REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: I 3086/2012

In the matter between:

CATERPLUS NAMIBIA (PTY) LTD t/a BLUE MARINE

INTERFISH **PLAINTIFF**

And

HALLIE INVESTMENT ONE HUNDRED AND FORTY

TWO CC t/a WIMPY MAERUA **1ST DEFENDANT**

CHRISTIAAN JACOBUS JOHANNES VAN DER MERWE **2ND DEFENDANT**

Neutral citation: *Caterplus Namibia (Pty) Ltd v Hallie Investment One Hundred and Forty Two CC (I 3086/2012)* [2014] NAHCMD 192 (20 June 2014)

Coram: HOFF J

Heard: **15 April 2014**

Delivered: **20 June 2014**

ORDER

(a) Plaintiff's first exception is upheld.

(b) The defendants' defence is dismissed with costs.

(c) The defendants' counterclaim is dismissed with costs.

(d) Judgment is granted against the defendants, jointly and severally, the one to pay the other be absolved for:

(i) payment of the amount of N$663,103.69.
(ii) Interest on the aforesaid amount a tempore morae at the maximum permissible rate of interest under the Usury Act 72 of 1968.
(iii) costs of the action on a scale as between attorney and client.

JUDGMENT

HOFF J:

[1] This is an exception raised by the plaintiff against the defendant's plea and counter claim on the basis that it is bad in law and not disclosing any defence or cause of action.

[2] The basis of the action instituted by the plaintiff against the defendants is contained in paragraphs 5, 7 and 11 of the particulars of claim which provides as follows:

‘5. On or about 5 September 2006 and at Windhoek, the first defendant represented by the second defendant duly authorised thereto, submitted a written application for credit facilities to the plaintiff, a copy of which is annexed hereto and marked annexure “POC 1”. The contents of the credit application is reiterated and incorporated herein as if specifically pleaded herein. The plaintiff accepted first defendant’s application for credit facilities on the terms and conditions set out in annexure “POC 1”.

7. During or about the period January 2010 until December 2011 the plaintiff sold and delivered goods to the first defendant on the latter’s special instance and request. Currently an amount of N$663,103.69 is due, owing and payable by the first defendant to the plaintiff in respect of goods sold and delivered by the plaintiff to first defendant. A copy of the certificates of indebtedness by the manager of the plaintiff is annexed hereto and marked annexure “POC 2”.

11. On or about 5 September 2006 and at Windhoek, the second defendant, in writing, bound himself as surety and co-principal *in solidum* with the first defendant for the due and punctual performance by the first defendant of all its obligations under the written credit agreement with the plaintiff. A copy of the deed of surety is contained in Clause B, sub-paragraphs 5.1 and 5.2 of the credit agreement annexed hereto and marked annexure “POC 1”.’

[3] Paragraph 14 of the particulars of claim avers that despite demand the first and second defendants have failed and/or neglected to pay the amount of N$663,103.69 to the plaintiff.

[4] The allegations contained in paragraphs 5 and 11 are admitted by the defendants. The allegation contained in paragraph 7 is denied. The first defendant denies that it is indebted to the plaintiff in the amount claimed or any part thereof, or that it is in breach of its obligations in terms of POC 1, and plead that POC 1 is unenforceable.

[5] In respect of paragraph 14 the first and second defendants admit that they have not paid the plaintiff the amount claimed, but deny that the amount claimed is due by the defendants to the plaintiff.

[6] In the counterclaim reference is made to the terms of paragraph 7.1 of annexure POC 1 which provides as follows:

'The applicant [the first defendant] does hereby irrevocably and in rem suam cede, pledge, assign, transfer and make over unto and in favour of the creditor [the plaintiff], all of its right, title, interst, claim and demand in and to all claims/debts/bookdebts of whatsoever nature and description and howsoever arising which the applicant [the first defendant] may now or at any time hereafter have against all and any persons, syndicates and other legal personae whomsoever ("the applicant's [the first defendant's] debtors") without exception as a continuing covering security for the due payment of every sum of money which may now or at anytime hereafter be or become owing by the applicant [the first defendant] to the creditor [the plaintiff] from whatsoever cause or obligation howsoever arising which the applicant [the first defendant] may be or become bound to perform in favour of the creditor [the plaintiff].'

