IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO. 7332/2009

In the matter between:

NEW REPUBLIC BANK LIMITED PLAINTIFF/EXCIPIENT

and

TERENCE ROSSITER DEFENDANT/RESPONDENT

JUDGMENT Delivered on 13 December 2010

SWAIN J

[1] Before me for decision are two exceptions taken by the plaintiff to the defendant's plea and counter claim, on the grounds that certain allegations made by the defendant are both vague and embarrassing. Both exceptions were preceded by notices served upon the defendant in terms of Rule 23 (1), calling upon the defendant to remove the causes for vagueness and embarrassment, which the defendant declined to do.

[2] For the purpose of deciding these issues it is unnecessary to set out the details of the ambit of the dispute between the parties, suffice it to say that the plaintiff's entitlement to claim payment of the

amount of R1,365,817.90 from the defendant has, as an essential element of its cause of action, a cession of the claim of Merchant Trade Finance (Pty) Ltd. (M T C) against the defendant, to the plaintiff.

[3] The existence of the cession lies at the heart of the first exception taken by the plaintiff to the defendant's plea and counter claim.

[4] The amount of R1,365,817.90 is the balance of the purchase price which the plaintiff alleges the defendant owes, for the purchase price of the shares held by M T C, as well as the loan account in Merchant Property Holdings (Pty) Ltd. It is in the realm of the security furnished by the defendant, to make payment to the plaintiff, that the second exception lies.

[5] The defendant undertook to pledge the shares and loan account to the plaintiff and deliver such shares in negotiable form to the plaintiff, which was to hold such shares on behalf of the plaintiff, as pledgee and on behalf of the defendant as owner. The defendant alleged that in doing so, M T C was, directly or indirectly, giving financial assistance to the defendant for the purchase of the shares, in contravention of Section 38 (1) of the Companies Act No. 61 of 1973.

[6] Dealing with the first exception, regarding the alleged cession, the relevant paragraphs of the defendant's plea read as follows:

"24.

This agreement foreshadowed a cession by M T F in the agreement of its claims against the defendant to the plaintiff. However no such cession was recorded in the agreement".

"25.

The defendant denies that M T F authorised such cession and/or that any such cession was effected".

[7] Paragraphs 13 and 14 in the defendant's counter claim repeat these allegations.

[8] Mr. Pammenter S C, who appeared for the excipient, submits that these allegations are completely at odds with the relevant clauses in the agreement in question, which provide as follows:

"6.4 The purchaser shall pay the purchase price for the Shares and the Claims, and the monthly interest payments referred to in sub-clause 6.2, in cash to NRB. The SELLER acknowledges that, in terms of the cession between the SELLER and NRB, as contained in this Agreement, the payment by the PURCHASER to NRB of the purchase price and interest contemplated in this sub-clause shall fully discharge the PURCHASER from any obligations it may have to the SELLER to pay it the purchase price and the interest in terms of this Agreement".

"12.1 The PURCHASER hereby consents to the cession by the SELLER of all its rights and entitlement in terms of this Agreement in favour of NRB".

"12.2 As security for the performance by the PURCHASER of its obligations under this Agreement to make payment to NRB, the PURCHASER undertakes to pledge the Shares and the Claims purchased by it under this Agreement to NRB and to deliver such Shares in negotiable form in pledge to NRB NOM, which shall hold such shares".

[9] The reference to the "purchaser" in these clauses is the defendant, the seller is M T F and the reference to N R B is to the plaintiff.

[10] The argument advanced by Mr. Pammenter S C, is that the only reasonable interpretation which can be given to the above quoted clauses, is that they contain the very cession which the defendant contends does not exist. He boldly asserts that nothing could be clearer. Developing his argument further, he submits that the pleaded cause of action is consequently diametrically at odds with the document on which the defendant relies for creating that cause of action. By reference to the decisions in

Keely v Heller 1904 T S 101 at 103/4

and

Naidu v Naidoo 1967 (2) SA 223 (N) at 226

he submits that this is a classic case, where the pleading is vague and embarrassing.

