W. MSIMEKI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION OF THE HIGH COURT,
PRETORIA

I agree,

C. P. RABIE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION OF THE HIGH COURT,
PRETORIA

I agree,

N. P. MNQIBISA-THUSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION OF THE HIGH COURT,
PRETORIA

Date of hearing:	12 August 2015
Date of delivery of Judgment:	20 September 2017
Counsel for the Appellant:	C. D. Roux
Instructed by:	RC Christie Attorneys
Counsel for the First and Second Respondents:	W. S. Brits
Instructed by:	Markram Inc. Atorrneys