IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 4502/2013

In the matter between:

DSD TRADING t/a EVEREADY BRICK & BLOCK **Plaintiff**

and

ETHEKWINI MUNICIPALITY **Defendant**

JUDGMENT

CHETTY, J

[1] The plaintiff instituted action against the defendant for payment of R217 405.90 in circumstances where it contends that an entity known as Siyathembana Trading 264 (Pty) Ltd had ceded its book debts to the plaintiff, and that the defendant was obliged to pay all monies owed to Siyathembana, to the plaintiff. The defendant failed to do so, despite having received notification of the cession of debts. Consequently, the plaintiff contends that the defendant is liable for all those amounts paid between 1 to 13 November 2012, together with interest and costs.

[2] At the outset the defendant's attorney, Mr *Mboto* informed me that the defendant had terminated the mandate of its counsel, Advocate *Gunase*, on the morning of the trial. The matter had been referred to the expedited trial role and a notice of set down had been filed on 13 December 2016. A pre-trial conference had taken place on 22 February 2017 which was attended by counsel and the attorneys for both parties. In terms of reaching agreement for the efficient hearing of the matter, the parties agreed that neither intended bringing any interlocutory motions.

[3] Mr *Mboto* requested a postponement of the matter on the basis that the defendant intended joining Siyathembana as a party to the proceedings as it considered Siyathembana to have a pivotal role in the matter. In addition, in light of the termination of the mandate of counsel, the defendant's attorney was not in a position to acquaint himself with the pleadings and documents pertaining to the matter, and as such he would be at a disadvantage if he were compelled to proceed under those circumstances. The defendant tended the wasted costs which would be occasioned by the postponement of the matter.

[4] The application for a postponement was opposed by Mr *Singh SC*, who appeared for the plaintiff. Counsel brought to the court's attention that at the time of the holding of the pre-trial conference the attorneys and counsel for both parties were *ad idem* that there were no interlocutory applications which would impede the commencement of the trial. No indication was given of the possibility of an application to join Siyathembana. Moreover counsel who had been briefed by the defendant was present at court and gave no indication that he was unprepared or that he was unable to proceed with the trial. On the issue of joinder, Mr *Singh* submitted that the involvement of Siyathembana is not a recent occurrence. When the plaintiff instituted application proceedings under case number 11484/2012, Siyathembana and the defendant were cited as co-respondents and the plaintiff clearly spelt out the basis on which Siyathembana was liable to it for goods sold and delivered, and monies advanced. In those proceedings, the plaintiff essentially sought an order freezing the accounts of Siyathembana. Ultimately, an order was granted in December 2012 preventing Siyathembana from collecting on its book

debts. Accordingly, it was submitted that the defendant had sufficient opportunity to bring an application to join Siyathembana in these proceedings, if it genuinely believed that it had a substantive and material interest in the matter.

[5] One of the aspects which weighs heavily against the defendant is that the court has not been fully, or at all, informed of the interest that Siyathembana has in order to be joined as a party to these proceedings. The onus rests on the defendant to show that Siyathembana has a direct and substantial interest in the issues involved and the order which the court might make. See *United Watch & Diamond Co (Pty) Ltd v Disa Hotels Ltd & another* 1972 (4) SA 409 (C) at 415E-F. In *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O) it was held that direct and substantial interest suggests an interest in the right which is the subject-matter of the litigation and not merely a financial interest which is only an indirect interest in such litigation.

[6] Mr *Singh*, in the absence of any facts placed before this Court to support a claim to join Siyathembana, was left to speculate as to the possible reason for the joinder. One of those reasons is for the defendant to recover monies which it paid to Siyathembana, when it ought not to. It was pointed out that there is however no prospect of such recovery as the payments to Siyathembana were made in and during November 2012. Any attempt to institute action at this late stage, would surely be met with a plea of prescription.

[7] Apart from the weak position in relation to the issue of joinder, the plaintiff took issue as to why, on the morning of a trial, would the defendant seek to terminate the instructions of counsel who has been properly instructed and is available to argue the matter. In my view, where a litigant proceeds to terminate the services of counsel in this matter, then it must be prepared to proceed with the trial, with or without another counsel in place, and in a manner that does not disrupt the functioning of the court. The defendant made the election to terminate the services of its counsel, and then sought to postpone the trial. In my view, it does not behove

the defendant to now contend that it has not had sufficient opportunity to prepare or to instruct new counsel.

