

SOUTH AFRICA / JUDGMENT

Shames N.O and Another v Ethekekwini Municipality (7437/2016) [2024]

ZAKZDHC 98 (6 December 2024)

[2024] ZAKZDHC 98

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Gwagwa

CASE / FILE NUMBER

7437/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

LOCAL DIVISION, DURBAN

Not

Reportable

Case

no: 7437/2016

In

the matter between:

KEVIN
DAVID SHAMES N.O
FIRST PLAINTIFF
GREGORY
MARC HAHN N.O
SECOND PLAINTIFF
and
ETHEKEKWINI
MUNICIPALITY
DEFENDANT
ORDER
The

following orders are
granted:

1
The relief set out in paragraphs 1, 2, 3 and 4 of the plaintiffs
particulars
of claim.

JUDGMENT

Gwagwa AJ:

Introduction

- [1] The plaintiffs, Kevin David Shames and Gregory Marc Hahn, in their capacity as trustees for the BC Specialized Opportunities Fund Trust ('the Trust'), bring this action in terms of which they seek an order directing the defendant, Ethekewini Municipality, to pay an amount of R14 480 397,50 plus interest and legal costs.

Relevant factual background

- [2] The genesis of this dispute lies in a written agreement, denoted as 'the cession agreement,' executed between the defendant and Voyager Property Management (PTY) LTD ('Voyager') in November 2010. Under this agreement, the defendant ceded its right to collect sectional title rates debts to Voyager for a consideration of R29 010 561, 56. Voyager subsequently ceded these rights to the Trust, a transaction duly communicated to the defendant. The Trust, in turn, remitted the agreed upon sum of R29, 010,561.56 to the defendant. However, in April 2014, the defendant communicated to the plaintiffs its contention that the cession agreement was invalid. The defendant asserted that the underlying debts were not legally transferable without the consent of the debtors, thus rendering the agreement null and void and, therefore, considered itself no longer bound by the agreement.
- [3] The defendant then remitted R14 480 397,50 to the plaintiffs, a sum representing the initial payment received from Voyager, less the sums collected by the plaintiffs under the cession agreement. The plaintiffs formally accepted the defendant's repudiation of the agreement in May 2014 and are now seeking specific remedies; mainly: the plaintiffs seek interest calculated at the prescribed rate of 15.5% per annum on the sum of R14 480 397,50 accruing from 29 November 2010 to 30 December 2014; and legal costs amounting to R6 752 982, which were incurred in the process of collecting R14 530 164,02.
- [4] The defendant's primary defence hinges on the assertion that the cession agreement was invalid from its inception due to a legal requirement for debtor consent. This purported invalidity, the defendant argued, negates any claim of repudiation on its part. Notably, however, the defendant failed to produce any evidence to substantiate this claim of invalidity.

Issue to be decided by the court

- [5] The issue turns on the validity of the cession agreement. In reaching a determination, I must address several key questions. First, the validity of the cession agreement must be determined. Should the cession agreement be deemed valid, the court must then evaluate whether the plaintiffs are entitled to claim the outstanding balance and accrued interest. Lastly, should the cession agreement be deemed invalid, the court must determine if the defendant has been unjustifiably enriched. I shall consider these issues in turn.

Case Law

- [6] According to van der Merwe et al 2002,[1] the following requirements must be met in order to effect valid cession:

'1 A right inhering to the cedent,

2 Agreement between the cedent and the cessionary to give and accept transfer of the right,

3 Compliance with any formalities set by the law.'

- [7] In the case of the First National Bank of SA Ltd v Lynn NO and Others[2], the court noted that a non-existent debt or right of action cannot be transferred as the subject of a cession. The court also stated that the parties can agree to cede a future or contingent right of action or debt to the cessionary.

- [8] In Engen Petroleum Ltd v Windshap Investments (Pty) Ltd and Others[3], the Supreme Court of Appeal (SCA) found that the cession agreement was an "out-and- out" agreement. This was because the agreement included "any and all reversionary rights" the cedent might have had and ruled that Engen owned the claims and would only re-cede them to Windsharp once the debt was paid.

- [9] The SCA in the case of National Sorghum Breweries Ltd v Corpcapital Bank Ltd[4] held that "as a general rule a creditor is free to cede its rights in whatever form it chooses. It does not need its debtor's

consent nor is it necessary for it to give notice to the debtor. But this power can be restricted by means of a contract to which the creditor is a party. In that case the creditor would be required to comply with the terms of the restriction when ceding its rights."