[7] In their denial that the agreement (POC 1) is enforceable the defendants refers to the content of the counterclaim praying that same be read as if specifically incorporated therein.

[8] The defendant's in the counterclaim alleged as follows:

(a) that the plaintiff has a monopoly in Namibia for the provision of supplies to the Wimpy restaurant brand in Namibia.

(b) in order to obtain supplies on credit in Namibia franchisees are required to sign a document in the form of POC 1.

(c) the effect of clause 7.1 of POC 1 is:

(i) to deprive the first defendant of its right to make any claim against the plaintiff for, on the arising of any such claim it is immediately by operation of clause 7.1 ceded and transferred to the plaintiff (who will not sue itself).

(ii) any claim which first defendant may have against any third party and/or the plaintiff for monies due to the first defendant automatically vests in the plaintiff.

(iii) divests in first defendant of *locus standi* to sue for the recovery of debts in its own name.

[9] Therefore it is alleged that the contract is contrary to public morals and unconstitutional; that it infringes the first defendant's constitutional rights of access to court (as well its rights to all its claims vests in the plaintiff); and that it is unenforceable and void. It is on this basis that the first defendant alleges that it is entitled to a refund of all the amounts paid to the plaintiff, totalling N$6,453.212.57.

[10] The first defendant therefore prays for an order declaring annexure POC 1, as a whole, to be invalid, illegal, and unconstitutional as being contrary to public morals and as a consequence thereof an refund of all sums received by the plaintiff.

The plaintiff raised two grounds of exception

[11] The first ground of exception alleges that the defendant's defence and counterclaim are unsustainable in law, more particularly in that:

'5.1 Public policy favours the utmost freedom of contract.

5.2 This freedom is recognised by Article 16 of the Namibian Constitution.

5.3 It is settled law that unless otherwise agreed, a cession *in securitatem debiti* results in the cedent being deprived of the right to recover the ceded debt retaining only the bare *dominium* or a reversionary interest therein.

5.4 As for the alleged invalidity of the agreement as a whole, the construction for which the defendants contend is unsustainable in law, more particularly in that:

5.4.1 The right to bring such a counterclaim is at best a procedural right.

5.4.2 A general rule which would have the effect of invalidating a cession (let alone an agreement as a whole) simply because the creditor alleges that he has a counterclaim has no place in modern commercial law.

5.4.3 The ‘Applicant’s debtors’ as defined in clause 7.1 does not and cannot include any claim(s) which the first defendant may have or obtain against the plaintiff.

5.4.4 This construction is confirmed by the provisions of clause 10 of the agreement which expressly provides that set off shall operate automatically as a matter of law at the moment reciprocal debts arise between the parties.

5.4.5 Clause 7.2 furthermore expressly retains first defendant’s right to sue in its own name and called on behalf of the plaintiff any debts ceded by the first defendant to the plaintiff.

5.5 In these premises the defendants’ plea and counterclaim lacks the necessary averments to sustain the defendants’ contention that the “*agreement”*

5.5.1 is contrary to public policy; or

5.5.2 unconstitutional; and

5.5.3 null and void.’

[12] The plaintiff therefore prays that:

1. the exception be upheld.
2. the defendants’ defence is dismissed with costs.
3. the defendants’ counterclaim is dismissed with costs.
4. that judgment is granted against the defendants, jointly and severally, the one to pay the other be absolved for:

    4.1 payment of the amount of N$663,103.69;

    4.2 interest on the aforesaid amount at the maximum permissible rate of interest under the Usury Act 72 of 1968;

    4.3 costs of the action on a scale as between attorney and client.

[13] I shall not deal with the second exception since it appears to me that counsel appearing on behalf of the plaintiff did not argue the second exception.

[14] The remedy of exception is only available where it goes to the root of the claim or defence (*Dharumpal Transport (Pty) Ltd v Dharumpal* 1951 (6) 700 AD at 705H-706A;) and the main purpose of an exception that a claim does not disclose an

action is to avoid leading unnecessary evidence at the trial (*Barclays National Bank Ltd v Thompson* 1989 (1) SA 547 (A) at 553G-I).

