IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: 90194/15

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

9-12-19
DATE

SIGNATURE

In the matter between:

SAMBIT HOLDINGS (PROPRIETARY) LIMITED	Plaintiff
and	
JOHAN MARAIS	First Defendant
PAUL MOJAPELO	Second Defendant

JUDGMENT

AVVAKOUMIDES, AJ

1. The Plaintiff launched an application in terms of Rule 28 of the Uniform Rules of Court wherein it seeks the following relief:

1.1 Condonation for the late filing of the application, and extension of the time limit provided for in Rule 28 within which the application was to be filed;

1.2 Authorising the Plaintiff to amend its replication, dated 18 March 2016 in accordance with the Plaintiff's notice of intention to amend dated 23 May 2017.

2. It is necessary to deal with the historical facts leading up to this application. On or about 9 November 2015 the Plaintiff issued summons against the First and Second Defendants for payment of certain amounts arising from a written application for credit facilities concluded between the Plaintiff and Elmandi Road Maintenance CC, the principal debtor. The action against the Defendants is based on suretyships which, in case of the First Defendant was included in the written credit facility and, in respect of the Second Defendant, a deed of surety annexed to the particulars of claim.

3. In the ensuing summary judgment application the First and Second Defendants filed an opposing affidavit wherein they set out their defences to the Plaintiff's claim. Included in their defences, the First and Second Defendants raised the defence that the Plaintiff had ceded its book debts to its bankers. This is also

evidenced by an email annexed to the opposing affidavit addressed to the First Defendant by the Plaintiff's representative.

4. The Defendants filed a plea wherein they, *inter alia*, pleaded that in the light of the Plaintiff having ceded its book debts to its bankers, *in securitatem debiti,* the Plaintiff had no *locus standi* to claim payment from the Defendants in the Plaintiff's name.

5. In response to the plea the Plaintiff filed a replication on 18 March 2016 wherein the Plaintiff did not deal with the cession of book debts at all.

6. It is important to note the timeline leading to *litis contestatio*. It is not disputed that the cession of the Plaintiff's book debts took place on or about December 2013 and the action was instituted on or about 18 November 2015. The Defendants' plea was filed on 23 February 2016 followed by the replication on 18 March 2016 and, on this basis, bearing in mind the time periods in the rules of court, *litis contestatio* occurred on or about 30 March 2016.

7. More than a year later, on 23 May 2017 the Plaintiff filed a notice in terms of Rule 28(1), thereby giving notice of its intention to amend the replication. In such notice the Plaintiff sought to introduce, in addition to paragraph 2 of the replication, the following:

"2. <u>*AD PARAGRAPHS 14.1 TO 14.4*</u>:

2.1 *The Plaintiff admits that on during or about 10 December 2013, it concluded a written agreement in terms whereof it ceded its Debtor's Book to its bankers, ABSA.*

2.2 *ABSA Bank however, and on 1 November 2016, confirmed in writing, its retrospective* ***rescission*** *(my emphasis) of the ceded debt in relation to the principal debtor.*

2.3 *The Plaintiff denies the remaining contents of these paragraphs and the First and Second Defendants are put to the proof thereof."*

8. The Defendants noted their objection to the proposed amendment on 1 June 2017. The Plaintiff failed to proceed with the amendment within the 10-day period provided for in Rule 28(4). It is submitted by the Defendants that this failure by the Plaintiff culminated in the proposed amendment lapsing because the 10-day period contained in sub-rule (4) expired on 15 June 2017. I will deal with this submission and the development of Rule 28 more fully hereunder.

9. On 13 December 2018 the Plaintiff's attorney addressed a letter to the Defendants' attorneys advising that the Plaintiff intended to launch an application for amendment as contemplated in Rule 28(4), and requested the Defendants to condone the late filing of such application. On 18 December 2018 the Defendants' attorneys responded and furnished an undertaking not to object to the late filing of such application but recorded that the Defendants

reserve their rights insofar as any other issues are concerned. The Plaintiff only filed the Rule 28(4) application on 13 February 2019.

