CASE NO. I 827/2008

IN THE HIGH COURT OF NAMIBIA

In the matter between:

KAAP AGRI BEDRYF LIMITED **PLAINTIFF**

and

HARDAP CO-OPERATIVE LIMITED **DEFENDANT**

CORAM: NDAUENDAPO, J

Heard on: 1 March 2010

Delivered on: 4 October 2010

JUDGMENT:

NDAUENDAPO, J: [1] This judgment deals with an exception raised by the defendant, in which the defendant, *inter alia*, attacks the validity of the cession upon which the plaintiff based its claim against the defendant.

The plaintiff, Kaap Agri Bedryf Limited, is a public company with limited liability duly registered in terms of the company Act, Act 61 of 1973, with registered address and place of business of 65 Voortrekker Road, Malmesbury, Western Cape, South Africa.

The Defendant is Hardap Co-Operative Limited with registration number 703/98, also a public company duly registered in terms of the company laws of Namibia, with registered address and chosen *domicillium cidandi et executandi* at main road, Windhoek at Stampriet Crossing, Namibia.

[2] The Plaintiff issued summons against the Defendant. In its particulars of claim it alleges, *inter alia*, the following: **(I quote the relevant part for this judgment)**

"The Plaintiff has *locus standi* in that:

2.1 Agri Oranje (Pty) Ltd, a private company with limited liability, with registration number 1999/023186/07, duly registered in terms of the Company Act, Act 61 of 1973, with registered address at 65 Voortrekker Road, Malmesbury, Western Cape, South Africa, ceded all debtors including all securities to WPK Landbou Limited, a private company duly registered in terms of the company Act, Act 61 of 1973, with registration number 1995/000336/06 with effect from 1 October 2005. A copy of the Cession is annexed and marked Annexure "KB1".

2.2 WPK Landbou Limited obtained all rights, title and interest of Agri Oranje (Pty) Ltd of all the debtors of Agri Oranje (Pty) Ltd as a result of the said cession.

2.3 WPK Landbou Limited changed its name to Kaap Agri Bedryf Limited as more full descried in paragraph 1 *supra*. A copy of the name change is annexed and marked Annexure "KB2"."

[3] The above Honourable Court has jurisdiction to adjudicate the matter in as far as the Defendant's chosen *domicile* is within the Honourable Court's jurisdiction.

[4] The Defendant, duly represented by Gerhard Van Der Merwe, completed a credit application as well as a 30 days trade facility on 10 August 2000 at Mariental, Namibia, a copy of the application is annexed and marked Annexure “KB3”.

[5] The credit facility was granted in the amount of R500 000.00 and the 30 days trade facility on open account was granted by the Plaintiff’s predecessor on 10 August 2000, subject to the following relevant conditions, as contained in the Credit application (Annexure “KB3”).

5.1 payment of the balance owing on the account shall be made on/or before the last business day of the month following the month in which the statement of account concerned was issued; See clause 1.

[6] The Plaintiff’s predecessor and from 1 October 2005, the Plaintiff, sold and delivered goods to the Defendant from time to time on the open account on the Defendant’s special instance and request and thus complied with all its obligations in terms of the credit agreement.

[7] In terms of a certificate of balance issued by the Plaintiff’s credit manager the Defendant is indebted to the Plaintiff as the 29 February 2008 in the amount of R1 014 583.06 (One Million Fourteen Thousand Five Hundred and Eighty Three Rand and Six Cents). The certificate is annexed and marked Annexure “KB4”.

[8] The Defendant made various payments on the open account from time to time, but despite demand, fails and/or refuses to make payment of the balance outstanding to the Plaintiff.

[9] The Defendant entered an appearance to defend the action.

The cession reads as follows:-

“Cession of Debtors

1. Agri Oranje (Eiendoms) Beperk, registration number 1999/023186/07 do hereby cede, with effect from 1 October 2005 any and all debtors (together with underlying securities) of the company to WPK Landbou Beperk, registration number: 1995/000336/06 (“WPK Landbou”).

2. All debtors, at face value thereof, as at 24:00 on 30 September 2005 are hereby ceded to WPK Landbou.

3. WPK Landbou accepts such cession”.

Upon receipt of the further particulars of claim, the Defendant filed an exception to the particulars of claim.

