

SOUTH AFRICA / JUDGMENT

Drive Control Corporation (Pty) Ltd v National Health Laboratory Service (A2023/049792)

[2024] ZAGPJHC 339 (10 April 2024)

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COURT

South Gauteng High Court, Johannesburg

BEFORE

S D J Wilson, Adams, Wanless

CASE / FILE NUMBER

A2023/049792

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FLYNOTES:

CONTRACT – Cession – Prohibition –
Cession
of right to receive payment from NHLS under contract –
Contractual prohibition on party ceding its rights without
prior
consent – Employee of NHLS acknowledged cession and
undertook that it would pay – This not superseding
original
agreement and had no effect independently of it –
Prohibition on cession was fused into right to payment the
contract itself created – NHLS' prior consent was
condition for its very creation and the prior consent was never
given – Cession relied on was never cession at all.

IN

THE HIGH COURT OF SOUTH AFRICA
(GAUTENG
LOCAL DIVISION, JOHANNESBURG)

1.

REPORTABLE: No

2.

OF INTEREST TO OTHER JUDGES: No

3.

REVISED

10

April 2024

Case

No. A2023-049792

In the matter between: DRIVE
 CONTROL CORPORATION (PTY) LTD
 Appellant
 and
 NATIONAL
 HEALTH LABORATORY SERVICE
 Respondent
CORAM: ADAMS J, WILSON J
AND WANLESS J

JUDGMENT

WILSON J (with whom ADAMS J and WANLESS J agree):

1 The appellant, Drive Control, took cession of a right to receive payment under a contract between the respondent, the NHLS, and a company known as Blue Future Internet and Surveillance CC (“Blue Future”). Blue Future won a tender to supply computers and information technology services to the NHLS. Finding itself unable to purchase the inventory necessary to perform its obligations under its contract with the NHLS, Blue Future ceded to Drive Control its right to be paid for the goods and services it was bound to supply under the contract. The cession was to operate as security for the supply of the inventory Blue Future needed to perform on its obligations to the NHLS.

2 Despite securing a written undertaking to honour that cession from one of the NHLS’ employees, a Mr. Motsepe, Drive Control

was never paid. Instead, the NHLS continued to pay Blue Future. Aggrieved, Drive Control sued the NHLS in the court below for the

payments it says were due under the cession. Those payments amounted to just over R33.75 million.

3 The court below absolved the NHLS from the instance at the end of Drive Control’s case. The court concluded that Drive Control

had failed to lead evidence upon which a reasonable court could give judgment for it. There was accordingly no need to put the NHLS on its defence. The primary bases on which the court below reached that conclusion were that the contract entered into between Blue Future and the NHLS stipulated that Blue Future would not cede any of its rights under the contract without the NHLS’ prior written consent, and that the NHLS’ prior written consent to the cession was never secured.

4 It was common cause before the court below that Blue Future ceded its rights to Drive Control on 22 August 2016. It did so without having first obtained the NHLS’ consent – whether in writing or at all. It was not until 24 August 2016 that Mr. Motsepe, the NHLS’ Head of Supply Chain Management, signed a document that purported to acknowledge the cession on the NHLS’

behalf, and that contained an undertaking that the NHLS would pay Drive Control pursuant to it.

5 The gist of the decision of the court below was that Drive Control could only succeed in the face of Blue Future's failure

to secure the NHLS' prior written consent to the cession of its right to payment if it could be shown that the NHLS had waived the prohibition on cessions without its prior consent, or if the contract had been varied to delete that prohibition. The court below found that the only person authorised to vary the contract or to waive the NHLS' rights was the NHLS' Chief Executive, Ms. Mogale, who had signed the contract on NHLS' behalf, and who had been authorised by the NHLS' board to implement the board's resolution to award the contract to Blue Future. Since no evidence had been led that Ms. Mogale had agreed to vary the contract, or had waived the prohibition on the cession of Blue Future's rights without the NHLS' consent, absolution had to be granted.

