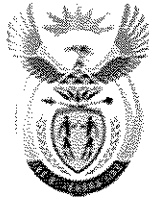


REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO. 2011/11966

DELETE WHICHEVER IS NOT APPLICABLE

1 REPORTABLE YES/NO

2 OF INTEREST TO OTHER JUDGES: YES/NO

3 REVISED

26/10/12

DATE

C. T. Richards

SIGNATURE

In the matter between:

PAGE AUTOMATION (PTY) LTD

Plaintiff

and

PROFUSA PROPERTIES CC t/a

HOMENET O.R. TAMBO

First Defendant

(Registration no. 2006/206915/23)

MARIO GROBER

Second Defendant

WILLEM GABRIEL THIRION

Third Defendant

JUDGMENT

NICHOLLS, J

- [1] The plaintiff, Page Automation (Pty) Ltd, is the supplier of the office equipment. O.E.P. Financial Services (Pty) Ltd ("OEP") are financiers. On 15 October 2008 Profusa Properties CC, the 1st defendant, entered into a 5 year rental agreement with OEP for the hire of three PABX systems ("the equipment") supplied by the plaintiff. It is common cause that OEP later changed its name to ABD Financial Services (Pty) Ltd t/a Assetfin. For the sake of convenience I will refer to it as OEP throughout.
- [2] The basis of the 2nd and 3rd defendants' liability is as sureties and co-principal debtors with the 1st defendant in terms of the rental agreement. A second and similar rental agreement in respect of photocopiers was entered into on the same day between the same parties. It has been agreed that any finding made in respect of the first rental agreement will be applicable to the second.
- [3] On 10 January 2010, as a result of the 1st defendant defaulting on its rental obligations, OEP ceded its right, title and interest to the rental agreement to the plaintiff. It is

pleaded by the plaintiff in paragraph 7 of the particulars of claim that the express, alternatively tacit, alternatively implied terms of the cession were inter alia that :

- 1.1 OEP ceded all its right, title and interest (including ownership) in the rental agreement to the plaintiff.
- 1.2 The plaintiff stepped into the shoes of OEP and could exercise the rights in terms of the rental agreement as if it were OEP.
- 1.3 The 2nd and 3rd defendants are liable to the plaintiff for the outstanding debts of the 1st defendant in terms of the surety clauses of the the rental agreement.

[4] Pursuant to the breach by the 1st defendant, the plaintiff instituted an action for various claims against the defendant. Claim A is for arrear rentals. This amount was amended at the hearing from R57 254.50 to the sum of R99 164.36. Claim B is for escalated future rentals until 15 October 2013, as provided for in the rental agreement. Claim C is for future rentals in terms of the second agreement. Claim D is for the delivery of the equipment. Claim E relates to costs of photocopies which is not applicable to the first rental agreement. This judgment accordingly deals with those claims applicable to the first agreement, namely claims A, B and D.

- [5] It is not in dispute that the 1st defendant breached the rental agreement in that it failed to pay the monthly instalments. It is common cause that a cession agreement was entered into between the plaintiff and OEP on 10 January 2010. At the outset of the trial it was indicated that the only issue for determination was the effect of the cession.
- [6] The crux of the defendants' case in respect of the cession as set out in the special plea is twofold. Firstly, that the plaintiff has no right to claim for any rentals after the date of the cession as the agreement of cession does not provide for the cession of future rentals. Secondly, because ownership cannot be ceded, ownership still vests in OEP rather than the plaintiff who accordingly has no locus standi to claim delivery of the equipment.
- [7] The cession is couched in the following terms: *"We accordingly confirm that ABD Financial Services (Pty) Ltd hereby cedes, assigns and transfers to and in favour of Page Automation (Pty) Ltd (registration number: 1999/000358/07) all of its rights, title and interest in and to its claim against the user in terms of the agreement."*
- [8] The rental agreement to which the cession refers makes provision for the hirer (in this instance OEP) to cede assign

and transfer “*without notice to the user ... all or any part of its right, title and interest in and to this agreement and/or ownership of the goods to any person whatsoever....*” (in this instance the 1st defendant). (clause 10)

- [9] Clause 9 deals with breach on the part of the user and entitles the hirer to: “*immediately terminate this agreement and take possession of the goods, retain all amounts already paid by the user and claim all amounts which are in arrears at the date of termination together, as pre-estimated liquidated damages, the future rentals which would have fallen due in terms of the agreement, from the date of termination until the earliest possible date on which the agreement could have terminated by notice....*”

- [10] The plaintiff called three witnesses. Their primary purpose was to explain the nature of the relationship between the plaintiff and OEP. The defendant elected not to call any witnesses and argued for absolution from the instance against the plaintiff.