[11] The response of Mr. Gajoo S C, who appeared for the defendant, is that Clause 6.4 contemplates a cession "as contained in this agreement" and it does not provide for a cession of the seller's rights thereunder to the plaintiff. He submits that Clause 12.1 notes the consent by the defendant to the cession, but does not provide for a cession of the sellers rights thereunder to the plaintiff and neither does Clause 12.2.

[12] It is a well established principle that courts are reluctant to decide upon exception, questions concerning the interpretation of a contract. In addition, as stated by Schreiner J A in

Delmas Milling Company Ltd. V du Plessis
1955 (3) SA 447 (A) at 455 C – D

"In dealing with exceptions to pleadings based on the meaning of written contracts the position may be modified by the attitude of the parties. They may within limits force the Court to give the best meaning it can to a contract, even though the Court feels that there is really not sufficient certainty as to the meaning to give a decision that would be satisfactory in other circumstances".

Schreiner J A went on to add that the decision in

Frumer v Maitland 1954 (3) SA 840 (A)

was such a case. In that case both Counsel in the Court *a quo* expressly negatived the existence of relevant evidence outside the pleadings and particulars, and that attitude was persisted in on appeal. In this case, Schreiner J A. writing for the Court, stated the following at page 843 C – F:

"In these circumstances this Court, like the Provincial Division, must exclude from consideration the possibility that evidence might shed useful light upon the problem…… The parties have elected to exclude such considerations from the interpretation of the special condition. But for that election the Court would have been entitled, if that was its view, to dismiss the exception on the ground that the excipient had not shown that the case was fit to be decided on exception, i.e. without evidence".

[13] As pointed out however, by Schreiner J A in Delmas at 455 E, in the case of

Cairns (Pty) Ltd. v. Playdon & Company Ltd.
1948 (3) SA 99 (A)

both sides were seeking an interpretation of the document as it stood, but the majority of the Court nevertheless found it necessary to remit the case to trial.

In Delmas, Schreiner J A pointed out that the defendants did not claim that the exception had to be decided on linguistic interpretation only, but argued that the trial Court would be in a better position than this Court, to deal with the matter finally.

Delmas *supra* at 455 E

[14] At the hearing of this matter, I had formed the *prima facie* view that the clauses in question were not as clear in their meaning, as contended for by Mr. Pammenter S C. I therefore raised with him whether this was not a case where the difficulty in interpreting the clause in question, may be cleared up by reference to "surrounding circumstances" i.e. "matters that were probably present to the minds of the parties when they contracted (but not actual negotiations and similar statements)".

Delmas *supra* at 454 G - H

Although not privy to any evidence there may be of this nature, it seemed to me to be the type of case, where evidence of this nature could have a decisive bearing upon the resolution of this issue.

[15] I understood Mr. Pammenter to resist such a suggestion, maintaining that the clauses were sufficiently clear to indicate that the cession in question was provided for, and effected within the terms of the clauses referred to above. However, I did not detect any similar resistance on the part of Mr. Garjoo S C, when he argued the matter.

[16] The words of Tindall A C J in Cairns *supra* at 107, with respect, correctly encapsulates my views in this regard.

"However, in the view I take of the matter, it is at this stage desirable to refrain from expressing an opinion, whether definite or provisional, on the correct interpretation of the document as it stands, for this is a case where evidence of the surrounding circumstances may assist such interpretation".

[17] For the sake of completeness, I should also add my views in regard to the issue of prejudice, complained of by the excipient. Mr. Pammenter S C submitted that it would be impossible for the excipient to plead to these allegations. I disagree. The allegation that "no such cession was recorded in the agreement" could be met by a denial of this assertion, as well as an averment that in terms of the agreement properly construed, in the context of the surrounding circumstances prevailing at the time of its conclusion, the cession was effected in terms of the agreement. I do not intend to be prescriptive in expressing this view as to how the allegations of the defendant may be responded to, but do so merely to explain my view, that the excipient was not prejudiced by the nature of the allegations.