10. The Defendants' objection to the Plaintiff's proposed amendment was set out as follows:

> *"1. By allowing the Replication to be amended as proposed would render both the Particulars of Claim and the Replication excipiable, and the Defendants' right to have excepted to the Particulars of Claim has lapsed.*
>
> *2. The Particulars of Claim would be excipiable on the basis that it lacks averments necessary to sustain a cause of action and the Replication would be rendered vague and embarrassing, and/or lacking averments to sustain a cause of action.*
>
> *3. The proposed amendment moreover, on a proper assessment thereof, constitutes an attempt at curing the Summons, which is irregular in as much as same was issued by the Plaintiff at the time the Plaintiff had no cause of action against the Defendants".*

11. The Plaintiff submitted that the true question which falls for consideration is whether a Plaintiff remains entitled to proceed with an action against a debtor for recovery of an amount due under circumstances where:

11.1 The Plaintiff ceded its claim against the debtor prior to the issuing of the summons against such debtor;

11.2 Such cession is thereafter cancelled by the cessionary resulting in the Plaintiff again becoming the only party entitled to enforce such claim.

11.3 And whether the Plaintiff's claim against the Defendants has prescribed under the aforesaid circumstances.

12. The Defendants however, in essence, allege that the Plaintiff had no *locus standi* to sue the Defendants because of the cession prior to issuing of summons. The Plaintiff submitted further that because this is an application to amend only, the dispute itself is not to be adjudicated, rather, the Plaintiff only has to show that it, *prima facie,* has a triable issue in order to succeed. The Plaintiff submitted further that in order to adjudicate the aforesaid questions, the court should accept the chronological sequence of events on the basis that the Plaintiff, on 10 December 2013, ceded its debtors book including its claim against the principal debtor, to Absa Bank; that letters of demand were sent to both Defendants *via* registered mail on 13 August 2015; summons was issued on 9 November 2015; Absa, on 1 November 2016, in writing retrospectively **rescinded** [my emphasis] the cession in relation to the debt owed by the principal debtor; and the Plaintiff's notice of intention to amend was served upon the Defendant's attorneys on 23 May 2017.

13. The Plaintiff relied heavily upon the case of **Mias de Klerk Boerdery (Edms) Beperk v Cole 1986 (2) SA 284 (NPD)** on the basis that such decision shared a marked similarity with those in this case. I do not see the marked similarity because in **Mias de Klerk**, de Klerk issued summons as Plaintiff but subsequently realised that the farm was registered in the name of a company, Mias de Klerk Boerdery (Edms) Beperk. De Klerk gave notice in terms of Rule 28 that the Plaintiff intended to amend the summons by substituting the company for De Klerk as Plaintiff. The original Plaintiff, De Klerk, did not have the right to sue but nevertheless the court granted the amendment which now described the company as the Plaintiff.

14. Furthermore, in Mias de Klerk, the Defendant filed a plea that the company's claim had become prescribed in terms of Section 11(d) of the Prescription Act. The court, in analysing the defence of prescription, considered Section 15(1) of the Prescription Act which has three requirements for the interruption of prescription, namely:

14.1 There must be a process;

14.2 The process must be served on the debtor;

14.3 By that process, the creditor must claim payment of the debt.

15. The court ruled that the Plaintiff had complied with the three requirements and that the notice of intention to amend in terms of Rule 28 is a *"process"* in terms of Section 15(1) of the Prescription Act. The notice of intention to amend thus interrupted the running of prescription.

16. In this case however, it is not the particulars of claim which is sought to be amended, but a replication. The Plaintiff also referred the court to **Bell Estates (Pty Ltd v Renasa Insurance Co. Ltd and Another 2012 (3) SA 296 (KZD)** wherein that court approved the view expressed in **Mias de Klerk** that a notice of intention to amend in terms of Rule 28 interrupted the running of prescription and that its service was sufficient for the purpose of Section 15(1) if there was proper service of such notice.

