

SOUTH AFRICA / JUDGMENT

Incledon (Pty) Limited v Sydwell Shabangu Projects CC t/a SSP and Another (2016/8804) [2019] ZAGPJHC 430 (25 October 2019)

[2019] ZAGPJHC 430

COURT

South Gauteng High Court, Johannesburg

BEFORE

L R Adams

CASE / FILE NUMBER

2016/8804

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 2016/8804

DATE:

25th
October
2019
In

the matter between:

INCLEDON
(PTY)
LIMITED Plaintiff
and
SYDWELL
SHABANGU PROJECTS CC t/a
SSP First
Defendant
SHABANGU,
SYDWELL
SIMON Second
Defendant

Coram:	Adams J Heard on: 17 and 18 October 2019 Judgment delivered on: 25 October 2019
Summary:	Contract – goods sold and delivered – cession and assignment of rights and obligations pursuant to a sale of business agreement Cession – Deed of suretyship – No prior written notice given – Cession not invalid for want of prior written notice – claim succeeds ORDER Judgment is granted in favour of the plaintiff against the first and second defendants, jointly and severally, the one paying the other to be
absolved, for:	(1) Payment of the sum of R739 062.72. (2) Payment of interest on R739 062.72 at the rate of 9% per annum from the 30th March 2016 to date of payment. (3) Cost of suit on the scale as between attorney and client.

JUDGMENT

Adams J:

[1]. In this action the plaintiff claims payment from the first and second defendants of the sum of R739 062.72, together with mora interest thereon and cost of suit. The claim against the first defendant is for the balance of the purchase price relating to goods

sold and delivered by the plaintiff to the first defendant at the latter's special instance and request. The claim against the second defendant is based on a written suretyship by the second defendant in favour of the plaintiff in terms of which written

suretyship the second defendant allegedly stood surety for the first defendant's liability and indebtedness to the plaintiff.

[2]. The defendants dispute liability for the amount claimed on the basis that it was not the plaintiff which sold and delivered to the first defendant the goods in question, but a related company, namely DPI Plastics (Pty) Limited ('DPI Plastics'). The only issue which I was required

to adjudicate relates to the identity of the seller of the goods in the sale agreement or sale agreements in terms of which goods were sold and delivered to the first defendant during the period June to August 2015. The defendants also dispute that the second defendant was liable to the plaintiff in terms of the suretyship. Any liability he (the second defendant) incurred in terms of the suretyship, so the second defendant contends, was to DPI Plastics (Pty) Limited.

[3]. Before me Mr Baer appeared on behalf of the plaintiff and Mr Naidoo for the first and second defendants.

[4]. The very crisp issue which I need to decide is a factual one and, as I indicated above, relates to the identity of the seller in the sale agreements in question. The facts in this matter are by and large common cause.

[5]. Before the 31st of March 2015 the business trading as Incledon was a division of DPI Plastics and it was the distribution arm of the said company and its related group of companies. On the said date DPI Plastics sold that part of its business as a going concern to IPS and Distribution (Pty) Limited ('IPS') in terms of a written 'Sale of Business Agreement'. On the 28th of September 2015 IPS officially changed its company name to that of the plaintiff, that being Incledon (Pty) Limited. In terms of the Sale of Business Agreement, DPI Plastics had expressly sold to the plaintiff any and all of its business contracts, which are defined in the agreement as 'all agreements in force on the 31st of March 2015, the relevant clause in the agreement providing as follows:

'The seller hereby ... assigns its rights and obligations under the contracts to the purchaser [the plaintiff] with effect from [31 March 2015], which will take over and complete all contracts for its own account. The purchaser hereby irrevocably and unconditionally accepts such assignment'.

