

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NUMBER: 1695/14

In the matter between:

TEBFIN (PTY) LTD

(REGISTRATION NO. 2006/015762/07)

Plaintiff

and

KUSAKUSA CATERING & PROJECTS CC CC

(REGISTRATION NO. 2007/100636/23)

First Defendant

**MEMBER OF THE EXECUTIVE COUNCIL for
HUMAN SETTLEMENTS AND PUBLIC WORKS,
KWAZULU-NATAL PROVINCE**

Second Defendant

AND

CASE NUMBER: 1696/14

In the matter between:

TEBFIN (PTY) LTD

(REGISTRATION NO. 2006/015762/07)

Plaintiff

and

KUSAKUSA CATERING & PROJECTS CC CC

(REGISTRATION NO. 2007/100636/23)

First Defendant

**MEMBER OF THE EXECUTIVE COUNCIL for
HUMAN SETTLEMENTS AND PUBLIC WORKS,
KWAZULU-NATAL PROVINCE**

Second Defendant

JUDGMENT

VAN ZYL, J.:-

1. The two matters before court are both opposed exceptions wherein the second defendant, as the excipient, excepted to the plaintiff's particulars of claim. Both exceptions relate to an alleged failure by the plaintiff to disclose a cause of action as against the second defendant, are couched in identical terms and by consent, were argued together as a single matter.
2. The same plaintiff instituted action in each of these matters. However, the first defendant in case number 1695/14 is Somju Investments CC and the first defendant in case number 1696/14 is KusaKusa Catering and Projects CC. In neither matter have the respective first defendants responded to the exceptions. In both matters the second defendant is the Member of the Executive Council for Human Settlements and Public Works, KwaZulu-Natal Province. As indicated, it is the second defendant who is the excipient in both actions. For convenience the parties are herein referred to as in the actions.
3. At the outset and order to place the exceptions in their proper perspective, it is necessary to deal briefly with the background and formulation of the plaintiff's claims. In each of the actions the plaintiff alleged that the respective first and second defendants had concluded, what were termed obligatory agreements, flowing from preceding

successful tender processes between the respective first defendants and the second defendant. These obligatory agreements related to different school construction projects to be performed by the respective first defendants on behalf of the second defendant.

4. It was further alleged that the first defendants in each instance were thereby required to comply with certain formalities. These included that the respective projects had to be completed within specified time spans, failing which the respective first defendants would become liable to the second defendant for penalties. Furthermore, that during the course of the construction the respective first defendants would become entitled to submit to the second defendant progress payment certificates, referred to as invoices, for part payment of the respective contract prices.

5. It appears that each of the first defendants required financial assistance for the acquisition of materials to be used in their respective construction projects and that the plaintiff agreed to advance, by way of loans, monies to such defendants for this purpose. As security for these loans the relevant defendants agreed to cede to the plaintiff their respective entitlements to collect monies becoming due to them by the second defendant upon presentation of the various progress payment certificates, but limited to the agreed loan amounts underlying the loan agreements in each instance.

6. The respective loan agreements thus entered into between the respective first defendants and the plaintiff were concluded in writing and included the cessions referred to above. Copies of these agreements are annexed to the particulars of the plaintiffs' claims in the two actions. In case number 1695/14 there were two such agreements (respectively annexures "B" and "C") and in case number 1696/14 only one such agreement (annexure "B"). However, these agreements are all in materially similar terms.

7. In respect of each of these agreements the plaintiff alleged in paragraphs 7 and 12 of the particulars of claim in case number 1695/14, as well as paragraph 7 of the particulars in case number 1696/14, that the respective first defendants had duly complied with their obligations to the second defendant in terms of the obligatory agreements and "*..accordingly (each first defendant) became entitled to receive payment of the contract price and obliged (the second defendant) to effect payment in favour of the plaintiff in the sum of..*", followed by a stated sum corresponding to the total amount ceded in each instance.

8. The plaintiff further alleged that notice of the cessions had in each instance been given to the second defendant and that each first defendant had authorised the second defendant to pay the proceeds of the progress payment certificates (referred to as invoices) up to the values of the ceded amounts into the nominated banking account of

the plaintiff. The plaintiff alleged in paragraphs 8 and 13 of the particulars of the plaintiff's claim in case number 1695/14 that notice of the two cessions had been given to the second defendant on 8 May and 11 September 2012 and in paragraph 8 of the particulars in case number 1696/14 on 7 June 2012.