[15] In *McKelvey v Cowan NO* 1980 (4) SA 525 (Z) at 526 the following was stated in respect of exceptions:

> 'It is a first principle in dealing with matters of exception that, if evidence can be led which can disclose a cause of action alleged in the pleadings, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led can disclose a cause of action.'

[16] In considering an exception a court must assume the correctness of the factual averments made in the relevant pleading, unless they are palpably untrue or so improbable that they cannot be accepted. (See *Voget and Others v Kleynhans* 2003 (2) SA 148 at 151G-H).

[17] In the present matter I must accept that the excipient (plaintiff) proceeds on the assumption that each and every averment in the pleading of the defendants is true, but nevertheless contends that, as a matter of law, the pleading does not disclose a cause of defence. (See *Michael v Caroline's Frozen Yoghurt Parlour (Pty) Ltd* 1999 (1) SA 624 (WLD) at 632C).

[18] The *onus* of showing that a pleading is excipiable rests on an excipient (See *Voget* (supra), *Caroline's Frozen Yoghurt* (supra) *McKelvey* (supra)).

[19] Mr Schickerling who appears on behalf of the excipient submitted that the agreement (POC 1) signed by the parties on 5 September 2006 in essence constitutes three distinct and separate agreements, namely, (1) a credit agreement governing the sale, delivery and payment of goods to be sold and delivered by plaintiff to the first defendant; (2) a cession, and (3) a deed of suretyship.

[20] Attached to POC 1 was a certificate of indebtedness signed by the general manager of the plaintiff. It was submitted that the credit agreement exists

independently of the cession, that the plaintiff does not rely at all on the cession, but that plaintiff's claim stands for *'goods sold and delivered'* in terms of an '*agreement'* which was *'cancelled'*.

[21] It was submitted that the invalidity of clause 7.1 of the agreement can never affect the validity of the credit agreement which is governed by its own terms.

[22] Mr Morison with reference to clause 7.1, (read with clause 17, which provides that any variation, cancellation or additions to the agreement shall not be of any force or effect unless reduced to writing, and signed by the parties, and clause 20) submitted that clause 7.1 is not severable from the rest of the agreement if one has regard to the *sine causa qua non* or 'but for' test. It was submitted that 'but for' clause 7.1 the parties would not have entered into the credit agreement. This court was referred to the case of *Sasfin v Beukes* 1989 (1) SA 1 (A) where it was held that the offending provisions in that case were not severable from the remainder of the deed of cession and was void *ab initio,* on the basis that the offending provisions were found to be contrary to public policy.

[23] I am of the view that the question whether or not the agreement is contrary to public policy and illegal and unenforceable should first be determined before deciding the issue of the severability (or divisibility) of the agreement.

[24] Regarding the issue of illegality it was submitted by Mr Morison with reference to clause 7.1, that the word 'irrevocably', implies that the cession will endure in perpetuity if read with the non variation clause (clause 17) of the agreement; that at the time of signing the agreement 'all rights and claims of the first defendant are transferred to the plaintiff which claims are not confined to ordinary book debts but relates to every conceivable claim of whatsoever nature and description, howsoever arsing and as a natural consequence first defendant does not have *locus standi* to sue anybody including the plaintiff; and that the cession gives the cessionary (the plaintiff) *carte blance* to infringe the rights of the cedent (first defendant) and to

prevent the first defendant from exercising its constitutional right of access to the courts.

[25] This court was referred to the case of *Springtex Limited v Spencer Steward & Company Prentice Hall (4) Weekly Legal Service* 1991 (1) case A.7 where Conradie J described a cession *in securitatem debiti* similarly worded as clause 7.1 as 'just about as wide as human ingenuity could make them . . .'.

[26] I am of the view that the effect of the offending clauses, which were found to be contrary to public policy in the *Sasfi*n matter, are distinguishable from those relied on by the first defendant in this action.