[8] Applying the test set out in *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (NmS), that the court has a discretion as to whether an application for a postponement should be granted, and that the exercise of such discretion must be done in a judicial manner, I am of the view that the application is unsubstantiated and misconceived. Where a party, like the defendant, requests an indulgence of the court, it is incumbent that a full and satisfactory explanation of the circumstances giving rise to the application must be set out. In the present matter there has been nothing of the sort, other than a reference to the joinder of Siyathembana, without any explanation from the legal representative of the defendant why it would be in the interests of justice to postpone the matter to allow for such joinder to take place.

[9] As set out earlier, this matter has been enrolled on the expedited trial roll and a postponement would only serve to prejudice the right of the plaintiff who has a substantive interest in having the matter expeditiously disposed. It is to be noted that the defendant tendered the wasted costs in this matter. Apart from the plaintiff not being persuaded by this tender, the ratepayer ultimately becomes liable for such costs through the public purse. No fault is attributed to the officials of the defendant or its legal representatives. Neither the attorney who attended the pre-trial conference nor any official from the defendant was in attendance at court, which suggests that the granting of a postponement was there for the mere asking. I was not satisfied that a proper case had been made out for the granting of a postponement. The application for postponement was accordingly dismissed, with costs.

[10] Consequent upon the above ruling, Mr *Mboto* requested a further indulgence for the matter to stand down in order to take instructions from his client, whom I pointed out above, were not in court. I refused the request, as I had earlier granted

him an extended period to consult with his client and consider the opposition of the plaintiff to the adjournment. Surely this consultation would have included a discussion of what the defendant would do in the event of the application being refused. Moreover, the granting of continuous adjournments is disruptive to the efficiency of the court's functioning, particularly in this case where the matter had been allocated a day to proceed on the expedited trial roll. I declined the request for the matter to stand down further and directed that the trial proceed. The plaintiff was ready to commence its case and proceeded to call its first witness. Mr *Mboto* remained present for the duration of the proceedings.

[11] Pregalathan Moodley ('Moodley'), the sole member of the plaintiff, testified that he had personal knowledge of the cause of action and that he represented the plaintiff in its dealings with Siyathembana in relation to a project initiated by the defendant for the upgrading of low-cost housing in the suburb of Lamontville, Durban. Moodley testified that in November 2011 a written agreement was concluded with Siyathembana, who was represented at the time by a Mr Makhaye, in terms of which the plaintiff undertook to supply building materials to contractors involved in the Lamontville project. The plaintiff granted Siyathembana credit facilities up to the amount of R2.5 million. Goods were supplied to the building contracts pursuant to an order number issued by Siyathembana, and the agreement between the parties was that the materials would be paid for by Siyathembana within 30 days of receipt of the plaintiff's statement.

[12] In terms of the agreement reached with Siyathembana, the latter irrevocably and *in rem suam* ceded to the plaintiff all its rights, title and interests in respect of any claims that it had with the contractors in respect of the materials supplied to them. This cession of rights to the plaintiff provided the necessary security to enable it to continue supplying building materials to the contractors. In addition, Mr Makhaye signed a personal suretyship for the debts of Siyathembana.

[13] Moodley further testified that the defendant entered into agreements with the individual contactors, who were small to medium enterprises ('SME's) falling within the framework of broad-based black economic empowerment to carry out the construction at the project site. In light of the contractors not having access to capital to fund their constructions, Siyathembana was installed as an 'intermediary' to procure the supply of building materials for the contractors, enabling them to complete their projects. In exchange Siyathembana obtained cessions from each of the contractors in respect of any claims that they would have against the defendant, in respect of monies owed to them for work done.

[14] According to the plaintiff the defendant was fully aware of its involvement in the housing project and in December 2011 it (the defendant) concluded an agreement with Siyathembana in terms of which the plaintiff was confirmed as the sole supplier of materials for the Lamontville building project. As I understood the witness's evidence, materials would only be supplied to the contractors upon the production of an order number issued by Siyathembana. Payment was to be effected within 30 days.

[15] By January 2012 the amount of goods supplied to the contractors had steadily increased and Siyathembana approached the plaintiff with a view to increasing its overdraft facility. The application was granted and the necessary contracts in respect of security and suretyship were put in place.