[6]. It is the case of the plaintiff that one such contract which was transferred to it (the plaintiff) was an agreement between DPI Plastics and the first defendant styled 'Sale Agreement with a Deed of Suretyship incorporating Cession of Claims' dated the 30th of October 2014. This agreement provided for the terms and conditions on which DPI Plastics would sell and supply to the first defendant goods and it contained an agreement that credit would be extended to the first defendant for a period of thirty days. In essence this agreement regulated the relationship between DPI Plastics and the first defendant relative to the sale and delivery of goods by DPI Plastics to the first defendant. The agreement also incorporated a written suretyship by the second defendant in favour of the plaintiff. The second defendant bound himself as surety and co-principal debtor in solidum with the first defendant in favour of DPI Plastics for the due payment of all amounts which may at any time be payable by the first

defendant to DPI Plastics from any cause whatsoever. The suretyship clauses also provided as follows:

'This suretyship is a continuing suretyship and shall remain in full force and effect notwithstanding any fluctuation in or temporary extinction of the indebtedness of the buyer [the first defendant] to the supplier [DPI Plastics]. It may not be withdrawn, revoked or cancelled by the buyer and / or the Surety without the prior written consent of [DPI Plastics]'.

[7]. The agreement also contained a cession clause, which provided as follows:

‘Should [DPI Plastics] cede its claim against the [first defendant] and the [second defendant] to any third party (‘the Cessionary”),

then the above Cession of Claims and Deed of Suretyship shall be deemed to have been given by the [first defendant] and the [second

defendant] to such Cessionary as continuing covering security for the due payment of every sum of money which may at the time of such Cession or at any time thereafter be or become owing by the [first defendant] and the [second defendant] to the Cessionary and such Cessionary shall be entitled to exercise all rights in terms of the Cession of Claims and Deed of Suretyship as if the Cessionary were the supplier thereunder.’

[8]. In light of the foregoing clauses, I am of the view that subsequent to the 31st of March 2015, there was in existence between the plaintiff, as ‘the supplier’, the first defendant, as the buyer, and the second defendant, as the surety, this written ‘Sale Agreement with a Deed of Suretyship incorporating Cession of Claims’. This position had arisen by virtue of the Sale of Business Agreement concluded between DPI Plastics and the plaintiff on the 31st of March 2015. This latter agreement expressly provided thus and the agreement of the 30th of October 2014 between DPI Plastics and the defendants expressly contemplated a transfer of rights and obligations to a Cessionary,

which is exactly what occurred pursuant to the Sale of Business Agreement.

[9]. The plaintiff led evidence that the amount claimed is the balance of the purchase price for goods sold and delivered by the plaintiff to the first defendant during the period from June to August 2015. By then, so the uncontested and unchallenged evidence on behalf of the plaintiff went, the plaintiff had already purchased from DPI Plastics the business trading as Incledon. The rationale behind the deal was also explained, and the unequivocal and unchallenged evidence was that it was the plaintiff, and not DPI Plastics, which was the seller of the goods, the latter company having disposed of the distribution business. This was so despite the fact the invoices were still issued in the name of DPI Plastics and the fact that in the first letter of demand by the plaintiff’s attorneys it was indicated that the monies are owed to DPI Plastics on whose behalf the said attorneys were demanding payment of the outstanding balance of the purchase price. This, so it was contended on behalf of the defendants, confirmed their view that it was in fact DPI Plastics was the seller of the goods and not the plaintiff. There is no merit in this contention, which completely disregards the evidence under oath by the plaintiff’s witness that the goods were in fact sold by the plaintiff. The contention also loses sight of the common cause fact that the business was in fact sold to the plaintiff on the 31st of March 2015. Why would DPI Plastics continue selling products to buyers after they had sold the distribution business to another entity? I ask this question rhetorically.

[10]. Even more instructive is the fact that the second defendant, when giving evidence during the trial, did not seriously contest or dispute the claim by the plaintiff that the goods were sold by it (the plaintiff) to the first defendant. All he said was that in his mind and as far as he was concerned the first defendant was buying the goods from DPI Plastics. He was constrained to concede that as far as DPI Plastics and the plaintiff were concerned, the seller in the sale agreements during the period June to August 2015 was the plaintiff. It probably did not matter to the defendants who the seller of the goods was. They probably would have ended up paying to the plaintiff the balance owing but for the fact that the first defendant was at the relevant time experiencing cash flow difficulties. This much was again conceded by the second defendant during his evidence at the trial. This then means that, on first principles, the first defendant liable to the plaintiff for the amount claimed.