[27] In *Sasfin* clause 3.4.4 provided *inter alia* that an amount which was recovered by the creditor (*Sasfin*) which exceeded the full amount of the indebtedness by Beukes irrespective of whether it is an actual or contingent or prospective indebtedness, *Sasfin 'shall be entitled but not obliged to refund such excess'* to Beukes without affecting the force and continuity of that session as security for any indebtedness subsequently arising in favour of the creditors (*Sasfin and Others*). This was held (at p 14) a sufficiently wide interpretation to allow Sasfin on termination of the deed of cession by the creditors to retain all monies collected by it in excess of Beukes' indebtedness to it and that that this clause amounted to a *pactum commissorium* which is invalid and unenforceable.

[28] Clause 3.4.2 (in *Sasfin*) provided that the creditors were entitled without first obtaining any order of court to sell by public auction or private treaty all or any of the claims ceded for such price and on such terms and to such purchasers as the creditors in their sole and absolute discretion may deem fit. This was held (at p 14) to be a clause for *parate executie* which authorises execution without an order of court, which is valid, provided it does not prejudice the rights of the debtor unduly. This clause was held to be open to abuse and the likelihood of undue prejudice to Beukes in the event of the terms being enforced.

10
10
10
10
10

[29] Clause 3.6 gave the creditors the freedom in their sole discretion to do or to omit to do any act negligently (whether grossly or otherwise) ‘or in a manner calculated to cause, or in fact causing prejudice’ to Beukes without in any way limiting the creditors’ rights against Beukes or otherwise affecting Beukes obligations to the creditors.

[30] Clause 3.8 provided that the creditors shall be under no obligation to Beukes to bring any proceedings against any of Beukes’ debtors and shall not be liable to Beukes for any losses which he may have suffered or incurred in consequence of anything done or omitted to be done by the creditors. The court found (at p 14) these clauses had the effect that Sasfin was under no obligation to collect book debts from Beukes’ debtors and, could if it so wished, merely sit back and do nothing, allowing claims to prescribe in the process and Beukes would be deprived of all rights of recourse to Sasfin. This it was held manifestly constituted ‘exploitation of Beukes to a degree which, in the public interest, cannot be countenanced’.

[31] Clause 3.24.2 provided that a certificate reflecting the amount owing by Beukes to Sasfin shall be binding on Beukes and shall be *conclusive* proof of the amount due, owing and payable and deemed to be a liquid document for the purpose of obtaining a judgment against Beukes and shall be proved under the signature of any of the directors of any of the *creditors*.

[32] It was held that the effect of such a certificate cannot effectively be challenged on any ground save fraud and purported to oust the court’s jurisdiction to enquire into the validity or accuracy of the certificate and to entertain any challenge directed at it other than on the ground of fraud.

[33] This clause was found to run counter to public policy. In *Ex parte Minister of Justice in re: Nedbank Ltd v Abstein Distributor (Pty) Ltd and Others and Donelly v Barclays National bank Ltd* (case 240/1993 AD) Steyn JA remarked as follows at p 57:

'I conclude, therefore, that in Sasfin this Court in essence decided that any conclusive proof clause in terms of which the creditor was the author of the certificate of balance was in any agreement per se against public policy and, therefore, invalid.'

[34] In the present matter the plaintiff also relies on a certificate of indebtedness signed by its general manager. The difference is that in terms of clause 1 of the agreement the certificate provides that the amount due and owing which is reflected on this certificate is *prima facie* proof of such fact. Clause1 in my view provides the cedent the opportunity to dispute the amount due and owing.

[35] Steyn JA further stated that the court (in *Sasfin*) considered a number of suspect clauses in the deed of cession, assessed each such clause separately, then considered the *cumulative effect* of the clauses found to be contra bonos mores on the validity of the deed of cession as a whole.
(Emphasis provided).

[36] The present deed of cession does not contain a clause similar to clause 3.4.4 which provides for the retention of money collected which exceed the cedent's indebtedness to the cessionary neither does it contain clause similar to clause 3.4.2 in the *Sasfin* matter, neither does it contain a similar clause as clause 3.8 in the *Sasfin* matter.