17. I have considered the submissions and the authority relied on by the Plaintiff, and despite both being technically correct, such authority relate to cases where a Plaintiff, who initially at the stage when summons was issued, did not have a cause of action, and, could either be substituted with a Plaintiff who indeed was vested with a cause of action, or the same Plaintiff can become the holder of a valid cause of action under which circumstances the matter will proceed uninterrupted. The aforesaid, in my view, relates to substitution of Plaintiffs in the particulars of claim alternatively where the particulars of claim are amended to include circumstances where the Plaintiff (who did not have a cause of action) can become the holder of a valid cause of action. This is clearly distinguishable from the matter at hand.

18. Before dealing with the Defendants' submissions it is necessary to address the development of Rule 28, particularly whether the failure to prosecute an application for amendment pursuant to an objection to a proposed amendment, within the 10 day period, culminates in the lapsing of such proposed amendment. In **ED v Middelhoven 2018 (3) SA 180 (GP)** the court dealt with this question by contrasting the old rule with the current new rule. The court set out the provisions of the old Rule 28(4) which was amended on 28 January 1994 by the current rule. The old rule read as follows:

> *"If an objection is made within the said period, which objection shall clearly and concisely state the grounds upon which it is founded, the party wishing to pursue the amendment* ***shall*** [my emphasis] *within 10 days after receipt of such objection, apply to court on notice for leave to amend and set the matter down for hearing. The Court may make such order thereon as to it seems meet."*

19. The current rule reads as follows:

> *"(4) If an objection which complies with subrule (3) is delivered within the period referred to in subrule (2), the party wishing to amend* ***may***, [my emphasis] *within 10 days, lodge an application for leave to amend."*

20. Thus there is a clear difference between the current rule and its predecessor. In my view, there is nothing in the wording of the current rule or any authority

which I am aware of, suggesting that an application will lapse if it is not brought within the stipulated time period. In the event where a Plaintiff does not adhere to the 10 day period set out in subrule (4), such party would need to bring an application for condonation and the court hearing such condonation application would exercise discretion on whether or not to grant condonation by taking into account all the facts before such court and all other relevant factors."

21. The Defendants submitted that the Plaintiff cannot make out its case in a replication and for that reason alone the application for amendment should be refused. Furthermore service of the summons could not have interrupted prescription because of the absence of the Plaintiff's *locus standi*. By seeking to amend the replication, the defendants submit that the Plaintiff, in attempting to amend the replication, now seeks to introduce a cause of action in respect of a debt that the Plaintiff did not have and which cause of action did not exist at the time the Plaintiff instituted the action, thereby attempting to deprive the defendants of their defence of prescription. For the aforesaid submission the defendants rely on **Trans-African Insurance Co. Ltd v Maluleke 1956 (2) SA 273 (A) at 279A-C** and **Imperial Bank v Barnard and Another NNO 2013 (5) SA 612 (SCA) at 616B**.

22. The Defendants further submit that the attempted amendment holds severe prejudice to the defendants which is not curable by way of a cost order in as

much as the proposed amendment is aimed at depriving the defendants of their obvious defence.

23. In as much as the question of prescription is concerned, the defendants submit that the summons could not in law have interrupted prescription because the Plaintiff was obviously not possessed *"of a debt against the defendants"*.

24. The remaining submissions surrounded the question of when prescription could be interrupted in terms of Section 15 of the Prescription Act and whether it was the Rule 28(1) notice which could be interpreted as interrupting prescription, alternatively whether it is when the proposed amendment is effected in terms of Rule 28(5). I do not see any reason for me to decide on this aspect because of what follows hereunder and more particularly in the light of various decisions to the effect that the Rule 28(1) notice which interrupts the running of prescription. (See: Bell Estates *supra*).

25. The defendants lastly submitted that the proposed amendment would render the replication excipiable because, the replication:

25.1 would not contain averments to sustain an answer to paragraph 14 of the plea (which takes issue with the absence of *locus standi*) alternatively;

25.2 that the *"amended"* replication would not comply with the provisions of Rule 18(4), (5) and (6), further; alternatively

25.3 that such amendment would render the replication vague and embarrassing because the Plaintiff, in replication alleges that, Absa, without pleading who represented it, on 1 November 2016, confirmed in writing, its **retrospective rescission** [my emphasis] of the ceded debt without pleading when, by whom, and on account whereof the **rescission** [my emphasis] occurred and under circumstances where the Plaintiff failed to attach a copy of the written **rescission** [my emphasis].

