

SOUTH AFRICA / JUDGMENT

Mercuria Energy Trading South Africa (Pty) Ltd v TSH Coal (Pty) Ltd (43104/2016) [2018] ZAGPPHC 180 (4 April 2018) [2018] ZAGPPHC 180

COURT

North Gauteng High Court, Pretoria

BEFORE

R S Willis

CASE / FILE NUMBER

43104/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 43104/2016

In

the matter between:

MERCURIA
ENERGY TRADING SOUTH
AFRICA
(PTY) LTD
Applicant
and
TSH
COAL (PTY) LTD
Respondent

JUDGMENT

WILLIS AJ:

1. The applicant (“Mercuria”) seeks an order for specific performance in relation to a written agreement to which it was not a party, directing the respondent (“TSH”) to deliver outstanding coal product to it. The primary issue concerns the validity of an averred cession upon which Mercuria relies.
2. By way of background, during February 2016 a company styled Duhentra (Pty) Limited (“Duhentra”), which is not a party to this application and TSH, concluded a written “Coal Trade Confirmation” agreement (“the Coal Trade Confirmation”) for the purchase by Duhentra of 33 200 metric tons of coal product of an agreed specification from TSH. The coal product was to be delivered by way of four train loads of 8 300 tonnes of product over a four consecutive week period commencing in the first week of March 2016.
3. On or about 23 May 2016, approximately two months after conclusion of the Coal Trade Confirmation, and after the first delivery had already been initiated[1], Mercuria avers that it concluded with Duhentra a partly oral, partly written agreement of cession (“the Duhentra/Mercuria

agreement”). The written part of the Duhentra/Mercuria agreement relied on is on a Duhentra letterhead to which was apparently attached a copy of the Coal Trade Confirmation. The letter is addressed by one Mr Bonthuys of Duhentra to one Mr Z Mastilo of Mercuria. It reads:

“RE: CEDE OF RIGHTS & OBLIGATIONS OF TSH COAL (PTY) LTD

I refer to the above mentioned, our discussion and attached signed trade confirmation between Duhentra (PTY) Ltd and TSH Coal (PTY) Ltd.

I, Hendrik Wilhelmus Bonthuys ID 6311085060080 Director of Duhentra (PTY) Ltd herein cede to Mercuria Energy Trading SA (PTY) Ltd represented by Mr Z Mastilo, all my rights and obligations in regards to the attached signed trade confirmation.

Should you require any further information please contact me.

Kind Regards

HW Bonthuys

Director” (SIC)

No oral terms were pleaded

4. TSH refuses to deliver the remaining three loads of coal. Mercuria contends that TSH is in breach of the agreement and seeks an order for specific performance.

5. TSH complains that there is no proper cession, that it cannot be expected to deliver coal to Mercuria, under circumstances where Duhentra claims to have divested itself of the obligation to make payment therefor, where TSH has not acceded to the risk that Mercuria may not pay. To this end TSH raises four defences. Firstly TSH challenges the applicant's locus standi arguing that ex facie the Duhentra/Mercuria agreement there was no cession of rights and/or delegation of obligations by Duhentra to the applicant because the signatory one Bonthuys, at best ceded his own rights and not those of Duhentra. Secondly TSH argues that the Duhentra/Mercuria

agreement seeks to transfer both rights and obligations to the applicant and this constitutes a "combined cession and delegation", which required the consent of TSH which TSH has never been asked for let alone given. Thirdly TSH contends that Duhentra's Cession transaction shows an election not to be bound by the Coal Trade Confirmation amounting to a repudiation which TSH accepted and has cancelled the Coal Trade Confirmation. Fourthly TSH relies on a foreseeable material dispute of fact on which ground alone it contends the application should be dismissed.

6. Mercuria's case is that properly construed, the Duhentra/Mercuria agreement is a cession of Duhentra's rights under the Coal Trade Confirmation to Mercuria as well as a concomitant undertaking by Mercuria to make payment (or perform the obligations of Duhentra) under the Coal Trade Confirmation. Mercuria believes that pursuant to the Duhentra/Mercuria agreement, TSH is in precisely the same position it was when it concluded the Coal Trade Confirmation if not better off because Duhentra is a very small trader compared to Mercuria. It was argued for Mercuria that: the Duhentra/Mercuria agreement is a "partial substitution" not requiring any consent from TSH; Duhentra has continued to operate as an agent for Mercuria in the Duhentra/Mercuria agreement and both Mercuria and Duhentra have tendered their continued performance of the obligations in terms of the Coal Trade Confirmation; and TSH has never communicated any acceptance of the alleged repudiation.
7. The first question to my mind is whether there was a cession of rights by Duhentra to Mercuria. Cession involves the substitution of a new creditor (the cessionary) for the original creditor (the cedent), the debtor remaining the same.[2] If the effect of the transaction is not to divest the cedent of his right to sue the debtor it is not a cession. See Purchase
- v. De Huyzemark Alberton (Pty) Ltd 1994 (1) SA 281 (W) 285 A 286 I.
8. Generally there are no formalities required for a cession which may validly be made orally or tacitly even if the right ceded formed part of a written contract. Of course parties can agree that a cession cannot take place without the debtors consent or at all or only on specific terms such as in writing, or the debtor must be informed in a certain manner etc. The Coal Trade Confirmation does not contain a prohibition or any such conditions.

