IN THE HIGH COURT OF UTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

CASE NO: 16634/2021

REPORTABLE: No
OF INTEREST TO OTHER JUDGES: No
REVISED: NO
28 December 2022

In the matter between:

SASFIN BANK LIMITED **First Plaintiff**

SUNLYN (PTY) LTD **Second Plaintiff**

and

FITNESS HOLDINGS LTD **Defendant**

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on caselines electronic platform. The date for hand-down is deemed to be 28 December 2022.

Summary: Exception- the defendant contending that the particulars of claim lacks particulars to sustain the cause of action based on the allegation that the plaintiff has failed to plead *locu standi* adequately in the averment relating to cession. The principles governing exception and cession restated. The confusion between an undertaking to cede rights and the cession itself explained. The distinction between the undertaking to cede rights and the cession itself explained. The undertaking to cede rights and the underlying cessionary agreement are two distinct enforceable juristic acts.

JUDGMENT

Molahlehi J

Introduction

[1] This is an exception brought by the defendant, against the plaintiffs' particulars of the claim, based on the contention that the particulars of claim lack averments necessary to sustain a cause of action.

[2] The essential aspect of the defendant's complain is that the plaintiffs have failed to adequately plead their *locus standi* to sue the defendant.

The background facts

[3] The background facts relating to the dispute between the parties are set out in the plaintiff's particulars of claim, which for this judgment, is accepted as being correct.[1] The dispute arose from a complex contractual relationship between various parties.

[4] The plaintiff's claim is for payment of monies owing in terms of three separate master rental agreements concluded between Astfin and the defendant, Planet Fitness Holding (Pty) Ltd.

[5] The amount to be paid for the rental by the defendant is set out in each agreement with the specified date for the commencement of the payment.

[6] The plaintiffs aver in the particulars of claim that the equipment, which is the subject of the lease agreement, was delivered and installed to the satisfaction of the defendant.

[7] The three rental agreements contain the same terms and conditions. The terms and conditions of the agreements, are as summarised in the plaintiff's heads of argument as follows:

"9.1 Asfin would rent to the defendant and the defendant would hire, the goods as described in the addendum's to each of the rental agreement ("*the equipment")* in

[1] See Makgae v Sentramboer (Kopertatief) Bpk 1981 (4) SA 239 (T) at 244H – 245A and Stalls v Garlicke 2012 (4) SCA 415. 421 H.

respect of the first rental agreement, for a minimum period of 60 months and 48 months in respect of the second and third rental agreement.

9.2 the rental payable would not escalate.

9.3. In the event of the defendant failing to make payment to in terms of any of the rental agreement on the due date thereof, it would be deemed that the defendant would be in breach in respect of any or all of the rental agreements, whereupon Astfin would be entitled, *inter alia*, to forthwith claim immediate payment of all amounts which would have been payable in terms of any of the of the rental agreements until the expiry of the Arctic rental agreement (s)."

9.4. Austin will be entitled, without notice to the defendant, receipt, transfer and make over, any and all rights in and to any of all of the rental agreements, to any person whatsoever.

9.5. A certificate signed by any manager of Austin, certifying the amount due by the defendant would on the face of it, the proof of the amount of the defendant's indebtedness.

9.6. The defendant will pay Astfin, interest at the prime rate plus 6% on all amounts overdue in terms of any or all of the rental agreements.

9.7 The defendant will bear Astfin's legal expenses, including attorney and own client cost incurred in recovering any amounts in terms of any or all of the rental agreements."

[8] The agreement that the plaintiffs rely on in claim A, which is between Astfin and ABSA Technologies Finance Solutions (Pty) Ltd (ABSA Finance) makes provision for a mechanism in clause 3.1 whereby the contracts can be ceded.

[9] Similarly, the agreements relied upon in claims B and C, between Asfin and Sunlyn provide for a mechanism whereby the contract can be ceded.

[10] The plaintiffs contend that in terms of the underlying contract, claims were ceded to ABSA Finance on 20 November 2015.

[11] About claims B and C, the plaintiffs contend that Astfin ceded the contracts on 31 October 2017 and 9 December 2019, respectively. In this respect, the rental agreements were offered for cession by Astfin and accepted by Sunlyn on 31 December 2017. The offer was accepted by way of Sunlyn making payment of the purchase price.

The grounds of exception

[12] The first ground of exception of the defendant is formulated as follows:

> "[8] the particulars of claim do not plead out that the Claim A Agreement was offered by Astfin and accepted by Absa Finance, in writing, and accordingly not set out the averments necessary to prove: –
>
> 8.1. The initial cession to Absa Finance:
>
> 8.2 The cessions thereafter to Sunlyn and /or Sasfin; and
>
> 9. Further, in pursuant to the principle *nemo dat quod non habet*, even if Austin had

ceded its rights in Claim A agreement to Absa Finance, and subsequently the cession by Absa Finance to Sunlyn and/or Sasfin, it would still be subject to the provisions of the "the first main cession agreement.

10 Accordingly, and on 22, November 2020 when the Initial period of Claim A Agreement expired, the rights in and to Claim Agreement would have automatically been ceded back to Astfin."