- [11] Pierre Robillard, the financial manager of OEP explained that as hirer, OEP remained the owner of the equipment but that it was customary to enter into a re-purchase agreement with the suppliers (in this instance the plaintiff). The re-purchase undertaking is an agreement between the financier and

supplier whereby the financier in return for purchasing the supplier's right, title and interest in and to the agreement would be entitled, once the user defaulted, to require the supplier to repurchase the equipment. Once the re-purchase agreement was invoked, all rights including ownership would be passed on to the plaintiff.

[12] Peter Rowley, a director of the plaintiff, confirmed that the financier would always retain ownership unless there was a default on the part of the user. In that event the bank or financial institution would cede all right title and interest in the rental agreement to the supplier, which would include ownership and the future rental stream.

[13] In accordance with the above practice once there was non-performance on the part of the 1st defendant, OEP ceded the rental agreement to the plaintiff. Peter Rowley, who was a signatory of the cession on behalf of the plaintiff, testified that he requested the cession from OEP once the first defendant defaulted in order that the plaintiff could pursue the claims against the defendants.

[14] It is against this background that the defendants sought to raise their two defences in respect of the effect of the cession. Before dealing with the question of whether it is permissible to

cede future rentals or to cede ownership, it is necessary to briefly recapitulate the elements of cession.

[15] Cession consists of several elements¹:

- a) An act of transfer;
- b) The subject matter of the transfer is a right in a moveable incorporeal thing ;
- c) The transfer is affected by agreement between the cedent and the cessionary; and
- d) The agreement consists of the concurrence between the cedent's animus transferendi and the cessionary's corresponding animus acquirendi.

In short cession is "a method of transferring incorporeal rights from one person to another."²

Cession of Ownership

[16] I will deal first with the defendants' plea that the plaintiff has no claim for delivery of the equipment as it is not the owner thereof. The basis of this defence is that ownership is not an incorporeal right that can be transferred by way of cession. Therefore the ownership of the equipment still vests in OEP rather than the plaintiff. The question to be determined is

¹ LAWSA Vol 2, para 229 (First Reissue 1993); *Uxbury Investments (Pty) Ltd v Sunbury Investments (Pty) Ltd* 1963 (1) SA 747 (C); *Hippo Quarries (Tvl) (Pty) Ltd v Eardley* 1992(1) SA 867 (A); *First National bank of South Africa Limited v Lynn and others* 1996(2) SA 339 (A).

² *Uxbury Investments (Pty) Ltd v Sunbury Investments (Pty) Ltd* 1963 (1) SA 747 (C) at 752; *Hippo Quarries (Tvl) (Pty) Ltd v Eardley* 1992(1) SA 867 (A) at 873.

whether the real right of ownership can be transferred by means of cession.

[17] It is well established that ownership in incorporeals such as shares can be transferred by way of cession provided the necessary intention is present.³ In *Etkind and Others v Hicor Trading Ltd and Another*⁴ it was found that ownership in shares can be transferred by the pledger to the purchaser without the consent of the pledgee who merely had to be notified.

[18] In the strict sense ownership in corporeals cannot be transferred by cession. Ownership must be transferred by either physical delivery or various forms of constructive delivery such as *clavium traditio*; *traditio longa manu*; *traditio brevi manu* and *constitutum possessorium*.

[19] It is generally accepted that in respect of hire purchase agreements whilst delivery takes place when the article is handed over, ownership is suspended until the purchase price is paid in full. The passing of ownership is not dependant on the actual physical control but happens automatically when

³ *Kalil v Decotex(Pty) Ltd* 1988(1) SA 943 (A) *Standard Bank of SA Ltd v Ocean Commodities Inc* 1980 (2) SA 175 (T); *Botha v Fick* 1995 (2) SA 750.