Exception

The grounds upon which the defendant excepts to the particulars of claim as amplified by the further particulars are stated as follows:-

1. GROUND 1

1.1 In law, in order to establish a valid cession, the cession must contain a *iusta causa traditioners;*

1.2 The Plaintiff relies on an alleged written agreement;

1.3 The alleged written agreement, is the sole source of the Plaintiff’s course of action;

1.4 The parole evidence rule is accordingly applicable;

1.5 *Ex facie* the written agreement, no *iusta causa traditiones* exists;

1.6 Accordingly, the cession is null and void and cannot sustain a cause of action.

2. GROUND 2

2.1 WPK Agriculture Limited's name was change to that of the Plaintiff on 9 September 2005;

2.2 Thus, as from 9 September 2005, no WPK Agriculture Limited was in existence anymore;

2.3 Nevertheless, the cession document indicates that the alleged cession agreement between Agri Oranje (Eiendoms) Beperk and WPK Landbou Beperk took place on 30 September 2005;

2.4 As at 30 September 2005, and on Plaintiff's own allegations, WPK Landbou Beperk was not in existence, or known, anymore.

[10] When the matter came before me the Court was asked to adjudicate on the exception only. Mr Heathcote S.C. appeared on behalf of the Defendant and Mr Janse Van Rensburg appeared on behalf of the Plaintiff. Both Counsel submitted written heads of arguments.

Defendant's submissions:

[11] Mr Heathcote, SC submitted that the Plaintiff's claim is based or relied upon the written cession exhibit "KB1" alone and as a result the parole evidence rule is applicable. He referred this Court to the matter of ***Incledon Welkom (Pty) Ltd v Qwa Qwa Development Corporation Limited 1990 (4) SA 798(A)*** in support of his contention.

[12] Mr Heathcote, SC, further submitted that exhibit "KB1" does not comply with the requirement of a (valid) cession. In terms of the law there are two requirements for a valid cession:

(i) A valid cause or (*Justa causa*) coupled by the (ii) transfer of the right.

[13] He referred the Court to the matter of **Johnson v Incorporated General Insurance Limited 1983(1) SA** 318 at 319 where the Court stated (at 319) that:

> "Cession, in our modern law, can be seen as an act of transfer to enable the transfer to take place. It is accomplished by means of an agreement of transfer between the cedent and the cessionary arising out of a *justa causa* from which the intention of the cedent to transfer the right to claim to the cessionary *(animus transferendi)* and the intention of the cessionary to become the holder of the right to claim *(animus acquirendi*) appears or can be inferred. The agreement of transfer can coincide with, or be preceded by, a *justa causa* which can be an obligatory agreement such as, e.g, a contract of sale, a contract of exchange, a contract of donation, an agreement of settlement or even a payment (solution)".

[14] Mr Heathcote SC, further submitted that for an effective cession to take place, the cedent and the cessionary must have the intention to transfer based on an *justa causa*. It is in respect of the last mentioned requirement that the Plaintiff's claim is lacking in substance. It is to be noted that the exception cannot be determined on the basis that there may be a *causa*, which may or may not be defective. On exception

stage (and in the absence of an allegation of *causa*) and given the application of the parole-evidence rule, no *causa* be assumed (not even a defective one).

[15] He also referred the Court to the commentary on cession of action by Johannes A Sande translated by Dr Anders, where the following is stated at page 14.

> 3. "Again the *causa* required must be such as is proper and sufficient for the transfer of corporeal as well as incorporeal things: for example purchase; the giving of dowry; payment; donation, and the like".
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> 4. "A further requirement is that the cause of cessions shall be real, and not fictitious or imaginary".
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> 5. "It is not necessary that the title should be specifically mentioned in the document, but it is sufficient that the existence of it can be gathered by inferences and from the surrounding circumstance just as if it were expressed in the document. *Caius* has ceded to *Sempronius* his actions against *Maevius* for the sum of one hundred florins: from the addition of a price the title of purchase is concluded, as *Bartolu*s points out and reports that it has been so decided. This opinion is embraced by the authorities, as Alexander *trentacinquius* proves".
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> 6. "By the authority of a very recent Frisian statue no cessions are recognised by the Court unless the *causa* or *titulus* are set forth and if the

causa is purchase the amount of the price must be stated". The Frisian statue referred to by Sande is part of the common law of Namibia as rightly pointed out by Mr. Heathcote SC. In Frans Paschke and others 2007(2) NR 520(8c), the court said the following:

