

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF

NAMIBIA

JUDGMENT

Case no: I 3274/2011

In the matter between

AUGUST MALETZKY

PLAINTIFF

and

HOPE VILLAGE

DEFENDANT

Neutral citation: Maletzky v Hope Village (I 3274/2011) [2013] NAHCMD16 (25 January 2013)

Coram: Smuts, J

Heard on: 25 January 2013

Delivered on: 25 January 2013

ORDER

1. The matter is postponed to 13 February 2013 at 10h00 for evidence and argument on the issues raised in this ruling and why this court should not dismiss the claims under case no. I 3274/2011 and for referral of the matter to the Inspector-General of Police and Prosecutor-General for a contravention of s21 of Act 15 of 1995.

2. Winnie Van den Bergh of Treasure Trove CC, Hilton Armstrong of Wicked Entertainment CC and Deryck Sinclair of Flashpoint Technologies CC are directed to be present in court on 13 February 2013 at 10h00 and to bring with them documentation relating to the purported cession of their respective claims to the plaintiff dated 12 May 2011.
3. Service of this order upon the persons referred to in paragraph 2 of this order is to be by Deputy-Sheriff.
4. The plaintiff is ordered to bring the separate agreement referred to in clause 6.1 of the cession agreement to court on 13 February 2013 at 10h00.
5. The Law Society must present argument and question witnesses with leave of the court as amicus curiae at the hearing of this matter.
6. The filing of any heads of argument is to be in accordance with practice directives.

RULING

SMUTS, J

[1] This is an application for default judgment. The plaintiff is described in the summon as:

“August Maletzky an adult male employed by African Labour and Human Rights Centre. Suing in the capacity of cessionary in terms of the cession by Winnie Van den Bergh t/a Treasure Trove CC and Hilton Armstrong Trading as Wicked Entertainment and Flashpoint Technologies CC (represented by Deryck Sinclair) the cedents who ceded their rights to the cessionary on 12 May 2011.”

[2] The summons is signed by the plaintiff with his name stated below his signature and below that is inscribed African Labour and Human Rights Centre (ALHRC). The particulars of claim are signed by the plaintiff above his name but below that is stated “C/O ALHRC.”

[3] In the particulars of claim the plaintiff claims two sums namely N\$43 949, 30 and N\$351 800 from the defendant. The plaintiff also claims 50% of ticket sales (in respect of a concert featuring the rock band UB40). The plaintiff also claims interest on these amounts and costs of suit.

[4] The action is defended. But according to the court file, the defendant has been barred. But Ms Klazen, who represents the defendant, stated that according to her records, no notice of bar had been served on her firm. She also said that the application for default judgment had also not been served on her firm and that the address given for her firm on the notice was outdated and that her firm had moved from there some six months previously.

[5] The plaintiff was not present in court. His name was called to no avail. The application for default judgment is accompanied by an affidavit deposed to by the plaintiff and has several attachments which I refer to below. Ms Klazen first asked that the matter be struck with costs alternatively dismissed by reason of the cession relied upon being in *fraudem legis*, relying upon *Maletzky v Zaaluka*¹ which is refer to below.

[6] The plaintiff in both his affidavit and particulars of claim refers to certain contracts between the defendant and three entities from which the plaintiff has purportedly obtained a cession in respect of their rights of action against the defendant arising from those contracts. In short, those agreements related to providing services to the defendant in respect of the UB40 concert. It is alleged that the defendant breached those agreements and did not make payment to the entities in question and did not duly perform in terms of those agreements. The plaintiff states in his affidavit that these entities ceded their respective actions to him in which he acts as plaintiff. These entities are Treasure Trove CC, Wicked Entertainment CC and Flashpoint Technologies CC.

¹High Court, unreported case I 492/2012, 18 January 2013

[7] I had intended to ask the plaintiff some questions concerning the cession in view of my concern that it may be a simulated transaction and in *fraudem legis* of s21 of the Legal Practitioners Act, 15 of 1995 and against public policy. I had wanted to enquire as to the causa for the cession and enquire about certain of its terms such as the clauses relating to restriction on the cessionary's rights and termination respectively. I also wanted to enquire as to the parties to the cession, given the reference to the cessionary at the conclusion being ALHRC and the difference between that and the description in the agreement. But Mr Maletzky was not present to answer these questions, despite having set the matter down for hearing.