[37] Mr Schickerling in support of his submission that defendants' pleaded defence, inclusive of its counterclaim, is ill-conceived and unsustainable in law referred to *Sasfin* where at p 9E it was stated that in dealing with the concept of public policy one must 'borne in mind that public policy generally favours the utmost freedom of contract, and requires that commercial transactions should not be unduly trammelled by restrictions on that freedom'.

[38] Smalberger JA in *Sasfin* at p 9B-C warned as follows:

'The power to declare contract contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from arbitrary and indiscriminate use of power. One must be careful not to

conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of proprietary and fairness. In the words of *Lord Atkin in Fender v St John-Mildmay* 1938 AC 1 (HL) at 12 [1937] 3 All ER 402 at 407B-C, "the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds'.'

[39] In *Interland Durban (Pty) Ltd v Walters NO and Another* 1993 (1) SA 223 CPD at 224J-225E Viljoen AJ commented as follows in respect of the issue of public policy:

'Public policy in the interpretation of contracts has, for some reason, inspired a shower of equine analogies. It has been variously described as a very unruly horse, a high horse to mount and difficult to ride, one which stampedes in opposite directions at the same time and one whose reins must be tightly held. (See for instance *Mabaso and Others v Nel's Melkery (Pty) Ltd* 1979 (4) SA 358 (W) at 362A-B and *Joosub Investments (Pty) Ltd v Marine & General Insurance Co. Ltd* 1990 (3) SA 373 (C)). But intimidating as these similar sound, the rules relating to contracts concluded contrary to public policy are not complicated or difficult to apprehend. As is frequently the case where interpretation is concerned, whether contractual or statutory, the problem does not lie so much in stating the applicable principles as it does in correctly applying them to the facts of a particular case. In *Sasfin* a contract between a finance house and a customer was struck down because it was held by the majority of three Judges to be, in effect, unconsciously onerous to the debtor. The *Sasfin* case has been considered in a number of subsequent decisions. In one of them Kriegler J remarked that it seem to have come to be regarded as a free pardon for recalcitrant and otherwise defenceless debtors' (*Donelly v Barclays National Bank Ltd* 1990 (1) SA 375 (W) at 381F). See also *Nedbank Ltd v Abstein Distributors (Pty) Ltd and Others* 1989 (3) SA 750 (T) at 753 *et seq*; *Botha (now Griessel) and Another v Finanscredit (Pty) Ltd* 1990 (3) SA 34 (E) at 43B-44G and *Joosub Investments* (supra at 385E).'

[40] In reply to the contention by the defendants that the provisions of clause 7.1 deprive the first defendant of the *locus standi* to sue for the recovery of debt in its own name this court was referred to authority (See *African Consolidated Agencies (Pty) Ltd v Siemens Nixdorf Information Systems (Pty) Ltd* 1992 (2) SA 739 where King J in considering the nature of a cession *in securitatem debitii* referred to

Appellate Division decisions as authority for the proposition that where a cession is made as security for a debt the right of action is required by the cessionary.

The following appears at 743J-744A:

'It is thus clear that the effect of a cession *in securitatem debitii* is to confer on the cessionary an exclusive right to sue; this right is retained during the subsistence of the cession;'

King J at 742C-D stated the following:

'It is now settled law that a consequence of a cession of an incorporeal right *in securitatem debitii* is that ownership of that right remains vested in the cedent; that ownership consists in a reversionary interest which entitles the cedent to claim the re-cession of the right upon payment of the indebtedness. *Incledon (Welkom) (Pty) Ltd v Owaqua Development Corporation Ltd* 1990 (4) SA 798 (A) at 804G-J. The cedent in such circumstances retains the *dominium* of the ceded right in the form of a reversionary interest therein, whilst the cessionary acquires a restricted ('beperkte') real right in the right of action to exercise such a right in the event of non-payment of the principle debt. *Land- en Landboubank van Suid-Afrika v Die Meester en Andere* 1991 (2) SA 761 (A) at 771D-F.'