[16] In April 2012 Siyathembana approached the plaintiff requesting they advance funds to it, to enable the contactors to pay the wages to their workers. These amounts were to be paid directly to the contractors upon receipt of the requisite order number being issued by Siyathembana.

[17] Despite the necessary securities being installed in order to ensure prompt payment, Siyathembana failed to pay the amounts owing, causing Moodley to

request a meeting with Siyathembana's attorney in order to work out a payment plan in respect of the outstanding amounts. At this stage the total amount owing to the plaintiff was R1 894 445.97 comprising R768 645.97 for goods delivered and R1 125 800.00 in respect of the wages paid to the contractors. No satisfactory conclusion was reached and despite demand Siyathembana failed to pay either of the sums referred to above.

[18] During the time that the plaintiff was supplying building materials as well as advancing sums of money to Siyathembana, Moodley testified that he had been authorised as an electronic signatory by Siyathembana. As such, he had access to the banking activity taking place in Siyathembana's account. He noticed that while monies were being paid into the account by the defendant, Siyathembana was not paying anything towards the liquidation of its indebtedness to the plaintiff. Moodley's access to the activity in the bank account was subsequently withdrawn.

[19] In light of the breach by Siyathembana in failing to pay its debts, Moodley approached his attorneys. On 1 November 2012 an application was launched by the plaintiff herein under case number 11484/2012 in which both Siyathembana and the defendant were cited as first and second respondents respectively. The relief sought in the application was for an order freezing the bank account of Siyathembana and preventing it from collecting its book debts. On 6 November 2012 the matter was adjourned to 12 November 2012 to enable Siyathembana and the defendant herein to file their answering affidavits. Furthermore, Siyathembana undertook that until 12 November 2012 "*it will not deal with any funds in the said Ned bank account under number 1012171280, nor will the direct any funds "in an out" of the said account*." I was advised that the defendant herein was represented by its counsel, Advocate *Gunase*, at the time.

[20] When the matter came before Steyn J on 12 November 2012 a rule *nisi* was issued, returnable on 4 December 2012. The order interdicted and restrained Siyathembana from diverging, conceding and disguising in anyway the funds and

debts due to it, as well as instructing any of its debtors to effect payment of money due to it, to an account other than that held at Nedbank, under account number 1012171280. In addition, Siyathembana was required to provide the applicant with a list of all of its debtors, the amount of the indebtedness and their further details.

[21] Despite the defendant being informed of Siyathembana's indebtedness to the plaintiff in terms of the cessions referred to above, the defendant notwithstanding paid to Siyathembana the following amounts, which the plaintiff contends should have been paid to it, in law. The amounts paid by the defendant to Siyathembana are the following:

a. 1 November 2012 - R35 792.18
b. 7 November 2012 - R 59 613.72
c. 8 November 2012 - R 30 000.00
d. 8 November 2012 - R 30 000.00
e. 8 November 2012 - R 32 000.00
f. 13 November 2012 - R 30 000.00

[22] In the result the plaintiff contends that the defendant is liable to it in the sum of R 217 405.90 being the total amount paid by the defendant to Siyathembana, despite the defendant having knowledge of the cessions, and of the application launched under case number 11484/2012, and the contentions advanced in support of the relief sought.

[23] Moodley further confirmed that the plaintiff had complied with the provisions of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 and gave necessary notice on 18 February 2013.

[24] Mr *Mboto* was then afforded the opportunity of cross-examining the witness. He informed the court that he was unable to do so because of a headache. The court then adjourned to enable him to obtain the necessary medication. On resumption,

the court was advised that he was still unwell and unable to proceed. Upon being directed to proceed with his cross-examination, Mr *Mboto* informed the court that he had no questions for the witness. At this stage, the court enquired from Mr *Mboto* whether he understood the implication of the witness not being cross-examined, to which he responded in the affirmative. As pointed out earlier, there was no official present in court that appeared to represent the defendant. Counsel for the plaintiff thereafter proceeded to close his case. Mr *Mboto* thereafter informed the court that he did not intend calling any witnesses and accordingly closed the defendant's case. That concluded the evidence.