9. A right may not be ceded without the consent of the debtor if the performance the debtor is to render to the cessionary would differ in character from the performance to the current creditor i.e. the cession must neither weaken the debtors position nor render it more onerous. See *Van Zyl v. Credit Corporation of SA* 1960 (4) SA 582 (A) 588; *FW Knowles (Pty) Ltd v Cash-In (Pty) Ltd* 1986 (4) SA 641 (C) 651; *Scott Cession* par 10.3.1 fn 26.
10. Although I did not hear the respondent or its counsel to specifically rely on any element of a *delectus personae*, TSH explains in the papers that it vetted Duhentra in respect of payment when considering its risks entering into the Coal Trade Confirmation while it did not have the same opportunity in respect of Mercuria, and the purchase is not cash, the obligation for payment being within five days of delivery i.e. TSH complains it is expected to surrender possession of the goods before receiving payment. In other words TSH says that the identity and creditworthiness of the buyer is of importance.
11. As I understand the law on *delectus personae* it involves an objective test and any elements would have to be identifiable on an interpretation of the Coal Trade Confirmation.

The approach is the following. The emphasis must be on TSH's obligation, the complement of the right which is the subject of the cession, and not on any obligation Duhentra may have incurred towards TSH arising from the Coal Trade Confirmation. See *Densam (Pty) Ltd v. Cywilnat (Pty) Ltd* [1990] ZASCA 120; 1991 (1) SA 100 (A).

12. In considering the Coal Trade Confirmation itself I considered binding the words of Wallis JA (Farlam JA, Van Heerden JA, Cachalia JA and Leach JA concurring) in *Natal Joint Municipal Pension Fund v. Endumeni Municipality* 2012 (4) Sa 593 (SCA) at 603: [18] Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School*. The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and

the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusiness-like results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible

or business like for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language of the provision itself’, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document. [19] All this is consistent with the ‘emerging trend in statutory construction’. It clearly adopts as the proper approach to the interpretation of documents the second of the two possible approaches mentioned by Schreiner JA in *Jaga v Dönges NO and Another*; *Bhana v Dönges NO and Another*, namely that from the outset one considers the context and the language together, with neither predominating over the other. This is the approach that courts in South Africa should now follow, without the need to cite authorities from an earlier era that are not necessarily consistent and frequently reflect an approach to interpretation that is no longer appropriate. The path that Schreiner JA pointed to is now received wisdom elsewhere. Thus Sir Anthony Mason CJ said: ‘Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasise the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise. ‘More recently, Lord Clarke SCJ said ‘the exercise of construction is essentially one unitary exercise.’” (Footnotes omitted)

13. Notwithstanding the explanation given by TSH that the respondent did not do business with just anyone, identity and creditworthiness were material in their choice of business partner and they had satisfied themselves in regard to Duhentra but not Mercuria, an objective assessment of the Coal Trade Confirmation even in its context does not to my mind lend itself to an interpretation that identity is decisive. TSH’s position as a debtor is not weakened or made more onerous. Mercuria’s obligation to make payment does not come into the picture and so identity of buyer cannot be decisive without more.
14. Considering the Duhentra/Mercuria agreement and applying the words of Wallis JA Wallis JA in *Natal Joint Municipal Pension Fund v. Endumeni Municipality* leads me to conclude that the argument that Bonthuys acted in his personal capacity and that Mercuria has no locus standi is without merit. Of course Bonthuys had no rights to cede, only Duhentra did. That’s why he did so on Duhentra’s

letterhead and with reference to his position as a director thereof and to the Coal Trade Confirmation.

15. Counsel for Mercuria sought to bring its case within Brook
- v. Jones 1964 (1) SA 765 (N) at 766 and the principle as applied by James J where he found no *delectus personae*. I have already found *delectus personae* not applicable, but did find support for my findings herein.