[18] Mr. Pammenter S C also complained that the excipient would be prejudiced by not knowing what case it had to meet at trial. In other words, what evidence the defendant would lead to show that no cession was effected. It seems to me that this issue is resolved by appreciating that the evidence to be led, would be evidence of the "surrounding circumstances" prevailing at the conclusion of the agreement.

[19] I am therefore of the view that the first, second and third complaints of the excipient to the defendant's plea, and the first and second complaints of the excipient to the defendant's counter claim, as contained in the excipient's notice of exception dated 02 April 2010, fall to be dismissed.

[20] Turning to the second exception raised, which relates to an alleged contravention of Section 38 (1) of the Companies Act No. 61 of 1973. The cause of complaint lies in the allegations made by the defendant, in paragraph 36 of the plea, as well as paragraph 32 of the counter claim, which are in almost identical terms.

[21] Paragraph 36 of the plea reads as follows:

"The defendant further pleads that in the alternative by requiring him to put up security by Pledging the Shares and claims to the Plaintiff and by delivering the shares in negotiable form in pledge to NRB Nominees which was to hold such shares on behalf of the Plaintiff as Pledgee and on the Defendant's behalf as the owner and/or by requiring the Defendant to dispose of the immovable Property in order to discharge the defendant's alleged indebtedness under the First Agreement and/or the Co-ordination Agreement and/or the Settlement Agreement that **MTF** and/or the Plaintiff contravened the provision of section 38 of the Companies Act, and as a consequence thereof the First Agreement is null and void and the Co-ordination Agreement and the Settlement Agreement are accordingly also null and void and unenforceable".

[22] At the hearing of this matter Mr. Gajoo S C, indicated that he

did not intend advancing argument in resisting the exception taken. His decision not to advance any argument was, in my view, well taken when regard is had to the fact that in his heads of argument he only relied upon the obligation imposed upon the defendant to pledge the shares and loan account to the plaintiff, and deliver such shares in negotiable form to the plaintiff, to hold such shares on behalf of the plaintiff as pledgee and on behalf of the defendant as owner, as security for the performance by the defendant of his obligations.

[23] It is therefore clear that paragraph 36 of the plea and paragraph 32 of the counter claim are vague and embarrassing in the manner complained of.

[24] I am accordingly of the view that the fourth complaint of the excipient to the defendant's plea, and the third complaint to the defendant's counter claim, as contained in the excipient's notice of exception dated 02 April 2010, should be upheld.

[25] As regards the issue of the costs of the application, it is apparent that the excipient has enjoyed partial success, but not what I would describe as substantial success. I say this because the exception aimed at the issue of the cession of the claims, went to the whole foundation of the defendant's defence to the claim as well as its counter claim. Although no argument was advanced by

the defendant, in opposition to the exception based upon the defendant's reliance upon Section 38 of the Companies Act No. 61 of 1973, the defendant never conceded the validity of the exception.

[26] Considering all of the above, the fairest order to both parties would be for the defendant to be ordered to pay fifty percent of the excipient's costs.

The order I make is the following:

(a) The first, second and third complaints of the excipient to the defendant's plea, as well as the first and second complaints of the excipient to the defendant's counter claim, as contained in the excipient's notice of exception dated 02 April 2010 (as amended) are dismissed.

b) The fourth complaint of the excipient to the defendant's plea, as well as the third complaint to the defendant's counter claim, as contained in the excipient's notice of exception dated 02 April 2010 (as amended) are upheld.

c) The defendant is ordered to amend paragraph

36 of his plea and paragraph 32 of his counter claim, within fourteen days of the date of this order.

d) The defendant is ordered to pay fifty percent of the excipient's costs.

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K. Swain J

Appearances: /

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For the Applicants	**:**	Mr. C.J. Pammenter S C
Instructed by:	**:**	Shepstone & Wylie Durban
For the Respondent	**:**	Mr. V. I. Gajoo S C
Instructed by	**:**	Theyagaraj Chetty Attorneys Durban
Date of Hearing	**:**	08 December 2010
Date of Filing of Judgment	**:**	13 December 2010