26. I asked counsel for the parties whether the fact that the word *"rescission"* as opposed to *"recession"* was of any relevance and both indicated that it did not matter because it was accepted that Absa's actions sought to recede the book debts to the Plaintiff and not to rescind the cession, if this was at all possible.

27. I have considered the submissions made by both parties. I have similarly considered the authorities to which I have been referred. In my view, a party must make out its case in its particulars of claim and cannot do so by way of replication. The relevant portions of the cession (some parts, not relevant, are illegible) by the Plaintiff in favour of Absa reads as follows:

"General Cession in Security *CONFIDENTIAL*

1 CESSION SECURITY
I/We, Robert Harold de Witt acting on behalf of SAMBIT HOLDINGS (PTY) LTD by virtue of a resolution passed by the directors on 09 October 2013
Identity/Registration no. 2009/002652/07
SKUILPLAAS PTN 6 OF FARM MODDERFONTEIN 445 IQ VANDERBIJLPARK, 1911 (physical address) and _____ (fax no) cede in security to Absa Bank Limited ('Absa / you') and your successors-in-title or assigns, all my/our right, title and interest in and to:

1.1 *all the claims listed in (or evidenced by the documents listed in) the attached schedule ('schedule'), together with all income, dividends, rentals and other monies which i/we now receive or may in future receive in respect of these claims; and*

1.2 *all the claims evidenced by any document which I/we deliver to you from time to time, together with all dividends, income rentals and other monies I/we now receive or may in the future receive in respect of these claims.*

And all these claims are referred to collectively in this cession as the "ceded rights".

2 *CONFIRMATION*

2.1 *I/we understand the concept of a cession in security to mean that I/we transfer the ceded rights to you as security for the repayment to you of all the secured obligations (defined in 4) on condition that you will cancel this cession and cede these rights back to me/us when you confirm in writing that all of the secured obligations have been paid/settled in full, and that this form of security is known in law as a 'cession in securitatem debiti'.*

2.2 *I/we have been given an adequate opportunity to read all the terms and conditions of this cession and I/we are also aware of the terms printed in bold.*

2.3 *I/we have taken independent legal advice and understand my/our rights and obligations under this cession and the potential consequences of this cession.*

4 *APPLICATION*

4.1 *I/we give this cession in your favour as continuing covering security for the due, proper and timeous payment and performance in full of all my/our debts to you in term of _____ (insert cause of debt), and to any other person to whom you transfer rights or obligation against me/us, notwithstanding any temporary extinction of any such indebtedness. This cession will only terminate after all of these debts have been unconditionally and completely paid or fully and finally settled and you have notified me/us in writing to this effect.*

4.2 *The debts for which this cession is given include:*

4.2.1 *all amounts owing by me/us to you at the time when this cession is signed, as well as all amounts which may become owing by me/us to you after the date on which I/we sign this cession.*

4.3 These debts for which this cession is given are referred to collectively in this cession as 'the secured obligations'.

5 REVERSIONARY CESSION

*5.1 I/we confirm that I/we have not ceded and will not cede my/our rights, title or interest in and to any of the ceded rights to any other person, however I/we previously ceded any ceded right to any other person ('**first cessionary**') as security, I/we cede to you all of my/our reversionary right, title and interest in and to such ceded right.*

5.2 This means that you will automatically be entitled to claim under the ceded rights in terms of this cession when the cession in favour of the first cessionary terminates or is cancelled. This includes the right, at the appropriate time:

5.2.1 to claim payment from the first cessionary of any balance of the proceeds of any ceded right obtained by the first cessionary;

5.2.2 to demand the re-cession of the rights ceded to the first cessionary; and

5.2.3 to demand that the first cessionary returns all of the document(s) evidencing the ceded rights.