[11]. In any event, the high watermark of the first defendant's opposition to the plaintiff's claim was a contention that it (the first defendant) was not advised that the contract between it and DPI Plastics had been assigned to the plaintiff. This consideration is irrelevant for the above reasons, notably the fact that the uncontested evidence was that the plaintiff was the seller. This defence is also raised with reference to the Suretyship. In that regard, I was referred to *Lynn & Main Incorporated v Brits Community Sandworks CC* [2008] ZASCA 100; 2009 (1) SA 308 (SCA) as authority in support of the contention that the cession of the contractual right by DPI Plastics to the plaintiff was invalid unless and until the defendants have been given notice of the cession. This contention is misguided if for no other reason than the fact that that matter is clearly distinguishable from this case on the basis that in *Lynn & Main* the agreement provided that the creditor was entitled to cede its rights 'on notice to the debtor'. In *casu* the agreement did not contain such a clause.

[12]. I am, in any event, of the view that the SCA judgment in fact is authority for the contrary proposition that, even with the clause requiring notice of the cession to be given to the debtor, a cession becomes effective and valid even before notice is dispatched to the debtor.

[13]. In that matter the respondent and a close corporation had concluded a suretyship agreement under which each bound itself as surety for debts owed by the other to a commercial bank. In terms of clause 11 of the deed of suretyship the bank could 'at any time, on written notice to us, cede its rights' under the suretyship to a third party. The bank duly ceded its debts, including its rights under the suretyship, to the appellant, but did so without notice to the respondent or the close corporation. The close corporation was wound up and the appellant, as cessionary, instituted action against the respondent, as surety, on the suretyship for the indebtedness of the close corporation. In its plea the respondent denied that the appellant had *locus standi* to bring the action on the basis that, in terms of clause 11 of the deed of suretyship, the respondent had not been notified in writing of the cession and the rights under the suretyship had therefore not been properly ceded. The High Court upheld the respondent's plea, finding that written notice was a prerequisite for a valid cession, and dismissed the appellant's action. On appeal to the Supreme Court of Appeal, the SCA held that the clause did not make written notice a prerequisite for a valid cession, but merely stipulated that the respondent could 'at any time

cede' its rights and obligations under the suretyship to a third party, a right that it had always had. Importantly, it was also held that at common law a cession of rights was ineffective as against a debtor until such time as he had knowledge of it. There was, however, no common-law rule that the acquisition of rights under a suretyship agreement following a cession of the principal debt was ineffective as against the surety until such time as the surety had knowledge of the cession. It followed that the court a quo was wrong when it stated that the cession would become effective only upon the giving of notice to the surety. The SCA therefore held that the validity of the cession did not depend on when or whether or not written notice of the cession was given to the surety.

[14]. I interpret Lynn & Main as authority for the proposition that in casu the cession is effective and valid as against the defendants especially in view of the fact that the defendants do not allege that they have discharged their liability to DPI Plastics, as the cedent. In any event, as was held by Mpati JA in Lynn & Marais, even if notice of the cession is a requirement for its validity and efficacy, then the issue and service of the summons constitutes such notice.

[15]. In my view, and having regard to the facts in this matter and the above considerations, the plaintiff has made out a case against the defendants for the relief claimed against them.

[16]. Plaintiff's claim should therefore succeed.

Costs

[17]. The plaintiff has been successful with its claim against the defendants. This means that, applying the general rule, it is entitled to a cost order.

[18]. I can see no reason to deviate from the general rule and cost should therefore be awarded in favour of the plaintiff. In that regard, the contract of application between the parties provide that, in the event of the plaintiff having to take legal action in order to enforce its rights against the defendants, it shall be entitled to cost on the scale as between attorney and client. I intend awarding such costs.

Order

In the circumstances, I grant judgment in favour of the plaintiff against the first and second defendants, jointly and severally, the one paying the other to be absolved, for:

L R ADAMS

Judge of the High Court

Gauteng Local Division, Johannesburg

HEARD ON: 17th and 18th October 2019 JUDGMENT DATE: 25th October 2019 FOR THE
PLAINTIFF: Adv H D Baer INSTRUCTED BY: Van Veijeren Incorporated FOR THE FIRST AND
SECOND DEFENDANTS: Adv K Naidoo INSTRUCTED BY: C De Villiers Attorneys

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