"[14] The common law referred to in art 66 of the Namibian Constitution embraces, fully, the concept of 'Roman-Dutch law as existing and applied in the Cape of Good Hope', as explained by Gutsche J in the Tittle case supra. Accordingly, Roman-Dutch law which was applied in the Cape of Good Hope through legislation, judicial precedent, ***custom or the pre-codal system of old authorities*** *(such as the decisions of the High Court of Holland, Grotius, Voet, etc) is common law as envisaged in art 66 of the Namibian Constitution to the extent it has not fallen into disuse. This becomes abundantly clear if regard is had to the wording of s 1(1) of the Administration of Justice Proclamation which provides that the Roman-Dutch law as existing and applied in the Province of Good Hope … shall …. Be the common-law of the Protectorate. The concept 'common law' as used in the proclamation, and 'common law' as used in art 66 of the Namibia Constitution, must and does have the same meaning."*

[16] In ***Mclachlan v Wiemand 1913 (J) at 195*** the court stated that:

"And cession is nothing but the special mode in which other persons may acquire rights therein. As Sande says (De Actionum cession, 2, 2, 4), the only requisite

is that there must be the same consideration (causa) as is required for the transfer of corporeal things such as sale, dowry, payment, donation and the like. And that consideration must be genuine and not unlawful or fictitious".

Plaintiff's submissions:

[17] In support of his contention that the intention to transfer and the intention to acquire is clear from the cession, Mr. van Rensburg referred this Court to the case of ***First National Bank v Lynn & others 1996 (2) SA 339 (A)*** where the court stated (at 339) that:

"cession is a particular method of transferring rights in a movable incorporeal thing in the same manner in which delivery (traditio) transfers rights in a movable corporeal thing. It is in substance an act of transfer (oordragshandeling) by means of which the transfer of a right (translatio juris) from the cedent to the cessionary is achieved. The transfer is accomplished by means of an agreement of transfer (oordrags-ooreenkoms) between the cedent and the cessionary arising out of justa causa from which the former's intention to transfer the right (animus transferendi) and the latter's intention to become the holder of the right (animus acquirendi) appears or can be inferred".

[18] **First National Bank** *supra,* is clearly also authority for the proposition that there must be a *justa causa* which is clear from the cession or can be inferred from the surrounding circumstances.

[19] He further referred this Court to the case of ***Commissioner of Customs & Excise v Randles, Brothers & Hudson Ltd 1941 AD 369*** as authority for his contention. The facts in that case where briefly as follows (as per the headnote):-

> *"Prior to 1925 it was the practice of the defendant company (Randles, Brothers & Hudson Ltd) to import goods and then transfer them under a form prescribed by regulation to a registered manufacturer to be made up into shirts and pyjamas for the defendant upon the cut, make and trim principle. Under the existing regulations, framed under Act 36 of 1925, such goods were imported under rebate of customs duty. In 1936, new regulations were promulgated recalling that, in such circumstances, in order that the goods might be imported under rebate of duty, the registered manufacturer to whom the importer transferred the goods should make a declaration that the goods were his own property. The defendant, thereupon, with the intention of complying with the new regulations, changed its procedure and purported to sell the goods to the manufacturer and at the same time agreed to purchase the garments at the price of the sum at which the goods had been sold, plus the costs of making. The goods were duly delivered to the manufacturer, who signed the appropriate form declaring that the goods were his own property. Payments were effected when the manufacturer delivered the garments he had made, the final result being that the defendant paid in cash and the manufacturer received the agreed costs of manufacturing the garments. The commissioner of Customs contended that, not withstanding the procedure adopted by the defendant the latter (defendant) remained at all*

times the owner of the goods and that it was liable to pay full duty upon such goods.

The court held that assuming it was a necessary implication from the regulations that it was a condition precedent to a rebate of duty that the ownership in the goods had in fact passed from the importer to the manufacturer, on the facts the plaintiff (Commissioner) had not proved that the contracting parties did not genuinely mean to enter into contract of sale and to transfer ownership of the goods when delivery was made in pursuance of those contracts, and that ownership in the goods had passed to the manufacturer, not withstanding the special features present in the transaction and not withstanding that the manufacturer had bound himself contractually to deal with the goods delivered to him in a certain manner only.