[41] It was also contended by the defendants that clause 7.1 deprives the first defendant of its right to make any claim against the plaintiff who will not sue itself, infringes the first defendant's constitutional right of access to the courts, and is contrary to public morals. I do not agree that this is indeed an effect of clause 7.1 in view of the provisions of clause 10 which provides as follows:

'It is agreed that set off shall operate automatically as a matter of law at the moment reciprocal debts between the creditor [plaintiff] and the applicant [first defendant] come into existence and independently of the will of the parties and it shall not be necessary for either of the creditor [plaintiff] or the applicant [first defendant] to specifically raise set-off. Upon the operation of an automatic set-off aforementioned, the debts shall be mutually extinguished to the extent of the lesser debt.'

[42] It is trite law that the *onus* of establishing that a term in a contract (admittedly entered into by the defendants) is *contra bonos mores* rests on the defendants. (*Diners Club SA (Pty) Ltd v Singh and Another* 2004 (3) SA 630 (D & CLD) at 645G).

[43] The effect of the clause relating to the deed of cession in this matter is distinguishable from the offended clauses in *Sasfin*. I hold the view that no evidence led on the defendants' plea can disclose a defence and that defendants' plea does not sustain a defence. The exception should accordingly be upheld.

[44] In view of my finding aforementioned it is not necessary to deal with the issue of the severability of the agreement.

[45] It was submitted by Mr Morison that even in the event of this court upholding the exception it is not competent to grant the prayers of the plaintiff, namely, that the defendants' defence be dismissed with costs; that defendants' counterclaim be dismissed with costs; that judgment be granted against the defendants jointly and severally; payment of the amount of N$663,103,69; the interests; and costs on a scale as between attorney and client.

[46] In this regard this court was referred to Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs 1993 (2) SA 593 (A) at 602D-E where Corbett CJ stated that 'where an exception has been successfully taken to a plaintiff's initial pleading' on the ground that it discloses no cause of action the invariable practice of our Courts has been to order that the pleading be set aside, and that the plaintiff be given leave, if so advised, to file an amended pleading within a certain period of time.'
(See also *Rowe v Rowe* 1997 (4) SA 160 SCA at 167H).

[47] In the present matter defendants' plea was found to disclose no defence and bad in law. It seems to me that the defendants' plea mainly founded on the judgment in *Sasfin* neatly fits the description by Kriegler J in the *Donelly* case (supra) namely, 'a free pardon for recalcitrant and otherwise defenceless debtors'.

[48] An order of this court setting aside the defendants' plea and granting leave to amend, presupposes that there is something which can be amended. In the particular circumstances of this matter there is nothing that can be amended. The counterclaim of the defendants is premised on the very same contention as in defendants' plea namely that the agreement relied on by the plaintiff is contrary to public policy, void, illegal and unenforceable. Since I have found that the defendants' plea discloses no defence it follows for the same reason that the counterclaim discloses no cause of action.

[49] I do not at all doubt that the practice of the courts as stated by Corbett CJ (supra) is correct, however in this particular case where I have found that the defendants' plea discloses no defence and in view of the fact that the defendants do not dispute the terms of the agreement, do not dispute that the second defendant in writing bound himself as surety and co-principal debtor *in solidum* with the first defendant, and do not dispute that, demand notwithstanding, the defendants have failed to pay the amount claimed by the plaintiff, there is certainly no room for the defendants to amend their plea.

[50] In the result the following orders are made:

(a) Plaintiff's first exception is upheld.

(b) The defendants' defence is dismissed with costs.

(c) The defendants' counterclaim is dismissed with costs.

(d) Judgment is granted against the defendants, jointly and severally, the one to pay the other be absolved for:

(i) payment of the amount of N$663,103.69.

(ii) iInterest on the aforesaid amount a tempore morae at the maximum permissible rate of interest under the Usury Act 72 of 1968.

(iii) costs of the action on a scale as between attorney and client.

16
16
16
16

E P B HOFF

Judge

APPEARANCES

PLAINTIFF	:	J Schickerling Instructed by Francois Erasmus & Partners, Windhoek
1ST AND 2ND DEFENDANTS:		L J Morison SC Instructed by Erasmus & Associates, Windhoek