- [10] In Naidoo v Plomp and Another[5] the court held that "in the case of a *condictio sine causa*, money which has come into the hands or possession of another for no justifiable cause, that is to say, not by gift, payment discharging a debt, or in terms of a promise, or some other obligation or lawful ground for passing of the money to the recipient, may be recovered to the extent that the recipient has thereby been enriched at the expense of the person whose money it was."

Analysis

- [11] The facts that are common cause are that Voyager and the defendant entered into the cession agreement in November 2010. The agreement involved the defendant ceding certain historical rates debts to Voyager. Mr Justin Mason, former managing director of Voyager, testified that these were debts owed by bodies corporate that they had failed to pay to the municipality.
- [12] Voyager informed the defendant of its intention to cede these debts to the Trust, as stipulated in clause 17 of the cession agreement. The Trust, in turn, paid the full amount, R29 010 561,56, which Voyager was obligated to pay under the agreement to the defendant.
- [13] The Defendant accepted this payment without raising any concerns initially. Only after a period of four years, in April 2014, did the defendant seek advice and subsequently declared the agreement invalid.
- [14] When Voyager ceded its right to collect sectional title debts to the Trust, the defendant was informed as alleged in clause 17 of the cession agreement. It is the evidence of Mason that the defendant knew that Voyager had intended to cede its sectional title debts to the Trust.
- [15] It is the argument of advocate lies that the cession agreement between Voyager and the Trust was valid. However, in the event that the court finds that the cession agreement was invalid, he argues that there had been an unjustified enrichment to the defendant.
- [16] The argument by the defendant's counsel, Advocate Gajoo, is that the cession agreement between the defendant and Voyager is invalid as debts which were not capable of being ceded without the consent of the debtors.
- [17] He further argues that if the cession agreement was invalid, then any refund thereunder should be made to Voyager to who the trust has a right of recourse.
- [18] The trite principles on cessions are made plain by Van der Merwe et al 2002, referred to in paragraph 21 above, that a valid cession requires three elements: (1) an existing right belonging to the cedent, (2) an agreement between the cedent and cessionary for the transfer of this right, and (3) compliance with any prescribed legal formalities.
- [19] The cession agreement, as evidenced by its express terms and the subsequent actions of the parties, clearly demonstrates the Defendant's intention to transfer its right to collect the sectional title rates debts to Voyager. This intention is a cornerstone requirement for a valid cession.
- [20] The execution of the written cession agreement, wherein the Defendant and Voyager outlined the terms of the transfer, fulfills the legal formality requirement for the effective delivery of the intangible right to collect debts. This formal agreement, coupled with the clear intention to transfer the right, further substantiates the validity of the cession

[21] Under the established legal principles of cession, a creditor possesses the inherent right to cede their rights without seeking the consent of the debtors or providing them with notice, unless a contractual provision explicitly limits this freedom. In this case, no such restrictions were imposed on the Defendant's right to cede the debts to Voyager, as evidenced by the absence of any such limitations in the cession agreement.

[22] The court therefore disagrees with the submissions of Advocate Gajoo.

[23] However, the Court is persuaded with the submissions made by Advocate Iles, who submitted that the cession agreement was valid, as the requirements of a valid cession agreement as stated in paragraph 6 above have been met.

[24] The Court further agrees with the principle applied in the case of National Sorghum Breweries Ltd v Corpcapital Bank Ltd quoted in paragraph 9 above.

[25] The following orders are granted:

1 The relief set out in paragraphs 1, 2,3 and 4 of the plaintiffs particulars of claim.

GWAGWA

Acting Judge of the High Court

KwaZulu-Natal Division, Durban

Appearances:

For the plaintiff: MR KD ILES SC

Instructed by:

WERKSMANS ATTORNEYS

For the defendant: MR V.I GAJOO SC

Instructed by:

SD MOLOI & ASSOCIATES INC.

Heard:

12 August 2024

Delivered: 06 December 2024

[1] Van der Merwe, van Huyssteen, Reinecke, Lube, and Lotz, Contract general principles, eighth edition, Juta 2002.

[2]

[1995] ZASCA 158; 1996 (2) SA 339 (A), para 352D-F

[3] 2008 (2) SA 606 (SCA) at para 10.

[4]

[2006] SCA 1 (RSA) para 1.

[5] 2020 ZAKZDHC at para

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