[20] It was further held as per Watermeyer JA at (398-9) that: "If the parties desire to transfer ownership and contemplate that ownership will pass as a result of the delivery, then they in fact have the necessary intention and the ownership passes by delivery. It was contended, however, on behalf of the appellant that delivery accompanied by the necessary intention on the part of the parties to the delivery is not enough to pass ownership; that some recognised form of contract (a causa habilis…) is required in addition. I do not agree with that contention. The habilis causa referred to by Voet means merely…. an appropriate reason for the transfer or a serious and deliberate agreement showing an intention to transfer." At 411 Centlives JA held that:

> "A wide meaning must be given to the words *"justa causa"* or *causa habilis*...[A] all that these words mean in the context I am at present considering is that the legal transaction preceding the traditio may be evidence of an intention to pass and acquire ownership. But there may be direct evidence of an intention to pass and acquire ownership and, if there is, there is no need to rely on a preceding legal transaction in order to show that ownership has, as a fact, passed. To put it more briefly it seems to me that the question whether ownership passed depends on the intention of the parties and such intention may be proved in various ways".

[21] According to Mr. Van Rensburg the intention to transfer and the intention to acquire is clear from the cession.

[22] The facts in **Commissioner of Customs and Exercise** *supra* are distinguishable from the facts in the case at hand. That case was not dealing with transfer of ownership based on a cession. It is also clear from those facts that the justa causa for the transfer of ownership was the sale". The **Commissioner of Customs and Exercise** *supra* is therefore no authority for the contention by Mr. Van Rensburg.

[23] Mr. Van Resnburg further submitted that the defendant is not a party to the cession, and whatever the *justa causa* is that preceded the cession (or can be inferred from the cession) is in any event only relevant visa vis the cedent and the cessionary and not the defendant. All that needs to be established is the cedent's intention to transfer *(animus transferendi)* and the cessionary's intention to acquire *(animus acquirendi),* which is unequivocally inferred from the cession. It is therefore not necessary to plead the *justa causa* as it also be inferred.

[24] Although I agree that the defendant is not party to the cession, the reason *(causa)* for the claim against the defendant is the cession. As pointed out by Sande and the authorities referred to by Mr. Heathcote, SC, the *justa causa* must be apparent from the document or from the surrounding circumstances.

[25] Mr. van Rensburg also submitted that the defendant has all the defences available against the cessionary that it has against the cedent and the defendant can raise its defences in its plea. (See ***Scottish Rhodesian Finance Ltd v Olivier 1965 (2) SA 716.***

[26] I agree with that submission, provided of course, it is clear from the cession what the *justa causa* is, otherwise how can it (the defendant) attack the cession if the *justa causa* is not apparent from the document or from the surrounding circumstances?

[27] I therefore come to the conclusion that it is an essential requirement of our law that for a cession to be valid there must be a real and genuine (not fictitious) *justa causa* which is apparent from the cession document or which can be inferred from the surrounding circumstances. The cession in this case ("KBI") is totally silent as to what the *justa causa* is, nor can this Court infer it from the surrounding circumstances.

The second ground of exception:

[28] Mr. Heathcoat, SC, submitted that the one party, i.e WPK Agriculture, to the transfer agreement was not in existence or known by its name, when the alleged cession “KB1” was allegedly entered into. Mr. Van Rensburg, on the other hand, submitted that *ex facie* the document “KB1” it is clear that the same legal entity continues to exist with the same registration number albeit with a different name.

On its own admission the name of WPK Agriculture Ltd was changed to Kaap Agri Bedryf Ltd. This was on the 9th September 2005.

The so called cession “KB1” was entered between WPK Agriculture Ltd and Agri Orange Pty Ltd on the 30 September 2005. WPK Landbou a non existing entity and could not enter into a cession with Agri Orange. Although the registration numbers are the same, that does not detract from the fact that at the time of entering the cession “KB1” WPK Agriculture was non existent.

In the result the second ground of exception must also succeed.

The order:

[29] In the result I make the following order:

1. The first and second grounds of the exception are upheld with costs.

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NDAUENDAPO, J

ON BEHALF OF THE PLAINTIFF:	**Adv. Heathcote SC**
INSTRUCTED BY:	**Van Der Merwe-Greeff Inc.**
ON BEHALF OF THE DEFENDANT:	**Mr. Van Rensburg**
INSTRUCTED BY:	**Grobler & Co**