**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

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

10 March 2017
DATE

SIGNATURE

**CASE NO: 32806/2012**

In the matter between:

**CORPORATE FINANCE (PTY) LTD** Plaintiff

And

**SCHWARTZ NORTH** Defendant

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**J U D G M E N T**

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**VICTOR J**:

[1] Ultimately this trial cantered around a primary issue of whether the Plaintiff had the locus standi to sue the defendant. The plaintiff had already acquired the

rights in terms of a cession between it and Tsamaya Asset Finance Pty Ltd (Tsamaya) before the rental agreement was concluded with the defendant

[2] On 23 October 2008 the plaintiff, Corporate Finance (Pty) Ltd concluded a rental agreement with the defendant in terms of which three Gestetner machines, with the relevant serial numbers were leased to it. The plaintiff sues in its capacity as cessionary in that Tsamaya had ceded the discount agreement to the plaintiff. The cession took place on 16 July 2008 and it was ongoing.

[3] The express terms of the rental agreement are fully canvassed in the particulars of claim. In addition, the plaintiff asserts that the main cession agreement between the cedent and the plaintiff was entered into on 16 July 2008 before the conclusion of the agreement of 23 October 2008 and that this was an ongoing arrangement. The plaintiff was duly represented by Mr Groenewald.

[4] In the alternative to prayers 8 to 11, the plaintiff pleads that on or about 23 October 2008 at Bedfordview, the rental agreement was ceded to the plaintiff in terms of an oral agreement between the cedent and the plaintiff. In response to the particulars of claim and further particulars for trial, the defendant raised a special plea, namely the lack of *locus standi* by the plaintiff. In its plea it pleaded as follows:

> "The plaintiff claims as cessionary of rights in terms of a written rental agreement concluded on or about 23 October 2008 between Tsamaya and the

defendant."

[5] In paragraph 7.2 of its reply to the plaintiff's request for further particulars dated 11 August 2015, the plaintiff avers, for the first time, that it acted as agent for and on behalf of Fintech Underwriting (Pty) Ltd.

[6] The defendant pleads that in the result any rights that the plaintiff may have acquired from Tsamaya as cessionary, which is denied, the plaintiff acquired its right as agent for and on behalf of Fintech and claims that the plaintiff as agent has no entitlement to institute proceedings for and on behalf of its principal Fintech.

[7] The question to be addressed is whether the Plaintiff could sue in its own name.

[8] The master rental agreement between Tsamaya and the defendant was common cause between the parties. It was signed on 23 October 2008 and Mr Groenewald acted on behalf of the plaintiff. The agreement itself makes provision for the possibility of a cession in clause 14 thereof:

> 'Entitled, without notice to the user to cede, delegate, transfer, pledge and or hypothec any of its right or obligations under this agreement.'

[9] It is that document which the defendant signed. It is common cause that the defendant terminated the rental agreement and requested the equipment to be removed. The defendant also pleaded that the agreement was fraudulently completed. However it abandoned this defence. The plaintiff contends that this

conduct amounted to a repudiation which repudiation it accepted and it cancelled the rental agreement, claimed arrear rental up until cancellation and liquidated damages from date of cancellation up to the expiry of the minimum period of the rental agreement.

[10] The plaintiff presented the evidence of three witnesses, Mr Groenewald who was the signatory to the master rental agreement, Ms Janine Beckman and Ms Tracy Bekker. The defendant did not lead any evidence. The plaintiff contends that Mr Smith, whilst duly authorised to represent the defendant, appended his signature to the master rental agreement containing the terms and conditions of the agreement as well as the debit order authorisation and also the certificate of acceptances, annexure B1 to 3 of the particulars of claim.

[11] The rental agreement makes reference to the period of lease being 60 months that it would expire in October 2013. The authority of Mr Groenewald and Mr Stephens to conclude the main cession agreement on behalf of the plaintiff was not disputed. It is also common cause that the defendant made rental payments for the period November 2008 until February 2011.

[12] The defendant gave 90 days written notice of termination of the rental agreement on 29 November 2010 and the plaintiff cancelled the rental agreement during December 2011. It is also common cause that the defendant on several occasions, during the period in question, requested the plaintiff to collect the equipment, which was duly done on 25 July 2012.

[13] It is also not disputed that the equipment was valued at R4 500.00 subsequent to their upliftment and that the net amount of R12 312.00 was received for the equipment at the auction.

[14] The validity of the rental agreement of course forms an important feature in the adjudication of this matter. The defendant's claim that the conclusion of the master rental agreement by Tsamaya, represented by Mr JJ Groenewald, and that the rights of the master rental agreement acquired by the plaintiff from Tsamaya did not give the plaintiff the right to sue because the plaintiff's principal was Fintech.