6 The court below also dealt with Drive Control's argument that the NHLS was estopped from denying Mr. Motsepe's authority

to consent to be bound by the cession on the NHLS' behalf. The court below found that Drive Control had not led evidence upon which it could conclude that Drive Control's reliance on Mr. Motsepe's authority was reasonable. Drive Control's own evidence was that it had done nothing to acquaint itself with the terms of the contract out of which Blue Future's rights were being ceded, and had made no more than the most cursory inquiries about whether Mr. Motsepe was employed at the NHLS, and what his position was. In these circumstances, Drive Control could not reasonably rely on Mr. Motsepe's ostensible authority.

7 The court below refused Drive Control's application for leave to appeal, but the appeal is now before us with the Supreme Court of Appeal's leave.

8 On appeal, Drive Control renewed its contentions that Mr. Motsepe had actual or ostensible authority to acknowledge the cession on the NHLS' behalf, and to bind the NHLS to it. Mr. Sawma, who appeared together with Mr. Roeloffze for Drive Control before us, also advanced the argument that the written acknowledgement of the cession Mr. Motsepe signed created a basis upon which NHLS is indebted to Drive Control that is separate and independent from the underlying contract out of which Blue Future ceded its rights.

9 The argument, as I understood it, was that the contractual prohibition on Blue Future ceding its rights without the NHLS' prior consent was only operative between Blue Future and the NHLS. Assuming he had the authority to do so (whether actual or ostensible), Mr. Motsepe's acknowledgement of the cession and his agreement on the NHLS' behalf to make payment under it was enough, in itself, to ground Drive Control's claim. It is, in other words, not necessary to consider whether the cession was consistent with the prohibition on cessions without the NHLS' prior written agreement in the underlying contract, because that prohibition is not binding on Drive Control. It accordingly mattered not whether Mr. Motsepe's conduct amounted to a waiver of the NHLS' rights under contract. All that mattered was whether Mr. Motsepe had actual

authority to acknowledge the cession or whether, if he did not, the NHLS was estopped from denying his authority.

10 In my view, the court below reached the correct conclusion. I also find it difficult to fault much of the reasoning the court adopted. That said, the approach I prefer to take to this matter is slightly different.

11 Mr. Berger, who appeared together with Mr. Manchu for the NHLS, argued that Blue Future's cession of its right to payment was void from the outset. It follows, Mr. Berger submitted, that Mr. Motsepe's acknowledgement of the cession and his agreement to be bound by its terms was likewise void, because there was in truth no cession to acknowledge. It therefore makes no difference what Mr. Motsepe's true authority was, or whether he waived any of the NHLS' rights under the contract, or whether the acknowledgement of the cession could have amounted to a variation of the contract's terms. The mere fact that the cession was invalid from the outset means that the rights of which Drive Control says it took cession never actually passed to it.

12 It seems to me that Mr. Berger's argument must be correct. Its correctness follows, I think, from the decision of the Supreme Court of Appeal in *Born Free Investments 364 (Pty) Ltd v FirstRand Bank Limited* [2013] ZASCA 166 (27 November 2013) ("Born Free"). There, the unanimous court drew a distinction between two types of prohibition on cession. The first type is an agreement not to cede a pre-existing right – viz. a right that came into being separately and independently from the prohibition on cession itself. For example, if A loans B a sum of money to be repaid over 20 years, and A agrees in year 10 of the term of the loan not to cede his right to repayment, the prohibition on cession is separate and distinct from the underlying right to repayment.

13 The second type of prohibition is one created at the same time and in the same agreement as the underlying right. Such a prohibition exists, for example, if A buys goods and services from B and stipulates in the contract of sale that none of B's rights under the contract may be ceded to anyone else. In that event, the prohibition against cession is fused into the rights and obligations between the parties at their inception. The prohibition against cession is part of the character of the rights themselves.

14 In *Born Free*, the Supreme Court of Appeal held that the second type of prohibition applies not just between the parties to the contract, but against third parties too. The theory animating the court's approach was that where a right is created as non-transferable – in other words, where it is designed to adhere to one of the parties to a contract and to no-one else – a cedent who attempts to cede such a right tries to pass to the cessionary more rights than the cedent really has (see *Born Free*, paragraph 14). That, of course, cannot be done.

15 In my view, the prohibition on cession contained in the contract between Blue Future and the NHLS was of this, second, type. The prohibition on cession was fused into the right to payment the contract itself created. In other words, the payments due under the contract were not objects of commerce in themselves. They were merely undertakings to pay Blue Future on the terms set out in the contract.

