

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 2729/2005

In the matter between:-

INFRASTRUCTURE FINANCE
CORPORATION LIMITED

Plaintiff

and

THABO MOFUTSANYANA DISTRICT
MUNICIPALITY

Respondent/Defendant

NASHUA LIMITED

First Excipient/First Third Party

RECORD TRADE 13 (PTY) LTD Second Excipient/Second Third Party

JUDGMENT BY: KRUGER, J

HEARD ON: 3 DECEMBER 2010

DELIVERED ON: 9 DECEMBER 2010

[1] Plaintiff, as cessionary, issued summons against defendant for payment of about R3 million in respect of unpaid rentals on four digital multifunction machines. Plaintiff alleged that defendant leased four machines of which it lists the serial numbers and which are herein described as machines A, B, C and D, from Edenbloem (Pty) Ltd t/a Nashua Bethlehem ("Nashua

Bethlehem”). Nashua Bethlehem ceded its rights under the lease agreement to Merchant West Asset Finance (Pty) Ltd, who in turn ceded the rights in respect of the machines to plaintiff.

[2] In the exception machines A, B and C are described as the “contracted machines”.

[3] Defendant pleaded that Nashua Bethlehem never delivered machines A, B, C and D to it. Nashua Bethlehem delivered other machines to it, which emanated from Nashua Ltd, which machines were claimed from defendant by Nashua Ltd.

[4] Nashua Bethlehem did not assist defendant to resist Nashua SA Ltd’s claim for eviction against defendant and Nashua Ltd took those machines from defendant.

[5] Defendant alleged in its plea that Nashua Bethlehem prepared false rental contracts, which it provided to defendant in order to conceal double discounting.

- [6] Defendant pleaded that Nashua Bethlehem was not the owner of the machines which Nashua Ltd took. Nashua Bethlehem falsely represented to defendant that it was the owner of the machines delivered on its behalf and that false representation entitled defendant to cancel the lease agreements, which defendants did.
- [7] When Nashua Ltd claimed the machines from defendant, defendant placed Nashua Bethlehem on terms to assist defendant to resist the claim by Nashua Ltd. Nashua Bethlehem did not deliver machines A, B, C and D to defendant and Nashua Bethlehem did not suggest to defendant that the claim of Nashua Ltd could be resisted.
- [8] On the day the trial between plaintiff and defendant was to commence, defendant obtained leave from this court to join the first and second third parties. In the annexure to the third party notices defendant alleges –
- (i) Plaintiff did not provide machines A, B, C and D to it.
 - (ii) The three machines described in annexure “B” to the third

party notice were claimed by the third parties from defendants and were surrendered to the third parties (Nashua Ltd).

- iii) The third parties held out –
 - (a) that machines (in annexure “B” to the third party notice) were the property of Nashua Ltd (the first third party).
 - (b) Record Trade 13 (Pty) Ltd (the second third party) was entitled to take possession of those machines.
 - (c) The machines are identified in annexure “B” to the third party notice and the serial numbers stated in annexure “B” do not correspond with the serial numbers stated in the lease contracts attached to the particulars of claim.

[9] 9.1 In the annexure to the third party notice the defendant says-

- (a) The question whether the third parties were entitled to take possession of the machines is the same as the argument that the third parties were not entitled

to take the machines.

- (b) The issues listed above should properly be decided not only between the plaintiff and defendant, but also between plaintiff, defendant and the two third parties.

[10] The relief sought in the annexure to the third party notice is a declarator by the court that -

- (i) the third parties were entitled to take possession of the machines.

Alternatively:

- (ii) the third parties were not entitled to take possession of the machines; and
- (iii) the third parties are liable for rental amounts payable to plaintiff; and
- (iv) the third parties must pay the costs of the action.

[11] The third parties took exception to the third party notices, alleging that the third party notices lack averments necessary to sustain defendant's claims against the third parties.

[12] In support of their exception, the third parties say-

- (i) Plaintiff claims rental for the machines listed in the contracts, being machines A, B, C and D.
- (ii) Defendant denies that machines A, B, C and D were delivered to it and for that reason defendant says it is not liable for rental.
- iii) Defendant identifies the machines that were delivered to it as those stated on annexure "B" to the third party notice.