16. Accordingly I find that there was no prohibition of or conditions for a cession, contained in the Coal Trade Confirmation.
17. To my mind the issue to be considered, is what is to be made of the purported delegation of obligations by Bonthuys representing Mercuria, in his written document intended to give effect to what had been agreed with Mercuria. Does it amount to a so called combined cession and delegation? Is it an assignment?
18. Delegation is a form of novation where by agreement between all concerned, a third party substitutes, as debtor, the original debtor, who is then discharged.
19. A transaction comprising both a cession and delegation requires the consent of all three different parties. As Christie puts it: "Since the lesser is included in the greater it follows that the whole process of substitution cannot take place without the consent of the other party to the contract." [3] Or as was stated by Corbett AJA (as he then was) in *Froman*
- v. *Robbertson* 1971 (1) SA 115 (A) at 122 E: "There is no doubt that, generally speaking, a contractual obligation cannot effectively be transferred from the debtor to a third person by agreement unless the creditor consents thereto and agrees to accept the third person as his debtor in substitution for the original debtor. (See *Voet*, 46.2.11 and 12; *Brenner v. Hart*, 1913 TPD 607; *Van Achterberg*
- v. *Walters* 1950 (3) SA 734 (T) at 745). Such a transfer, therefore, involves the concurrence of the three parties concerned and is properly termed a 'delegation', which is a species of novation (see *Brenner v. Hart*, supra). Although the term 'cession' is sometimes used with reference to a transfer of obligations, particularly in cases where it is sought to substitute some third person for a party under a contract containing reciprocal rights and obligations, this is strictly a misnomer in that 'ordinarily rights can be ceded but obligations cannot' (per Davis, AJA in *Hersch v. Nel* 1948 (3) SA 686 (AD) at 698; see also *Colyvas v. Standard Bank* 1926 AD 56 at 58; *Rolfs, Nebel and Co v. Zweigenhaft* 1903 TS 185 at 195). It has further been held that even where the creditor has agreed to accept discharge of the debt by a third person, this does not constitute a proper delegation unless it is clear that, in so agreeing, the parties intended that the obligation of the original debtor be discharged and the obligation of the third person be substituted in its place."
20. Regarding assignment: In *Securicor (SA) (Pty) Ltd v. Lotter* 2005 (5) SA 540 I the Full Court held at 547: "The word 'assignment' in our law is usually used to denote a transfer of both rights and obligations. Christi *The Law of Contract in South Africa*, in my view, happily describes it as 'a combined cession and delegation': 'stepping into another's shoes involves acquiring his rights, which can be done by cession without the debtor's consent, and undertaking his obligations, it can be done by delegation with the creditor's consent, since the lesser is included in the greater it follows that the whole process of substitution cannot take place without the consent of the other party to the contract.'" And as said by Smalberger JA said in *Simon v. Air Operations of Europe AB* [1998] ZASCA 79; 1999 (1) SA 217 (A) at 228 I: "The word 'assignment' in our law is generally used to denote a transfer of both rights and

obligations, but its precise meaning in any given case may depend upon the context in which it is used.”.

21. Applicant’s counsel contended for what Christie calls a partial substitution: “A partial substitution may take place without the other party’s consent where there is no *delectus personae* and a third party takes cession of one party’s rights and undertakes its obligations but (and it is the but that makes the other party’s consent unnecessary) the cedent remains responsible for the proper performance of those obligations.”[4]
22. At the very least Duhentra intended to conclude a valid cession of its rights to Mercuria for the remaining coal deliveries. This much is clear *ex facie* the Duhentra/Mercuria agreement as well as from Mercuria making application to court relying on the cession and not Duhentra.
23. However one describes the Duhentra/Mercuria agreement, it cannot include a delegation, as a delegation required the consent of TSH. If there was never a delegation then there was never an assignment either.
24. The intention expressed by Bonthuys to “cede Mercuria’s obligations” too, or as expressed in counsel for the respondent’s heads of argument namely to facilitate an assignment,[5] cannot render the agreement both a cession and delegation or a so called combined cession and delegation. If Duhentra sought to divest itself of its obligations too, it could not and has not achieved that, and was not able to do so without the consent of TSH. Duhentra remains obligated to TSH, even if Mercuria claims itself to be liable to TSH. If anything Mercuria is alleging a liability to Duhentra. It matters not, the rights of TSH vis a vis Duhentra are intact. Any demand by Mercuria that it has been delegated Duhentra’s obligations is something of a *plus petitio*.
25. I can see no cogent reason, and none was argued either, why the purported delegation vitiates or voids the cession. The case

for repudiation, contrived in my view, is in any event against Duhentra and not Mercuria, and of no assistance to TSH in the result

of my findings. I find no dispute of fact that implicates the rule in *Plascon-Evans Paints Ltd v. Van Riebeeck Paints (Pty) Ltd*. [6]

26. In the result I find the cession valid and enforced and I grant the following order

26.1. It is declared that Duhentra (Pty) Ltd reg no: 2012/061343/07 ceded its rights in terms of the Coal Trade Confirmation dated 26 February 2016, to the applicant.

26.2. The respondent is directed to comply with the Coal Trade Confirmation dated 26 February 2016 and to deliver to the applicant 24 900

metric tonnes of 0-50mm, 5500k.cal (RB3) Coal Product by way of three trains of 8300 tonnes over a three week period to Woestallen Siding No: 742902, with the first delivery to take place subject to the terms of the Coal Trade Confirmation within 10 days of the granting of this order.

26.3. The respondent is to pay the costs of this application.

R S WILLIS

ACTING JUDGE OF THE HIGH COURT

Date of Hearing: 19/10/2017

Judgment

Delivered: 4th April 2018

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[1] The first delivery of 8300 metric tonnes took place on 24 March 2016 and the purchase price for that was paid by Duhentra.

[2] GB Bradfield, "Christi's Law of Contract in South Africa", 7th Edition pg 33

[3] R H Christie: The Law of Contract, Fourth Edition, pg. 547.

[4] Applicant's heads of argument, para 16.

[5] Pg 7 para 22

[6]

[1984] ZASCA 51; 1984

(3) SA 623 A at 634 E – 635 C

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Prepared on 11 October 2026 · Esheria