16 It follows from all of this that the cession upon which Drive Control relies was never a cession at all, because the right to treat the payments due under the contract as objects of commerce capable of transfer to third parties was not a right that Blue Future really had. Blue Future did not have that right because the NHLS' prior consent was a condition for its very creation, and the NHLS' prior consent was never given. There was, therefore, nothing for Mr. Motsepe to acknowledge when he signed the document Drive Control forwarded to him on 24 August 2016, and no cession to which Mr. Motsepe could have bound the NHLS.

17 It is accordingly impossible to accept Mr. Sawma's argument that the acknowledgement of cession Mr. Motsepe signed created a separate and free-standing basis on which Drive Control's claim against the NHLS can be pressed. Besides the fact that a cession generally has no life of its own, as it is always accessory to the rights ceded, the cession in this case was invalid because it purported to pass on a right that did not really exist.

18 Mr. Sawma's argument derived much of its force from the judgment of this court in *Hilsage Investments v National Exposition* 1974 (3) SA 346 (W) ("Hilsage") and the Appellate Division's decision on appeal in that matter: *Hillock v Hilsage Investments* 1975

(1) SA 508 (A) ("Hillock"). In that case, both this court (see *Hilsage* at pages 354F to 355C) and the Appellate Division (see *Hillock* at page 515A-C) appear to express themselves against the proposition that a prohibition on assignment in a contract of lease could apply to third parties. The facts of the matter were that one company, Hilsage, had let premises to another company, Hirba. Hirba later assigned its rights and obligations as lessee to a third company, National Exposition. Hilsage then sued National Exposition for rent. National Exposition denied liability, partly because the lease between Hilsage and Hirba contained a prohibition on assignment.

19 Both this court and the Appellate Division nonetheless held National Exposition liable for the rent. But neither court actually concluded that the prohibition on assignment in the lease between Hilsage and Hirba could not have rendered the assignment invalid. Both courts instead concluded that, whatever the effect of the prohibition on assignment, National Exposition had in any event later concluded a new contract, directly with Hilsage, in terms of which National Exposition assumed all of Hirba's rights and obligations under Hirba's lease with Hilsage. That superseding contract was the basis on which both courts held National Exposition liable (see *Hilsage*, at page 355H and *Hillock*, at page 516A-D).

20 This case is different, for two reasons. The first reason is that we are bound by the decision in *Born Free*, which makes clear that a prohibition on cession of the type agreed to between Blue Future and the NHLS does in fact void any cession

purportedly executed in breach of its terms. The second reason is that Mr. Motsepe's apparent acknowledgement of the cession

executed between Blue Future and Drive control did not supersede the original agreement between Blue Future and the NHLS. It pre-supposed

the validity of the cession and had no effect independently of it.

21 During argument, Mr. Sawma also adverted to the injustice of a third party being bound by a prohibition on cession in a contract "of which he knows nothing". But the answer to this is simple. The third party is only bound where the prohibition on cession is created at the same time as, and is fused into, the rights purportedly ceded. A cessionary wishing to protect itself against a prohibition on cession need do no more than examine the contract under which the cedent's rights were created. If that contract creates a prohibition on cession, then the cessionary is bound by it. If it does not, the cessionary is not bound by it. If the court below was correct when it found that Drive Control did nothing to acquaint itself with Blue Future's contract with the NHLS, then Drive Control has only itself to blame.

22 In sum, then, at the close of Drive Control's case there was no evidence on which a reasonable court could give judgment for Drive Control. The cession on which Drive Control relied was void from the outset. Mr. Motsepe's acknowledgement of the cession – even if it was made with NHLS' actual or ostensible authority, and whatever the legal consequences that may otherwise have attached to it – could have done nothing to change that.

23 The appeal is dismissed with costs, including the costs of two counsel.

S D J WILSON

Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 10 April 2024.

HEARD ON: 28 February 2024

DECIDED ON: 10 April 2024

For the Appellant:

A Sawma SC

AL Roeloffze

Instructed by Hooker Attorneys

For the Respondent: D Berger SC

T Manchu

Instructed by Lawtons Inc

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