⁴ 1999 (1) SA 111 (W)

the condition is fulfilled.⁵ This can be categorised as a new form of constructive delivery or a type of *tradition brevi manu*.⁶

[20] The English law concept of attornment has been adopted into our law.⁷ This is a method of constructive delivery where C holding an article for A begins to hold it for B instead. From then onwards C will hold the article for B and no longer on behalf of A, constructive delivery of rights having been made to B. An example of this is where an owner of a motor vehicle (A) left it with a panel beater (C). A wished to transfer ownership of the motor vehicle to B. Attornment was effected when A instructed C to hold the motor vehicle on behalf of B, and C and B agreed that C will hold on behalf of B and no longer on behalf of A. This form of delivery presupposes a tripartite agreement between the three interested parties and requires that actual control be exercised by the party who consents to hold it in future on behalf of the transferee⁸.

[21] But what of the situation as in the present case where the owner and the possessor enter into an agreement which, inter

⁵ *Info Plus v Scheelke and Another* 1998 (3) SA 184 (SCA)

⁶ *LAWSA* vol 27 para 371 (2002 First reissue)

⁷ *Standard Bank v O'Connor* (1888) 6 SC 32; *Trust Bank van Afrika v Ebrahim*; *Trust Bank van Afrika v Omar* 1961 (40 SA 336 (T)); *Air-kei (Edms) Bpk h/a Merkel Motors v Bodenstein* 1980 (3) SA 917 (A)

⁸ *Air-kei (Edms) Bpk h/a Merkel Motors v Bodenstein* supra at 932B; *Hearn and Co (Pty) Ltd v Bleiman* 1950 (3) SA 617 (C)

alia, permits the owner to cede ownership. Once the owner enters into an agreement of cession with a third party to cede ownership of the article has constructive delivery taken place and is attornment applicable? There is no tripartite agreement per se, the first defendant not having specifically agreed to hold on behalf of the plaintiff. However the first defendant has agreed that the holder, OEP, may cede the agreement to whomsoever it wishes. The question then arises whether the requirements of attornment have been met or whether an adaptation of the legal principles relating to cession has to be made in order to give effect to the intention of the cedent and the cessionary.

- [22] Although in principle only personal rights and not real rights are capable of being ceded, increasingly our courts have acknowledged that commercial realities demand a more streamlined mode of delivery free from the archaic requirements that accompany the traditional modes of transfer.⁹ To this end some jurists are of the view that attornment has been sufficiently developed to reflect this. The other view is that this is not merely an extension of attornment but what is described in *LAWSA* as a new form of constructive

⁹ *LAWSA* vol 27 para 374 (2002 First reissue).

delivery “undogmatically labelled cession of the right of vindication”¹⁰.

- [23] This principle was first formulated by the Appellate Division in *Caledon & Suid-Westelike Distrikte Eksekuteurs-Kamers Bpk V Wentzel en Andere*¹¹ where Rumpff JA as obiter dictum spoke of the “cession of ownership” in a moveable corporeal article. In that case the transfer of the corporeal object was not by mere agreement between the cedent and the cessionary. The possessor of the object had agreed with the owner (cedent) that the possessor would deliver the object to a future cessionary. In other words, it had been agreed between the owner and the possessor that the possessor holds on behalf of the owner and any other future cessionary. Rumpff JA held that in such circumstances delivery of the object takes place when the owner cedes the right of ownership to the transferee, even if the possessor is unaware that the cession has taken place, as long as the possessor still exercises control over the object at the time. The agreement therefore completes the delivery for the purposes of passing ownership and serves as a true transfer of the claims ceded.

¹⁰ LAWSA Vol 27 para 368. ¹¹ Reissue; See also Van der Merwe *Sakereg* 330-333 and Van der Merwe and Neethling 1973 *THRHR* 86 who maintain that traditionally cession meant the transfer of actions, including real rights. They are prepared to abandon this approach in the interests of commercial necessity.