[25] In argument, Mr *Singh* submitted that the evidence, which stands uncontradicted before this court, confirms that the plaintiff supplied goods and materials to Siyathembana, which were intended to be used by the individual contractors, who enjoyed a contractual relationship with the defendant. The evidence further reveals the existence of a cession in favour of the plaintiff by Siyathembana of any monies owed to it by the defendant.

[26] A perusal of the defendant's plea reflects that, in the main, the plea constitutes a non-admission of the averments contained in the plaintiff's particulars of claim. It does contain a denial that the defendant was obliged to make any payment to the plaintiff, while at the same time admitting that it made payment to Siyathembana of the amounts between the period 1 November 2012 and 12 November 2012. It further contends that such payment was made "*in pursuance of its legal obligation to do so*".

[27] In regard to this latter 'defence' that the defendant was under no obligation to pay over monies which it owed to Siyathembana, to the plaintiff, Mr *Singh* submitted that such contention is untenable. All that the plaintiff is required to do in these circumstances is to give the defendant notice of the cession of rights. In this case, the plaintiff served a copy of the papers in case number 11484/2012 on the defendant on 1 November 2012. In *Kubyana v Standard Bank of South Africa Ltd*

2014 (3) SA 56 (CC) the court made the following observations with regard to the requirement of serving the s 129 notice (in terms of the National Credit Act 34 of 2005) on the consumer:

> '[51] This argument cannot be sustained. It is premised on the notion that a credit provider is under an obligation to bring a s 129 notice to the subjective attention of the consumer, which is not the case. It fails to appreciate that, if the purpose of consensual dispute resolution is to be achieved, *a consumer must act responsibly when notified of her default - the credit provider does not bear sole responsibility for ensuring that the objective underlying s 129 is achieved*. And it does not account for the responsibilities of a reasonable consumer: the Act does not allow a consumer to ignore, or unreasonably fail to respond to, notifications from the Post Office and thereby stave off enforcement proceedings by a credit provider."'

[28] In *Lynn & Main Inc v Brits Community Sandworks CC* 2009 (1) SA 308 (SCA) Mpati P stated the following at para 12:

> 'It has been held, correctly so in my view, that a cession of rights is ineffective as against a debtor until such time as he has knowledge of it and that payment by him to the cedent, without knowledge of the cession, renders him immune to a claim by the cessionary. See *Pillay v Harichand* 1976 (2) SA 681 (D) at 684F-H. Put differently, for a cession to be effective as against a debtor, the debtor must have had knowledge thereof, which would serve to pre-empt him from dealing with the cedent to the detriment of the cessionary. Where the debtor pays the cedent without knowledge of the cession and the surety is subsequently sued for payment of the debt, the surety would be entitled to plead that the debt had been discharged and this at a time when the debtor had no knowledge of the cession, a defence which the debtor would have been entitled to raise. But such defence would not be grounded on absence of knowledge of the cession on the part of the surety, but of the debtor.'

[29] Mr *Singh* submitted that what was necessary was only for the plaintiff to have the cession brought to the knowledge and attention of the defendant. This is an objective assessment. It is not disputed that the application for the interdict was served on the defendant on 1 November 2012 – the same day on which the

defendant avers that it paid the amount of R35 792.18 to Siyathembana. There is no evidence that the defendant took any steps to reverse this transaction of payment to Siyathembana. On the contrary, it contends that it was acting in pursuance of a 'legal duty' to do so. This must be examined in the face of what the defendant set out in its affidavit opposing summary judgment in which *inter alia*, the defendant acknowledges that papers in case number 11484/2012 were served on it on 1 November 2012. It further states that it "*made payment*" to Siyathembana on the same date. In *Volkskas Bank Bpk v Bankorp Bpk (h/a Trust Bank) en 'n ander* 1991 (3) SA 605 (A) the court considered at what precise moment, in the course of its clearing process, can payment of a cheque be said to have been effected. In the present case, one can assume that payment by the defendant would take the form of an electronic funds transfer (EFT). Counsel for the plaintiff submitted that in *Volkskas* supra, it was held that payment was a 'bilateral juristic act' which, barring an agreement to the contrary, could not have taken place without the knowledge of the respondent. See also *ABSA Bank Ltd v Standard Bank of SA Ltd* 1998 (1) SA 242 (SCA).

