IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, MAKHANDA

NOT REPORTABLE

Case No.: CA113/2024

In the matter between:

SEARTEC TRADING (PTY) LIMITED Appellant

and

AGNI STEELS SA (PTY) LIMITED Respondent

JUDGMENT

EKSTEEN ADJP:

[1] The appellant, Seartec Trading (Pty) Limited (Seartec) sued the respondent, Agni Steels SA (Pty) Limited (Agni Steels) for payments due in terms of a rental agreement concluded between the parties. The claim was met with a special plea in which Agni Steels contended that Seartec had ceded its right title and interest in the rental agreement

to a third party before the issue of summons and, accordingly, it lacked *locus standi in iudicio*. In a replication, Seartec admitted that it had ceded its rights under the rental agreement, but contended that it had, before the issue of summons, cancelled the cession and that the right of action had been ceded back to it. The issue of *locus standi* raised in the special plea and replication was separated from the remaining issues in the action and was decided *in limine*.[1] The Regional Magistrate (the Magistrate), Gqeberha, found that Seartec had failed to establish its *locus standi* and dismissed its action, hence the current appeal.

Background

[2] During June 2016, a company known as Limtech Biometric Solutions (Pty) Limited (Limtech) entered into an agreement with Agni Steels whereby Limtech would install certain hardware and software at the premises of Agni Steels. They approached Seartec to provide a financing solution. Accordingly, Seartec and Agni Steels concluded an agreement (the rental agreement) whereby Seartec would finance the purchase of the hardware and software and obtain ownership thereof, while Agni Steels would hire it from them.

[3] The rental agreement provided for Seartec to cede its rights in terms of the agreement to a third party, without notice to Agni Steels. Thus, on 20 November 2017, Seartec ceded its rights under the rental agreement to the trustees for the time being of the Rental Company Trust (RCT), thereby divesting itself of all its rights under the

[1] In a rejoinder Agni Steels had contended that in the event that it is found that Seartec did have *locus standi,* it was estopped from relying on the cancellation of the cession. The estoppel was not pursued.

agreement. However, as I have said, Seartec contended that the cession had been cancelled and the debts ceded back to itself before the issue of summons on 24 October 2018, thus establishing its *locus standi* to enforce the terms of the rental agreement. This second cession, back to Seartec, was the subject of the dispute at the trial.

[4] Mr Juan Laubscher, the chief executive officer of Seartec, was the only witness. He explained that the rental agreement was the only agreement which existed between Seartec and Agni Steels. As I have said, it is common cause that the right, title and interest in the rental agreement had been ceded to the RCT in November 2017. Mr Laubscher explained that it had formed part of an overarching agreement in terms of which a number of rental agreements were sold to the RCT. The RCT paid an amount of R171 935,49 (exclusive of VAT) for the rental agreement. It emerged from email correspondence received from one Peter France, a trustee of the RCT, in February 2018, that the RCT were unhappy with the purchase price paid, which France contended had been based on a misrepresentation in respect of the duration of the rental agreement. The disagreement persisted and on 12 April 2018, Mr France sent a further email to Mr Laubscher in which he recorded that the agreement that he purchased was not reflective of the sum paid. A series of emails followed to and fro. In the final email to Mr France, Mr Laubscher recorded:

> 'No problem, I will buy it back. No reason for us to have a dispute on it.'

[5] The offer was gratefully accepted by email on 13 April 2018, and Mr France delegated the further conduct of the resale to one 'Cindy', an employee of the RCT. Mr

Laubscher explained that Seartec then purchased the agreement back for a purchase price of around R186 000,00. He personally instructed the payment to be made, although he did not personally release it, and he presented a Standard Bank confirmation of payment in support of the payment. The confirmation of payment reflects a payment made from the account of Seartec to 'The Rental Company' in the amount of R186 893,81, on 20 April 2018. In addition to the account name, the confirmation of payment reflects an account number and a statement reference. Under cross-examination Mr Laubscher was taxed in this regard and he said that he did not know from personal knowledge whose account number was reflected there or what the statement reference was. He was also unable to explain the difference between the purchase price paid by the RCT in November 2017 and the buy back price in April 2018.

[6] In the interim, on 17 April 2018, Mr Laubscher had addressed an email to Agni Steels in which he recorded:

> 'Dear Customer
> Seartec Trading (Pty) Limited has finalised an agreement with the trustees of the Rental Company Trust to purchase your equipment lease agreement, effective immediately.'

Accordingly, Mr Laubscher said that when the summons was issued in October 2018, Seartec was 'the owner' of the rental agreement.