[15] However, it was common cause, according to the defendant that the plaintiff's first witness, Mr Groenewald, at the time of the conclusion of the rental agreement, was, amongst others, employed by Fintech as a manager and in particular as head of Sales Administration. Mr Groenewald testified that the front page of the master rental agreement had been signed on his instruction by one, Mr Gerhard Venter who was also an employee of Fintech and according to the plaintiff's second witness Ms Beckman she acted as Mr Groenewald's second in charge.

[16] The defendant contends that because Mr Groenewald testified that he had signed the front page of the master rental agreement in the block which was to be completed by Tsamaya Asset Finance (Pty) Ltd, he was acting in his capacity as head of Sales Administration of Fintech Underwriting. Mr Groenewald conceded that he never had any authority to conclude

agreements on behalf of Tsamaya and could not have represented Tsamaya in the conclusion of the master rental agreement, He asserted that paragraph 4 of the particulars of claim are incorrect.

[17] The defendant in its heads of argument sets out a timeline which demonstrates that Mr Groenewald could not have been acting on behalf of Tsamaya, when Tsamaya presented the invoice to Fintech Underwriting, it was Fintech Underwriting that paid Tsamaya for the equipment. The defendant contends that according to the timeline when Fintech on 22 October 2008 paid the Tsamaya invoice, it, Fintech, acquired ownership of the equipment and therefore it was fatally defective for the plaintiff to sue in its name.

[18] It is the Plaintiff's case that the concession by Groenewald that there was no need for a cession of agreement as Fintech was already the owner, is incorrect, and that a legal concession by a lay person cannot be read to be correct in law. In other words, a concession incorrectly made cannot stand and in this regard see the case of *Matatiele Municipality & Others v President of the RSA & Others* 2006(5) SA 47 CC para [67] Ngcobo J stated' It is trite that this Court is not bound by a legal concession if it considers the concession to be wrong in law'

[19] It is common cause that there was a valid cession of the rental agreement between Tsamaya and the plaintiff. It is also common cause that there was no discounting letter delivered by the plaintiff to Tsamaya and that the main cession agreement entered into between Tsamaya and the plaintiff,

was deviated from without any compliance of the formalities described in clause 11.4 of the main cession agreement. The plaintiff contends that such informal deviation was permissible and this did not render the cession agreement ineffective.

[20] It is trite law that a cession is a bilateral juristic act whereby a right, a contractual right is transferred by agreement between the cedent and the cessionary. This can be compared to the sale of the goodwill in the business. In *Botha & another v Carapax Shadeports (Pty) Ltd* 1992 (1) SA 202 (A) pg 214. Botha JA stated 'When he sells the goodwill of the business, the merx embraces that contractual right.'

[21] The cession therefore embraces the contractual right to sue. It is common cause that a cession, to be effective, does not require the prior consent, knowledge, concurrence or cooperation of the debtor. The debtor has no right of refusal/veto or to intervene in the cession agreement unless there is prejudice. It is effective irrespective of the debtor's attitude as the debtor is not actively engaged in the process.

[22] The question for determination here is whether the defendant had sufficient interest in the cession so as to justify the defence taken on the cession. There was no prejudice alleged or that the cession was to the defendant's detriment or that lack of compliance with clause 11(4) of the cession agreement resulted in prejudice. The formalities can be waived by the party, or the party in whose favour it is stipulated. In this regard reference was

made to the cases of *Hillock and Another v Hilsage Investments (Pty) Ltd* 1975 (1) SA 508 (A) Muller JA, Aussenkehr Farms (Pty) Ltd v Trio Transport CC 2002 (4) SA 483 (SCA) Lewis JA stated 'that the position could be different where a third party reasonably relied on the apparent terms of an agreement between others to his or her detriment, such that an estoppel arose, but this was not the case …"

[23] In *Letseng Diamonds Ltd v JCI Ltd & others; Trinity Asset Management (Pty) Ltd & others v Investec Bank Ltd & Others* 2007 (5) SA 564 (W) in applying the correct principle in relation to whether a third part has locus standi in relation to a declaration of rights it was held that: (1) applicant must have a direct interest in subject-matter of the litigation; and not an indirect financial interest in validity of agreements and therefore lacks locus standi to bring applications. In an unreported case in 2013 *Corporate Finance Solutions (Pty) Ltd v Dwergieland Kleuterskool & Others*, a decision of the full bench it was held:

> 'The respondent's contention since the procedure had not been followed, there can be no valid and binding cession cannot be entertained. Respondent's not having been parties to the cession agreement cannot raise this as a defence, especially when the parties to the agreement do not and in fact, insist that a valid and binding cession was concluded.'