¹¹ 1972 (1) SA 270 (AD)

- [24] Subsequent cases have approached this issue in a number of ways largely dependant on which party had control of the article at the time of the cession. Without actually labelling it as such, the principle of cession of ownership was applied in *Air-kei (Edms) Bpk h/a Merkel Motors v Bodenstel*¹². However the court found that on the facts of that case ownership of the article had not passed on the basis of attornment because the third party holder had lost control thereof.
- [25] In *Absa Bank Ltd v Myburgh*¹³ the respondent entered into a hire purchase agreement with Nedfin for the purchase of a motor vehicle. Before the full purchase price was paid he sold the motor vehicle to another car dealer who failed to pay Nedfin as agreed with the respondent. Instead the dealer proceeded to sell the motor vehicle to a new purchaser who was financed by Absa, the appellant. In order to protect the new purchaser's possession of the motor vehicle Nedfin ceded its rights in terms of the hire purchase agreement with the respondent to Absa. When Absa sued the respondent for the balance of the purchase price the respondent pleaded that Nedfin, in effecting the cession to Absa, had rendered it impossible for the ownership of the motor vehicle to pass against full payment by the respondent. He was therefore entitled to cancel the agreement between himself and Nedfin. The court held that ownership remained with Nedfin and did

¹² 1980 (3) SA 917 (AD)

¹³ 2001(2) SA 462 (W)

not pass to Absa despite the wording of the cession and ordered the respondent to pay the outstanding costs to Absa. Although it was found that Nedfin's real rights did not pass to Absa, the reasoning behind the judgment was that the respondent was not the holder of the motor vehicle at the time. Neither had the new purchaser consented to hold the motor vehicle on behalf of the respondent. The *Absa* case is therefore distinguishable from the present case where the first defendant was the holder and had agreed with the owner to pass ownership to any future cessionary.

- [26] The question of who was the holder of the article was discussed in *Barclays Western Bank v Ernst*¹⁴. A master discounting agreement between the bank and the trader provided that delivery by the trader to the bank (the appellant in that case) of the relevant agreement would constitute an offer by the trader to the bank to sell and cede to the bank all the trader's right, title and interest into and under the agreement, including ownership of the goods (a motor vehicle). The appellate division held that to enable ownership to pass, the law required that the person who was to hold the article on behalf of the intended new owner had to be in control thereof when the owner of the right ceded his rights in respect thereof to the new owner. However, because the

¹⁴ 1988 (1) SA 243 (AD)

holder was no longer in possession of the motor vehicle at the time of the cession, attornment could not succeed.

[27] In the present case the rental agreement, namely the main agreement between the owner and the 1st defendant, expressly empowers the owner to cede, assign and transfer its right, title and interest in and to the agreement and/or ownership of the goods to any person whatsoever without notice. By agreeing to these terms, the plaintiff was placed in a similar position to that of the appellant in the *Caledon* case where on appeal the cessionary was entitled to claim vindication from the possessor.

[28] As pointed out in *Silberberg and Schoeman's: The law of Property*¹⁵ the basic difference between the mode of delivery recognised by the appellate division in the *Caledon* case and attornment in the strict sense is that in the *Caledon* case the holder may consent in advance to hold in the acquirer's name if and when the real agreement, as evidenced by the cession, is entered into. Ownership passes immediately upon completion of the cession irrespective of whether the holder is aware thereof provided that the holder is still in possession of the article.

¹⁵ Fifth Edition, page 197

[29] What is apparent from the above is that South African courts have taken cognisance of commercial demands and practices and made the necessary accommodation. Whether it be labelled as an extension of attornment or a new form of constructive delivery, it is in my view, necessary that the law of cession should be developed in accordance with the obiter dictum of Rumpff JA in the *Caledon* case to accommodate cession of ownership or cession of the right of vindication. In this matter I am of the opinion that OEP ceded all its rights in terms of the rental agreement, including ownership to the plaintiff. Accordingly, in the present matter I find that delivery and transfer of ownership of the equipment took place when OEP ceded its rights to and in the agreement to the plaintiff on 10 January 2010. The plaintiff's claim for delivery of the equipment therefore must succeed.

Cession of future rentals

[30] I now turn to the defendants' contention that the only claim for rentals that has been ceded is the claim for arrear rentals outstanding as at the date of the cession, 10 January 2010. Any amounts for arrear rentals after that date are disputed, as is the claim for future rentals. It is further submitted that the witnesses were unable to clarify the intention of the parties to cession on the basis that Robillard is only an employee of the cedent and Rowley, although a signatory on behalf of the cessionary, was not the author of the cession.