The Law

[7] A cession is effected by a bilateral act[2] accomplished by means of an agreement of transfer between the cedent and the cessionary arising out of a lawful underlying cause (*justa causa)* from which the cedent's intention to transfer the right (*animus transferendi*) and the cessionary's intention to become the holder of the right (*animus aquirendi*) appear or may be inferred.[3] In *Johnson* the Supreme Court of Appeal (the SCA) explained that the underlying cause constitutes a separate agreement (the obligatory agreement), such as the contract of sale, exchange or donation, that gives rise to the obligation to transfer the rights in issue. However, the actual transfer is constituted by a further agreement (the transfer agreement), which may coincide with the obligatory agreement or occur thereafter.[4] The conceptual distinction between the obligatory agreement and the transfer agreement is important[5] and I shall revert thereto.

[8] The cedent may transfer the personal right to the cessionary without the co-operation or knowledge of the debtor[6] and the law prescribes no formalities. By parity of reasoning, a cession, fully accomplished, may be withdrawn against the will of the debtor by mutual consent of the purchaser and the seller,[7] and the rights re-ceded back. Again, the transfer agreement passing ownership of the rights may be affected orally, whether the original agreement was in writing or not, and it may be established tacitly, by inference

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[2] *LTA Engineering Co Ltd v Seacat Investments (Pty) Ltd* 1974 (1) SA 747 (A) at 762A.
[3] *First National Bank of SA Ltd v Lynn NO* 1996 (2) SA 339 (A) at 345G-I; and *Johnson v Incorporated General Insurance Ltd* 1983 (1) SA 318 (A) at 331G-H.
[4] *Johnson* at 331H; and *First National Bank* at 345H-I.
[5] See *Scott* on *Cession* p 27.
[6] *Paterson's Executor v Webster, Steele and Co*. 1880-1882 (1) SC 350 where De Villiers CJ at 355 stated that: 'No rule is more clearly established in our law than that rights of action may be ceded to third parties without the consent of the party liable.'
[7] *Johnson* at 332B-G.

from the parties' conduct.[8] The transfer agreement between the cedent and the cessionary is established when the cedent has the intention to transfer the personal right to the cessionary and the cessionary, in turn, has the intention to receive the personal right.

The finding of the Regional Court

[9] As I have said, the Magistrate found that Seartec had failed to establish its *locus standi*. In arriving at this finding, he found, firstly, that the only reasonable conclusion arising from the proven facts was that the proof of payment in the amount of R186 893,81 was totally unrelated to the rental agreement, and, secondly, that there was no evidence before the court that the RCT intended to re-cede the rental agreement to Seartec.

[10] In respect of the first point, the Magistrate relied only on the proof of payment and afforded considerable weight to the repurchase price reflected on it. The approach fails to recognise the distinction between the obligatory agreement and the transfer agreement. The obligatory agreement underlying the cession was the repurchase of the rental agreement. The payment of the purchase price reflects the fulfillment of the obligatory agreement, but it has no bearing on the transfer agreement. Accordingly, the approach constitutes a misdirection in law.

[11] In any event, the reasoning of the Magistrate in respect of the proof of payment, cannot be sustained. He noted that Mr Laubscher was unable to confirm the account

[8] *Botha v Fick* 1995 (2) SA 750 (A) at 762E-H.

number of the recipient reflected on the proof of payment nor could he identify the bank's statement reference number 'AC 61002675'. Accordingly, he considered that a crucial link in Seartec's case, the establishment of the payment of the purchase price, has not been proved. This, too, constitutes a misdirection in respect of the import of the evidence. In any civil case the onus is ordinarily discharged by producing credible evidence to support the case of the party on whom the onus rests. He can only succeed if he satisfies the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable. However, in deciding whether that evidence is true or not the court will weigh up and test his allegations against the general probabilities. If the probabilities favour him, then the court will accept that his version is probably true. As adumbrated earlier, Mr Laubscher was the only witness and there is no competing version. His evidence that the proof of payment related to the purchase price of the re-cession was uncontroverted, and it must be tested against the general body of evidence and the probabilities. I have set out the sequence of events earlier. Emails passed to and fro between Mr France and Mr Laubscher on the 12th and 13th April 2018. They culminated in an agreement that the rental agreement would be repurchased and Mr France delegated the further conduct of the agreement to an employee. Mr *Lambrechts*, who appeared for Agni Steels, together with Mr *van den Bos*, acknowledged, correctly, that the correspondence proved the obligatory agreement. On 17 April, Mr Laubscher confirmed the finalisation of the agreement in an email to Agni Steels, and the payment of the R186 893,81 to the RCT followed, on 20 April 20218. There is no evidence of any other agreement sold by the RCT to Seartec. In my view, the evidence of Mr Laubscher

in this regard, seen in the context of the events as they unfolded, accords with all the probabilities.