The principles governing exception

[13] The approach to adopt in determining whether the pleading is excepiable is set out in Barnard v Barnard,[2] as follows:

> "[10] In considering the question whether the plaintiff's proposed amendment (or any part of it) is excipiable, the Court must accept the truth of the allegations contained therein and determine whether those allegations are capable of supporting a cause of action. In considering this question the Court is ordinarily not entitled to consider any facts outside those stated in the particulars and the proposed amendment. It is for the excipient (defendant in this case) to satisfy the Court that in all its possible meanings no cause of action is disclosed."

[14] It is also a well-established principle of our law that an exception has to be confined to the four corners of pleadings. In other words, the excipient must confine his or her complaint to what is pleaded in by the other party.[3]

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[2] 2000 [3] SA 741 [C] in paragraphs 9 and 10.

[3] See Sanan v ESKOM Holdings, Ltd 2010 [6] SA 638 [GSJ] paragraph 20 and 21.

[15] In the present matter, the defendant complains that although the plaintiff contends in Claim A that the contract was ceded over to ABSA Finance on 20 November 2015, the essentials of the cession as provided for in the contract has not been complied with. It further contends that in the absence of establishing the underlying cession between Sasfin and ABSA Finance, cession cannot be said to have taken place.

[16] The other challenge faced by the plaintiffs, according to the defendant, is that when the contract in Claim A expired in September 2020, the agreement between Asfin and ABSA Finance automatically receded to Asfin and not any of the plaintiffs. The defendant contends, based on the above, that the plaintiff lacks *locus standi* to sue under that agreement.

Evaluation

[17] As the above shows, the exception is based on the contention that the particulars of claim are excepiable because of the failure to plead the essentials of the cession. It is particularly alleged that the cause of failure to establish the cession between Asfin and ABSA Finance, any subsequent cession between the plaintiffs and Sunlyn, cannot be said to have taken place.

[18] The complexity of this matter arises from the conceptual confusion that often arises between the undertaking to cede and the cession itself. The undertaking is

abstract in its nature and distinct from the underlying agreement. It should, however, be pointed out that the two juristic acts constitute two types of binding agreements, as explained in Brayton Chartswald and Another v Brews,[4] In further explaining the distinction between the two types of agreements the SCA quoted with approval what was said in Law of South Africa:

> "The undertaking to cede and actually cession will often coincide and be consolidated in a single document, yet remain discreetly juristic acts. However, because they are frequently merged into one transaction between the obligatory agreement to cede, and the actual cession sometimes tends to be smudged. They are nevertheless distinct in function and can be so in time: By the former, a duty to cede is created, the latter is discharged."

[19] It is trite that a debtor has no role to play in the cessionary process between cedent and cessionary. This means that the debtor need not know about the cessionary process. Neither is his or her consent required. Furthermore, the debtor has no right to veto the agreement between the cessionary and the cadent. This also means that the cedent need not notify the debtor in concluding a cession with the cessionary.

[20] Simply put, a cession is an agreement to transfer rights from the cedent (the creditor) to cessionary (the new creditor).[5] And thus as a matter of law, contractual obligations arising from such an agreement would exist between the cedent and the cessionary. It follows, therefore, that it is only any one of the parties to such a contract that would have the right to challenge the validity or enforcement of the terms of the

[4] 2017 (5) SA 498 (SCA) paragraph (15).
[5] See Damsam (Pty) Ltd v Cywilnut (Pty) Ltd 1991 (1) SA 100 (A).

cession. This rule was stated in Letseng Diamonds Ltd v JCI Ltd and Others,[6] as follows:

> "The general rule is that if two parties enter into an agreement and there has been non-compliance with its terms, it is only the contracting parties who can challenge the validity of the agreement."

[21] In my view, both exceptions raised by the defendant are bad in law. The defendant was not a party to the agreement between Astfin and ABSA Finance. As the matter stands, it appears from the papers that Astfin and ABSA Finance, being the only parties to the main cession, were no longer parties at the expiry of the first rental agreement. The rights to the first rental agreement were at that stage ceded to Sunlyn and thereafter to Sasfin.

[22] As I understood the submission made during the hearing, the defendant did not persist with the second ground of exception. Even if it did it would, for the same reasons as those stated in the first exception, not be sustainable.

[23] For the above reasons, I find that the defendant has failed to demonstrate that the plaintiffs' particulars of claim do not disclose a cause of action. In other words, the defendant has failed to show that the plaintiffs do not have *locus standi* to institute action proceedings against it.

Order

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[6] 2009. [4] SA58 [SCA] in paragraph [23].

[24] In the premises, the defendant's exception is dismissed with costs on the attorney and client scale.

E Molahlehi

JUDGE OF THE HIGH COURT OF

SOUTH AFRICA, GAUTENG

DIVISION, JOHANNNESBURG.

Representation:

For the applicant : Adv J M Hoffman

Instructed by: Smit Jones and Pratt Inc.

For the respondents: Adv S Aucamp

Instructed by: Swartz Weil Van Der Merwe Greenberg Inc.

Heard on: 29 August 2022

Delivered: 28 December 2022