[24] In relation to the special plea raised by the defendant as to the plaintiff's *locus standi*, it was submitted by the plaintiff that it was entitled to act as an agent for the undisclosed principal being Fintech but it had already acquired rights in terms of the cession. The plaintiff asserts that it is a party to the main cession agreement in its own name and not in its capacity as agent. There is

also no indication that Tsamaya was aware of the fact that the plaintiff acted on behalf of Fintech when entering into the main cession agreement. The fact that Tsamaya subsequently invoiced Fintech for the equipment, according to the plaintiff is of no consequence.

[25] The subsequent discovery of an undisclosed principal does not alter the position to that of a named or a disclosed principal. The plaintiff had already acquired the rights in terms of the cession. It is also common cause that the defendant, on a monthly basis, paid the debit order to Fintech as a beneficiary. It is not disputed that Fintech acted as an administrative collecting agent on behalf of the plaintiff.

[26] The plaintiff explains that it did not institute action against the defendant on behalf of Fintech but in its own name and did so based upon its reliance on the main cession agreement. It also contends that the fact that it acted as an undisclosed agent for Fintech in taking cession of the written rental agreement, is irrelevant to the rights of the defendant. The question is whether the plaintiff can maintain the action where it acted as agent on behalf of an undisclosed principle.

[27] Reliance was placed on the case of *Continental Illinois National Bank and Trust Co of Chicago v Greek Seamen's Pension Fund* 1989 (2) SA 515 (D) at 538 to 539 where Thirion J held that the agent would however be entitled to maintain an action on a contract in respect of which he had acquired rights and he emphasises that an agent has a right to sue in his own name on a contract

where the contract was made with him personally or where he has acquired a special interest in terms of the contract. Where a right to sue is not conferred on the agent in express terms, the terms of the agent's authority have to be examined to ascertain whether the right to sue is implied in it.

[28] Reliance was also placed on the principle that an agent can sue on behalf of an undisclosed principal. In the case of *DB Botha v Geozie t/a Paragon Fisheries*, this involved the purchase of a fast food business conducted in Queenstown in the Eastern Cape and where the seller had sued for the purchase price which the buyer had refused to pay. The issue argued before that court, was whether the appellant acting as agent for an undisclosed principal was entitled to sue a third party in his own name. In this regard, the argument was upheld and reference was made to LAWSA, 2nd Edition, by Joubert paragraphs 178 and 181 as follows, I quote form LAWSA 2nd: ed

> 'In a standard situation of representation, the representative acquires no rights and incurs no liabilities from the contract concluded by him or her on behalf of his or her principal. The rights and obligations come into being between the principal and the third party.
>
> In an undisclosed-principal situation, however, the intermediary and the third person create vincula juris between themselves by the contract concluded in their own name, but also, in alternative vinculum juris between the undisclosed principal and the third person.
>
> At paragraph 181:
>
> "The contract is concluded between the third person and the intermediary acting in his or in her own name, the third person is in terms of the contract liable to the intermediary, he or she cannot avoid liability to the intermediary

on the ground that he or she is liable to the undisclosed principal unless and until the undisclosed principal elects to hold him or her liable.'

[29] It is for that reason therefore, based on the principles emanating from the cases referred to, that an agent can act on behalf of an undisclosed principal where as in this case it acquired rights in terms of the cession agreement and sue in its own name. The plaintiff also refers to the fact that it is not the defendant's case that the plaintiff could not act as an agent for an undisclosed principal because the identity of the entity taking cession of the rental agreement was not a material factor for the defendant. It made no difference to which entity rental payments were made, it had the use and enjoyment of the equipment and the identity of the owner of the equipment was not material The defendant was also not deprived of any of its defences as a result of the cession or the existence of an undisclosed principal.

[30] A further question to be addressed is that of repudiation. Did the defendant repudiate the agreement by terminating same prior to the five year period reflected on the master rental agreement? It was put to the plaintiff's witnesses that the agreement was for 30 months and not 60 months, however, the question of fraud was not persisted with, fraud having been mentioned that the plaintiff had failed, or the person acting on behalf of the plaintiff, had failed to record that the agreement was only to be for 30 months.

[31] Clearly the defendant repudiated the agreement. It did so before the termination period, it stopped paying and invited the plaintiff to come and fetch

the equipment, which it ultimately did. The defendant has submitted that if the court were to find that the plaintiff does have *locus standi*, then the question of damages has not been correctly computed or quantified by the plaintiff.