[12] In reaching his conclusion that the payment was unrelated to the rental agreement the Magistrate considered that there were unexplained contradictions between the amounts claimed in the summons, the price that the RCT paid for the rental agreement, in November 2017, and the repurchase price reflected in the proof of payment. I am unable to discern any contradiction. The amount claimed in the summons is immaterial to the issue before court, and it was not explored in evidence at all. The R171 935,49 (exclusive of VAT) was paid for the rental agreement in November 2017. The rental agreement provided for interest on the outstanding balance to be calculated from time to time and for penalty interest to be levied on any overdue payments. It is in the nature of an agreement of this kind that the outstanding balance would fluctuate with time. Whilst there was some dispute on the pleadings about the reasons for Agni Steels defaulting on their monthly payments, and when it occurred, it was common cause that Agni Steels at some stage stopped payments. In these circumstances it seems self-evident that the value of the rental agreement would differ from time to time, depending on the amounts outstanding and overdue, and it is unsurprising that Mr Laubscher, who did not testify as an accountant, was unable to explain how the difference in figures was arrived at. His evidence, of both the purchase price in November 2017 and April 2018, is uncontroverted.

[13] I turn to the second point, that there was no evidence before court that the RCT had intended to re-cede the rental agreement to Seartec. As I have explained, the law

prescribes no formalities for a transfer agreement which occurs by the manifestation of a simultaneous intention of the cedent to transfer the right and of the cessionary to become the holder of the right. The transfer agreement may be tacit and it may be inferred from the conduct of the parties.[9]

[14] Mr Laubscher testified that Seartec had purchased the rental agreement and became the owner thereof. The evidence discussed earlier established that he wrote to Agni Steels on 17 April 2018 to advise them that the sale had been finalised 'with immediate effect'. Agni Steels, as the debtor, had no role to play in the cession, and the only logical explanation for the letter is to advise Agni Steels that Seartec was now their creditor, with immediate effect, thus confirming that the transfer of rights had occurred.

[15] Seartec issued summons in October 2018, and the trial proceeded in October 2023. As I have said, it is common cause that Agni Steels defaulted on their instalment payments, but it was not suggested to Mr Laubscher in cross-examination that the RCT had ever sent a demand or taken any steps whatsoever against Agni Steels for the enforcement of the rights under the agreement. The ineluctable inference to be drawn from these facts is that they claimed no entitlement to any benefits under the rental agreement after 17 April 2018, which accords with the uncontroverted evidence of Mr Laubscher.

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[9] *Botha* at 762H.

[16] The Magistrate appeared to suggest that Seartec ought to have called Mr France to confirm the transfer agreement. As I have said, the evidence of Mr Laubscher is uncontroverted and accords with all the probabilities. Mr France, as a witness, was equally available to Agni Steels, and they were entitled to consult with him and to call him. In *Raliphaswa*[10] the SCA noted that where a witness is equally available to both parties, but not called to give evidence, it is logically possible to draw an adverse inference against both. The party on whom the onus rests has no greater obligation to call a witness, but the failure may, in appropriate circumstances, create a risk that it may be found that he has failed to discharge the onus. For reasons set out earlier I do not consider this to be such a case.

Costs

[17] The parties agree that the costs of the appeal should follow the result. However, Mr *van den Bos* submitted that in the event that the appeal is upheld, the costs occasioned by the inclusion of pages 205 to 288 of the appeal record should be excluded from the costs order. These relate to an action instituted in the High Court for the recovery of the equipment installed by Limtech at the instance of Agni Steels, which formed the subject matter of the rental agreement. They have no bearing on the dispute before us and Mr *Hewitt*, on behalf of Seartec, acknowledged that they ought not to have been included in the record.

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[10] In *Raliphaswa v Mugivhi* [2008] 3 All SA 92 (SCA) at para 15.

[18] In the result:

1. The appeal is upheld with costs, such costs to include the costs of counsel to be taxed on scale B, but shall exclude the costs occasioned by the inclusion of pages 205 to 288 of the appeal record.

2. The order of the regional court upholding the special plea with costs, is set aside and replaced by the following order:

   'The defendant's special plea is dismissed with costs, including the costs of counsel.'

J W EKSTEEN
ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

TOKOTA J:

I agree.

B R TOKOTA
JUDGE OF THE HIGH COURT

Appearances:

For Appellant:	Adv D Hewitt
Instructed by:	Wiese & Wiese Inc
	c/o Jacques du Preez Attorneys
	GQEBERHA
For Respondent	Adv I Lambrechts and Adv A van den Bos
Instructed by:	Goldberg & De Villiers
	GQEBERHA
Date Heard:	14 February 2025
Date Delivered:	04 March 2025