9. The particulars of plaintiff's claims, under a heading reading "Statement and Debatement of Account" then in both actions alleged as is set out below. For convenience the extract is taken from paragraphs 16 and 17 of the particulars of plaintiff's claim in case number 1695/14. However, paragraphs 11 and 12 in the particulars of the plaintiff's claim in case number 1696/14 are similar, save for the date in paragraph 12 which is 7 June 2012. The relevant paragraphs read, as follows:

16. *As a consequence of the fiduciary relationship between the Plaintiff and the First Defendant and the contractual obligations imposed upon the Plaintiff and the Defendants respectively, Plaintiff became entitled to receive an account at regular intervals from both the First and Second Defendants regarding amounts paid to the Plaintiff standing in relation to the Obligatory Agreement read with the written Cession referred to above.*
17. *Despite demand, the Defendants have failed to render any account alternatively have rendered defective the inadequate accounts to the Plaintiff in respect of the amounts which were paid to the First Defendant by the Second Defendant standing in relation to the Obligatory Agreement on the dates following upon that of 11 September 2012"*

10. The particulars of the plaintiff's claims in the two actions also conclude with similar prayers for relief. Again the extract is taken from case number 1695/14, which reads:

- “1. *that Defendants render a full account of all payments having been effected between them in terms of the obligatory and Cession agreements since 8 May 2012 to date.*
2. *Debatement of the said account;*
3. *Costs of suit;*
4. *Further, other and / or alternative e relief.”*

11. It is apparent from the foregoing that, underlying the plaintiff's claims in both actions, is the assertion that a fiduciary relationship had come into existence between the plaintiff on the one hand and *inter alia* the second defendant on the other. It is the plaintiff's case that such a relationship came about by virtue of the contractual arrangements entered as between the plaintiff and the respective first defendants in the two actions and in terms of which the plaintiff advanced monies and in return received cession of the respective first defendants' rights to receive payments from the second defendant in each instance.

12. In both actions the second defendant excepted on the ground that the plaintiff's particulars of claim failed to disclose a cause of action as against the second defendant. The relevant portions of the exceptions were formulated, as follows:-

“The Plaintiff in its particulars of Claim failed to allege and prove:

- (a) a basis of a right to receive an account from the Second Defendant;*

- (b) *a contractual obligation on the part of the Second Defendant to render such account;*
- (c) *a statutory duty on the part of the Second Defendant to render such an account.”*

13. Mr Bedderson, who appeared for the second defendant in the exceptions, submitted that no contractual relationship had arisen as between the plaintiff and the second defendant and no contractual or statutory duty existed requiring the second defendant to render an account to the plaintiff. Counsel further submitted that the only other basis upon which the plaintiff could rely for such a duty was to have established that there existed as between the plaintiff and the second defendant a *fiduciary* relationship, but that no such allegation appears from the particulars of the plaintiff's claims in either action.

14. It is clear, however, that the cession agreements relied upon were bilateral agreements concluded as between the plaintiff and the respective first defendants only and that the second defendant was not party to such agreements. It is not always necessary to plead the terms of an agreement extensively in order to establish that a *fiduciary* relationship came about. In *Phillips v Fieldstone Africa (Pty) Ltd and Anor* 2004 (3) SA 465 (SCA), Heher JA at para 27 remarked that;

“There is no magic in the term ‘fiduciary duty’. The existence of such a duty and its nature and extent are questions of fact to be adduced from a thorough consideration of the substance of the relationship and any relevant circumstances which affect the operation of that relationship”

And further in the same paragraph it was said that;

“The emphasis in the particulars of claim upon the representative nature of the appellant’s status in dealing with Safika and the duty to account for profits acquired by him in that capacity should have been to counsel an unmistakable beacon which marked the claim as one in which the appellant stood towards the respondents in a position of confidence and good faith which he was obliged to protect. No more was required to set up a case on a fiduciary duty.”

15. In *Absa Bank Bpk v Janse van Rensburg* 2002 (3) SA 701 (SCA) the court of appeal was called upon to deal with a matter where the respondent claimed the existence of a fiduciary relationship between himself and the appellant as his bankers with regard to the conduct of a current account. The court held that the respondent was in any event not entitled to claim an account and a debatement thereof because, in order to succeed on such a claim the respondent would have had to prove either the existence of a fiduciary relationship between himself and the appellant, or that the appellant had contractually bound itself to account, or the existence of a statutory duty obliging the appellant to render and debate an account. In this regard the court of appeal referred with approval at page 708 E-F to the decision in *Rectifier and Communications Systems (Pty) Ltd v Harrison* 1981 (2) SA 283 (C).
16. The court of appeal also held that it was generally accepted that the contractual relationship underlying the operation of a current account was that of debtor and creditor and that as such it did not give rise to a fiduciary relationship between the parties thereto (paragraph 16 at page 709B). The court further remarked that there was in any event

no reason why the appellant should be legally obliged to assist in determining the extent of a claim against it. (at page 709C.).