- [31] The plaintiff contended that the cession has to be read in conjunction with the rental agreement which confers the right to future rentals. Further because there is no non-variation clause excluding evidence on the cession, the evidence of both cessionary and cedent (Robillard and Rowley) that all the rights in terms of the rental agreement had passed to the cessionary including ownership, should be accepted.
- [32] The defendant relied on *First National bank of South Africa Limited v Lynn and others*¹⁶ to argue that that as a matter of construction the cession could not be found to be in respect of future claims. Joubert JA in the *Lynn* case stated at p346 that as a legal principle and as a matter of logic a non-existent right of action or a non-existent debt can never in law be transferred as the subject matter of the cession. However the learned judge accepted that future or contingent rights were capable of immediate transfer in certain circumstances.
- [33] In *Headley Private Hospital (Pty) Ltd t/a Rand Clinic v Soller & Manning and Others*¹⁷ Cameron J, as he was then, held that there was a valid cession where a client had ceded “all my claims for costs” to his attorneys in an action brought on his behalf. At the date of the cession there had been no costs order at all and it was argued that the cession could not

¹⁶ 1996(2) SA 339 (A)

¹⁷ 2001(4) SA 360 (W)

include future claims as there were no existing rights to be ceded at the time. In dealing with the *Lynn* case, Cameron J said the bark of the dicta was worse than their bite as all three judgements in that case gave effect to a cession which included present and future debts. Similarly it was held in *Hippo Quarries (Tvl) Pty Ltd* ¹⁸ that an agreement to cede “due payment of all and any monies which the debtor may now or from time to time hereafter owe the creditor from whatsoever cause...” constituted a true cession.

[34] Counsel for the defendant argued that in the *Lynn* case the court found that the cession was couched in such wide terms so as to include a claim for future debts; in contrast to *Lynn*, the wording of the cession in this matter creates uncertainty and insufficient evidence was led as to what was intended by the cedent. If future rentals were to be ceded, so it is argued, then the cession agreement should have clearly stated that the entire rental agreement was being ceded as opposed to merely “the claim” in terms of the agreement. In the absence thereof “the claim” could only refer to the arrear rentals outstanding as at the date of the cession.

[35] Insofar as it was argued for the defendant that the *Lynn* case is distinguishable by virtue of the cession being couched in

¹⁸ 1992(1) SA 867 (A)

terms wide enough to encompass future claims as opposed to the present matter where only the current claim was being ceded and not the rental agreement encompassing future claims, this has no merit. The cession expressly reads: "*The right, title and interest in and to its claim against the user in terms of the agreement*" (my underlining) are ceded.

- [36] The defendant seems to suggest that the latter phrase be ignored. On a normal reading of the cession, "the claim" cannot be divorced from the rental agreement as the claim is specifically stated to be in terms of the agreement. The rental agreement in turn makes provision for a claim for future rentals in clause 9. To interpret the cession otherwise would be unnecessarily restrictive and would attribute a meaning that neither the cedent nor the cessionary intended. The defendant's special plea on this point must fail.

In the result I make the following order:

1. Judgment is granted against the defendants, jointly and severally the one paying the other to be absolved, as follows:
 - 1.1 Payment of the sum of R99 164.36 in respect of claim A;
 - 1.2 Interest on the aforesaid amounts at the rate of 15.5% per annum from date of the summons to date of payment

- 1.3 Payment of the sum of R218 937.79 for the future rentals in respect of claim B.
2. 1st and 2nd and 3rd defendants are to deliver the equipment and goods (being PABX DCS 408 serial number S2JQ709711, PABXDCS 816 serial number S2JQ551307, PABX DCS 100 serial number S2JQ709333, copier KM252E serial number S2JQX8508262, DP-710 serial number Q8539913 and FAX-N serial number P8203764) to the plaintiff with immediate effect.
3. The sheriff of the above Honourable Court is directed to do all things necessary in order that the equipment and goods be delivered to the plaintiff if the 1st and 2nd and 3rd defendants fail to return the equipment and goods within 2 days of granting this order.
4. The defendants are jointly and severally liable for costs of suit on a party and party scale

C.E. HEATON NICHOLLS
JUDGE OF THE SOUTH GAUTENG
HIGH COURT – JOHANNESBURG

Appearances:

Plaintiff's Counsel : Adv. C. Cothill

Plaintiff's Attorneys : Tracy Sischy Attorneys

Defendant's Counsel : Mr Swanepoel

Defendants' Attorneys: Vorster Thirion Adlam Attorneys

Date of hearing : 24 August 2012

Date of Judgment: 26 October 2012