6 AGREEMENTS AND OTHER SECURITY

...

11 RENUNCIATION OF BENEFITS

...

13 GOVERNING LAW

...

SCHEDULE OF GENERAL CESSION
(...Illegible...)

28. The cession is aimed at securing a debt. The nature of such cession was discussed in **Grobler v Oosthuizen 2009 (5) SA 500 (SCA)** and amounts to a

pledge of an incorporeal. In **Picardi Hotels Ltd v Thekweni Properties (Pty) Ltd 2009 (1) SA 493 (SCA)**, the Supreme Court of Appeal stated that *"it is settled law that unless otherwise agreed, a cession in securitatem debiti results in the cedent being deprived of the right to recover the ceded debt, returning only the bare dominium or a 'reversionary interest' therein."* The Supreme Court of Appeal in **Picardi Hotels** dealt with the question whether the mortgagor could in light of the cession claim unpaid rental. The court held not. The court was mainly concerned with clause 1 (cession of rentals and revenues) and to that extent the case is very similar to the current matter.

29. Had the Plaintiff sought to introduce the recession by means of an amendment to its particulars of claim I would in all probability have granted such amendment on the basis that amendments are allowed without deciding a substantive issue. All defences, factual or legal would remain open to the defendants, including the defence that one may not rely on a backdated recession to create *locus standi* or new cause of action. I rely on **Picardi Hotels** for the aforesaid.

30. I have also considered the decision **Pangbourne Properties Ltd v Your Life (Pty) Ltd 2013 (4) All SA 719 (GSJ)** which in turn relied on **Aussenkher Farms (Pty) Ltd v Trio Transport CC (2002) 3 All SA 309 (A) - Ed** wherein the following was stated:

"I must exercise a discretion in making a decision whether or not to allow the second Plaintiff to proceed. See Du Toit v Vermeulen 1872 (3) SA 848 (A) at

857A [also reported at (1972) 3 All SA 573 (A). I exercise that discretion in favour of the second Plaintiff and find that the second Plaintiff is entitled to proceed to seek judgment against the second Defendant even though at the time it instituted action the retrospective cession did not exist. In exercising the discretion, I take into account:

1. *The second Defendant suffers no prejudice.*
2. *The second Defendant was indebted to someone at the time action was instituted although it was not the second Plaintiff.*
3. *The retrospective re-cession by a fiction vests the claim in the hands of the second Plaintiff from a time prior to the second Plaintiff joining the action.*
4. *It appears to me that it is counter-productive, highly technical and a waste of costs to non-suit the second Plaintiff at the present time in these circumstances.*

I am comforted in this approach by the recent decision Aussenkher Farms (Pty) Ltd v Trio Transport CC 2002 (4) SA 483 (SCA) [also reported at (2002) 3 All SA 309 (SCA) – Ed].

In that matter, a Plaintiff only (by cession) acquired the right to sue after action had been instituted. A court granted relief to the Plaintiff that fact notwithstanding. No comment was made of the current issue. The issue cannot have been absent from the mind of the judges as ***Philotex*** *was cited to them and the issue concerned locus standi. The facts in that matter was similar to*

the facts in the present matter. it, accordingly, appears to be although it did not say so that the Supreme Court of Appeal considered the issue and decided not to non-suit the Plaintiff. This, in my view, has nothing to do with the present case based on the view that I have formed, the cession divested the Plaintiff from placing the defendants in mora or to issue summons against the defendants for payment of monies allegedly due by the principal debtor. The only party that could have done so before the recession, was Absa. The Plaintiff had no mandate to act on behalf of Absa and its actions, accordingly, had no legal consequences."

31. Consequently, I am not persuaded that the Plaintiff has made out a proper case for amendment of the replication under the prevailing circumstances and the application is hereby dismissed with costs.

G.T. AVVAKOUMIDES

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Representation for Plaintiff: Adv. C. Acker.

Instructed by: Pagel Schulenbburg Inc.

Representation for Defendants:	Adv. L.W. Koning SC.
Instructed by:	Zelda Karelson Attorneys.