[13] The excipients (third parties) contend that neither plaintiff nor defendant alleges-

- (i) that the machines listed in annexure "B" were delivered in substitution of the machines listed in contracts A, B, C and D;
- (ii) the machines delivered to defendant were subject to the provisions of plaintiff's contracts;
- iii) plaintiff's claim is for rental in regard of the machines listed in annexure "B";

[14] The exception is based on the allegation that there is no nexus between machines A, B, C and D and the machines removed by the third parties. The excipients say the removal of the machines by them is irrelevant to the action between plaintiff and defendant.

[15] In his heads of argument, on behalf of the excipients, Mr. De Wet repeats the allegations in the exception.

[16] In the heads of argument drawn on behalf of the defendant/respondents it is pointed out that the defendant was deprived of possession of machines by the third parties. Plaintiff must rely on proper performance by the cedents. If the cedent, in particular Nashua Bethlehem, did not deliver the machines stipulated in the contracts, plaintiff cannot claim the rentals under the contract and related relief. The issue whether the third parties were entitled to evict the defendant (i.e. remove the machines) is an issue separate and distinct from whether the wrong machines were delivered or not. Whether the wrong machines were delivered, is a contentious issue between the

parties and one which cannot be decided on the papers.

[17] On behalf of the defendant, it is contended that the case between plaintiff and defendant is not limited to a claim for rental in respect of the machines listed in the contracts upon which plaintiff relies in its particulars of claim. Defendant has pleaded the eviction issue. The third parties read the pleadings in a restricted manner.

CONCLUSION

[18] In considering an exception, the excipient must show that on any construction of the pleadings, the claim is excipiable - **KLERCK NO v VAN ZYL AND MARITZ NNO AND ANOTHER AND RELATED CASES** 1989 (4) SA 263 (SE) at 288 E – F; **CALLENDER-EASBY AND ANOTHER v GRAHAMSTOWN MUNICIPALITY AND OTHERS** 1981 (2) SA 810 (E) at 813 A. The court should not simply have regard to the pleadings and disregard the reality of the case. (See **NATAL FRESH PRODUCE GROWERS' ASSOCIATION AND OTHERS v AGROSERVE (PTY) LTD AND OTHERS** 1990 (4) SA 749 (N)

at 754 I – 755 C.)

[19] The allegation that Nashua Bethlehem delivered the machines listed in annexure “B” to the third party notice in substitution of the machines listed in the contracts on which plaintiff relies, is at least implied in the plea.

[20] It is a principle of cession that no one can cede more than he got. If Nashua Bethlehem could not succeed in its claim against defendant, because it did not deliver the machines in the contracts it relies on, the plaintiff, as cessionary, can also not succeed against defendant. It appears from defendant’s pleadings that machines were taken from it as a result of its breach of its contract with Nashua Bethlehem.

[21] Even if plaintiff’s claim were to be dismissed because it failed to prove that the machines listed in the plaintiff’s claim were delivered to defendant, the position remains that machines were removed from defendant by the third parties relying on defendant’s alleged breach of its contracts with plaintiff. The

right of defendant to join the third parties is independent of the question whether the plaintiff could have successfully sued the third party - **SWART v SCOTTISH UNION & NATIONAL INSURANCE CO, LTD AND OTHERS** 1971 (1) SA 384 (W) at 395 H. It is desirable that the issue whether the third parties were entitled to remove the machines they took from defendant, be decided together with plaintiff's present claim against defendant. The issue whether the third parties were entitled to remove the machines they took from defendant, has been raised on the pleadings and is properly before the court.

[22] The exception is dismissed with costs.

A. KRUGER, J

On behalf of the excipients/
first and second third parties:

Adv. P.J.T. de Wet
Instructed by:
Symington & De Kok
BLOEMFONTEIN

On behalf of the respondent/
defendant:

Adv. C. Ploos van Amstel
Instructed by:
Honey Attorneys
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/sp