17. In *Rectifier and Communications Systems (Pty) Ltd v Harrison* (supra) Watermeyer JP at page 287H to 288B held that there was no general principle of law that, when one party did not know how much it was owed by another, it could demand that the latter render an account. The Court remarked that a plaintiff was not infrequently faced with uncertainty as to the amount of its claim, but could then solve the difficulty with resort to discovery proceedings in terms of the rules of court.
18. The second defendant did not dispute that the relationship which came about between the plaintiff and the respective first defendants could be of a fiduciary nature as between them. Nor was it suggested that the respective first defendants would not have a duty to account to and debate with the plaintiff. What counsel for the second defendant submitted with some vigour was that such a relationship did not extend to the second defendant, who was not contractually involved with the plaintiff. In short, the contractual relations between the plaintiff and the respective first defendants were bilaterally concluded and the second defendant was not a party thereto.
19. Mr Hattingh, who appeared for the plaintiff in the exceptions, but who was not the author of its particulars of claim in the two actions,

submitted that a cession in *securitatem debiti* amounted to a conglomerate of incongruous elements. Relying upon the remarks of the court of appeal in *Grobler v Oosthuizen* 2009 (5) SA 500 (SCA) at para 17, counsel submitted that both the cedent and the cessionary have rights in relation to the performance of the debtor and by necessary implication this would include the right to receive an account from the debtor, as part of the debtor's performance.

20. In my view there is no merit in counsel's submissions in this regard. The argument confuses the rights and duties arising from the contractual relationship which came about *inter partes* between the plaintiff and the respective first defendants with those which came about between the first defendants and the second defendant.
21. The plaintiff's particulars of claim contain no grounds upon which it can be suggested that the second defendant, prior to the cessions, as the debtor of the respective first defendants owed them any duty to account. That is not surprising because the underlying relationship between the respective first defendants and the second defendant was one in terms of which the second defendant became obliged to pay the relevant first defendant for construction work performed. *Prima facie* the nature of their relationship was one of debtor and creditor. There was no suggestion that the second defendant stood in any fiduciary relationship towards the respective first defendants, or would have any duty to account to them. Since it is trite that a cedent cannot

transfer to the cessionary greater rights than the cedent possessed in the first instance, it follows that the rights of the respective first defendants, thus ceded to the plaintiff, would not contain any entitlement to an accounting as against the second defendant.

22. That being so, there is also no basis upon which the second defendant, after and by virtue of being notified of the cessions pursuant to agreements to which it was not a party, could then become liable to render an account to the cessionary of its creditor. The situation appears analogous to that which prevailed in the Rectifier and Communications Systems matter (supra) and the solution to the plaintiff's difficulties probably lie in discovery proceedings.
23. It follows that the plaintiff's particulars of claim in both actions are defective and do not disclose causes of action as against the second defendant for the accounting relief sought. Both exceptions should be allowed, with costs. However, since both matters were by common consent argued as one, the Taxing Master should make due allowance for this fact in assessing the costs with regard to each individual matter.
24. In the result I make the following order on exception by the second defendant to the plaintiff's particulars of claim in respect of each of the actions under case number 1695/14 and 1696/14;

- a. The exception in each instance is upheld.
- b. The allegations contained in each of the particulars of the plaintiff's claims and insofar as any liability to the plaintiff by the second defendant is alleged, are struck out.
- c. The plaintiff is granted leave in respect of each of the two actions, if so advised, to amend its particulars of claim within 20 days.
- d. The plaintiff will pay the costs of the exceptions.

Van Zyl, J.

JUDGMENT RESERVED: 14 OCTOBER 2015

JUDGMENT HANDED DOWN: 26 MARCH 2015

COUNSEL FOR PLAINTIFF: ADV. C. HATTING

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COUNSEL FOR FIRST DEFENDANT: NO APPEARANCE

COUSEL FOR SECOND DEFENDANT: ADV. B. S. M. BEDDERSON

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