[8] I also referred to the judgment of the Judge-President in a strikingly similar cession also involving the plaintiff and ALHRC² which was also raised by Ms Klazen. In that judgment, the Judge-President stated the following:

“[3] The law prohibits³ a person who is not admitted as a legal practitioner in terms of s 3 of the Legal Practitioners Act 15 of 1995 (hereinafter referred to as the Act), from practising law. Such a person is not subject to the discipline of the statutory Law Society, or indeed the court as he or she is not an officer of the court. Because a person who is not admitted does not fall for scrutiny under the Act, they cannot also obtain a fidelity fund certificate so that in the event of negligence or of theft of client's money, members of the public are entitled to compensation from the Fidelity fund created under the Act. For those practitioners practising without a fidelity fund certificate, the court retains the power to discipline them if they act improperly towards a client. One such option is to strike them from the roll. There is therefore a very sound public policy rationale behind prohibiting non-admitted persons from practising law or taking instructions from members of the public and representing them in court.

[4] It appears to me to be in *fraudem legis*, a *simulated transaction*, for a person to induce a cession and thus create in his favour a right of action in order to circumvent the provisions of the Act. Fraud unravels everything and the court would in such circumstances be entitled to go behind the ruse of a cession and expose its true character. The questions I asked of the

²Maletzky v Zaaluka supra

³

cessionary and the answers I got from him suggest, prima facie, that the cession of the right of action in the present case is a ruse intended to circumvent the provisions of the Act.

[5] How else does one explain the fact that he asks for costs? He signs the pleading in his personal name but states that he is from the 'African Labour and Human Rights Centre' a body under which he says he does not render legal service but offers labour law advice. He conceded though that he had adopted this kind of scheme (i.e. acquiring cessions from people and thus gaining right of action) in one two or three cases.

[6] If the cession was truly intended to be what he says it is, I have no explanation from him why he gives his official business reference and not, say his personal address or entirely omitting any reference to the official business. Maasdorp CJ stated as follows in *Wilcocks NO v Visser and Another* 1910 CPD 102:

'Two of the essentials of a valid cession are an intention to make over to another what belongs to oneself in order that it may in future belong to that other and not to oneself, and in addition delivery or some legal formality equivalent thereto.'⁴

[9] The purported cession in this matter also contains terms almost identical to those referred to in the Zaaluka matter. They are entitled "Restriction on Cessionary's Rights" and "Termination of Cession Agreement". The latter clause refers to a separate agreement regulating the relationship between the parties. It was not attached and I had intended to enquire after it, had Mr Maletzky been present in court.

[10] I respectfully agree with the Judge-President in the Zaaluka matter that the reversion to the cedent is an indication that the cession may be a ruse to enable Mr Maletzky or ALHRC to provide legal services. There is also the claim for legal costs in both the application for default judgment and in the letter of demand (attached to the application for default judgment) which preceded the action.

[11] It is also not clear to me that the requisites for a valid cession are met by purported cession, given the reversionary provision as well as it not being clear whether

⁴At paras 3 to 6, footnotes excluded.

there was a valid *causa* for the cession⁵. This is quite apart from the question as to whether the cession is against public policy or contravening s21 of Act 15 of 1995. In the latter eventualities, it is the duty of this court to mero motu consider the legality of the cession. It would seem to me that these aspects require further investigation.

[12] I have accordingly decided to postpone this matter to 13 February 2013 at 10h00 for such investigation which may include the hearing of evidence and submissions. Mr Maletzky will be entitled to give evidence on the issues then and present argument. Representatives of the cedents will be required to be in attendance to give evidence. The Law Society will also be obliged to be represented to present argument and with the leave of the court question witnesses as *amicus curiae*.

[13] I accordingly make the following order:

- a) The matter is postponed to 13 February 2013 at 10h00 for evidence and argument on the issues raised in this ruling and why this court should not dismiss the claims under case no. I 3274/2011 and for referral of the matter to the Inspector-General of Police and Prosecutor-General for a contravention of s21 of Act 15 of 1995.
- b) Winnie Van den Berg of Treasure Trove CC, Hilton Armstrong of Wicked Entertainment CC and Deryck Sinclair of Flashpoint Technologies CC are directed to be present in court on 13 February 2013 at 10h00 and to bring with them documentation relating to the purported cession of their respective claims to the plaintiff dated 12 May 2011.
- c) Service of this order upon the persons referred to in paragraph 2 of this order is to be by Deputy-Sheriff.
- d) The plaintiff is ordered to bring the separate agreement referred to in clause 6.1 of the cession agreement to court on 13 February 2013 at 10h00.

⁵SJ Scott *The Law of Cession* 2 ed (1991); Joubert ed *The Law of South Africa* (2 ed) Vol 2 part 2 paras 28 and 31

- e) The Law Society must present argument and question witnesses with leave of the court as amicus curiae at the hearing of this matter.
- f) The filing of any heads of argument is to be in accordance with practice directives.

D F Smuts
Judge