[30] In light of the above decisions, it was contended that it is not enough for the defendant to say that knowledge of the cessions came to its attention after it made payment. There is nothing before me to suggest that the defendant made any attempt to reverse the transaction. In any event, once the plaintiff proves delivery, the onus shifts to the defendant to show why despite service of the papers, it proceeded to make payment to the cedent. That onus has not been discharged.

[31] Turning to the defendant's contention that it was 'legally obliged' to pay Siyathembana at the time when it did, Mr *Singh* submitted that this explanation is without foundation. He drew to the Court's attention to the following averment made at paragraph 15 of the affidavit opposing summary judgment:

> 'It is significant that the Plaintiff is aware that the Cedent has acted in *fraudem legis* when notwithstanding the alleged Cessions, the Cedent has fraudulently obtained payment from the Defendant.'

[32] It was submitted that if such allegation is true, no explanation is tendered as to why the defendant went ahead and made payments to Siyathembana not only on 1 November 2012, but on five successive occasions thereafter. Nowhere in its plea or in the opposing affidavit is there any indication of when the defendant says it acquired knowledge of the cession.

[33] I was satisfied that the evidence of Moodley was satisfactory in all material respects in order to prove the plaintiff's claim. His evidence was consistent with the allegations set out in the particulars of claim and with the contents of his founding affidavit in case number 11484/2012. The defendant on the other hand, led no evidence and elected not to cross-examine the plaintiff's witness.

[34] Counsel for the plaintiff sought interest on the amount of R217 405.90 at 15,5% per annum, from 30 November 2012, on the basis that the various sums due to the plaintiff would have been due and payable by this date.

[35] I turn to the issue of costs, where the plaintiff's counsel submitted that in light of the defendant's conduct in not being able to advance a defence, either on the papers and at trial, is reason enough that the defendant be ordered to pay costs on an attorney client scale.

[36] In light of the defendant withdrawing the instructions to counsel on the morning of the trial, by its own conduct, it was left defenceless despite the attorney remaining in court for the duration of the trial. He put no questions to the plaintiff's witness and made no submission to me on the merits of the matter. Equally, any

costs order granted against the defendant has no salutary impact on its officials who were responsible for the instructions that the action be defended, and for the particular defence raised, albeit obliquely. Matters such as that before me only result in the unnecessary incursion of legal costs. It is the ratepayer who ultimately bears liability for this ineptitude.

[37] In a recent judgment of *Westwood Insurance Brokers (Pty) Ltd v Ethekwini Local Municipality and others* [2016] ZAKZDHC 46 the Court ordered the municipal officials to personally pay a portion of the costs incurred in a dispute related to the appointment of a service provider for water insurance, in circumstances where the entity ought never to have been appointed. In *Member of the Executive Council for Health, Gauteng v Lushaba* 2016 (8) BCLR 1069 (CC); 2017 (1) SA 106 (CC) the Constitutional Court considered the issue of public officials being held liable for costs, but set aside the decision of the High Court which ordered the officials to be personally liable for costs. The Court considered that the officials concerned were not afforded the opportunity to make representations nor where they joined as parties in the action.

[38] I am also mindful that the defendant, as an organ of state, may still yet investigate this matter – particularly in light of the instructions given to defend the action, and thereafter the decision to terminate the instructions of the counsel. These decisions may have caused the municipality to incur “wasteful expenditure”. However, the defendant has an obligation to be accountable in terms of section 152 of the Constitution to communities on how its budgetary resources are allocated and spent. The Court, in my view, must be cautious not to usurp the role of a sphere of government. Accordingly, whether the defendant conducts any enquiry into this matter or holds anyone liable, is outside the scope of the dispute before me.

[37] I therefor make the following order:

1. Judgment is granted in favour of the plaintiff for payment of the amount of R217 405.90.
2. Interest on the said sum at the rate of 15,5% *a tempore more*, as from 30 November 2012 to date of final payment.
3. Costs of suit on an attorney client scale.

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M R CHETTY

Appearances

Counsel for the Applicant – N Singh SC & I J Patel

Instructed by – Sham & Co incorporated

67 Mathews Meyiwa Road

Durban

Tel: 031 309 5615

Ref: MR RAMNARAIN / HC /H303

Attorney for second respondent Mr Mboto

Gcolotela & Peter Incorporated

294/296 Mathews Meyiwa Road

Morningside

Ref: Mr Peter/vp/ETH120

Date of Hearing : 6 March 2017

Date of Judgment: 26 April 2017