[32] In the light of the fact that I do find that the plaintiff has *locus standi* based on the factual matrix and cases referred to above, I now have to assess whether the plaintiff's damages have been properly quantified. On behalf of the defendant it was submitted that the rental agreement does not make provision for transfer of ownership by the plaintiff to the defendant and that the damages are in fact arrear rentals and for loss or rentals remaining for the unexpired period. It was submitted on behalf of the defendant that the onus rests on the plaintiff to show the amount that should be credited to the defendant because of the reversion to the plaintiff of the right to sublet the equipment and that there is no onus on the defendant to establish the value of the reversionary right as part of its onus of proving that the plaintiff had failed to mitigate its loss.

[33] The evidence in this regard was clear, I have already referred to the initial estimate of the value of the goods returned as being R4 500.00 and the goods later being sold for R12 000.00. In the result, it seems to me, that in the absence of testimony on behalf of the defendant and in its cross-examination of the plaintiff's witnesses, there was nothing to demonstrate that the plaintiff had done nothing to mitigate its loss. It is quite clear that the equipment was sold in excess of the initial valuation.

[34] The defendant has also submitted that because of the non-use of the three copiers and it's tender of return to Fintech and the fact that Fintech only collected the equipment some 16 months later, this was a factor that should be taken into account in the mitigation of its damages. The evidence of Ms Beckman of the plaintiff was clear, that the plaintiff does not mitigate its loss by re-renting the copiers to an alternative lessor, it simply sells the equipment.

[35] It is the defendant's case therefore that the plaintiff has not mitigated its damages and that it has been unreasonable in not re-renting the copiers. Ms Beckman was quite clear that prospective customers are not keen to take over and rent second hand copiers. The defendant also points to the fact that the delay meant that the equipment could have been sold some 16 months prior, that is April 2011 and from that date the plaintiff would have had no claim for future rentals and the damages would have been computed quite differently.

[36] The defendant had ample opportunity to cross-examine the plaintiff's witnesses in this regard and the submission therefore that it was entirely up to the plaintiff to come and collect the equipment timeously is unreasonable in my view. The defendant itself could have delivered the equipment to Fintech, but it did not do so, therefore the submission that the defendant should only be liable for two months in arrears is without substance.

[37] It was quite clear from the agreement and having abandoned the initial defence of fraud it was up to the defendants to claim that the plaintiff should

have acted differently within that 60 month period. It is the defendant's case that the plaintiff has recovered an asset and that would not be an appropriate calculation of the damages.

[38] It is the defendant's case that the calculation of damages is limited to the agreement of the rental agreement and that, because it was only in arrears in respect of two months, the plaintiff cannot now submit that the value of the equipment is the R12 000.00-odd that it has claimed.

[39] In my view, the calculation done by the plaintiff is accurate. The plaintiff did what it could to mitigate its loss, its loss was not simply tied or connected to the loss or rental, the value of the equipment is something which the court must take into account.

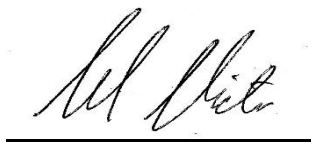
[40] The defendant repudiated the agreement and the plaintiff was entitled to cancel, the calculation and the amount claimed by the plaintiff, is R510 605.91. The summons was served on 9 May 2013, the agreement makes provision for costs on the attorney client scale should there be any litigation as per clause 16 of the rental agreement. In the result I make the following order:

1. The defendant is ordered to pay the amount or R510 605.91;
2. Interest on the said sum calculated at 15.50% per annum from date of service of summons, being 9 May 2013 to date of final payment;
3. Costs of suit on the attorney and client scale;

4. The conditional counterclaim to be dismissed with costs.

There is the question of the first third party. It submitted that it should not have been brought to court. No case was made out against it. It was not even mentioned in the plaintiff's evidence and had to sit through the trial at the instance of the plaintiff. It sought costs for its attendance at court. In Gr*oss v Commercial Union Assurance Company Limited & Another* 1974(1) SA 630 costs are a discretionary matter in relation to the costs of a third party. There was nothing to suggest that it was reasonable to bring the first third party to court. A costs order in the circumstances of this case is justified. The first third party was indeed represented. The order that I make in that regard is the following:

1. The plaintiff is ordered to pay the first third party's costs of this trial action including the days when it attended court.



**M. VICTOR**

**Judge of the High Court**

**Gauteng Local Division**