

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-ACT-CON-2021/00610

In the matter between:

**MIS HAMZA CONSTRUCTION
HENDRIK HENRICH SALI**

**FIRST RESPONDENT/PLAINTIFF
SECOND RESPONDENT/PLAINTIFF**

and

PATRICK JOHN BRITZ

APPLICANT/DEFENDANT

Neutral citation: *Mis Hamza Construction v Britz* (HC-MD-CIV-ACT-CON-2021/00610) [2023] NAHCMD 8 (25 January 2023)

Coram: PARKER AJ

Heard: 16 November 2022

Delivered: 25 January 2023

Flynote: Contract – Agreement of cession – The defendant (the plaintiff in reconvention) pleaded that the Agreement was entered into by and between the defendant and the plaintiffs (the defendants in reconvention) – However court found that the defendant and the plaintiffs and a third party appear at the beginning of the Agreement and in the testimonium clause thereof – Court found further that although the Agreement assigns responsibilities to all the three parties the third party had not signed the Agreement – Additionally, it was not clear who the cedant was, who the

cessionary was, and what was the ceded obligation – Consequently, court concluded that no contract of cession existed.

Summary: Contract – Agreement of cession – The defendant (the plaintiff in reconvention) pleaded that he undertook construction works on behalf of the plaintiffs (the defendants in reconvention) in performance of his obligation under an Agreement of cession – The defendant claimed N\$286 037.62 from the plaintiffs being the amount used in purchasing materials for the project after plaintiffs had failed to supply the said materials in breach of the Agreement – The defendant pleaded further that the Agreement was entered into by and between the defendant and the plaintiffs but the document annexed to the pleading as the Agreement indicated a named entity (the SME Bank) as a party to the Agreement and all the three parties are assigned individual responsibilities by the terms of the Agreement – Yet the document was not signed by the SME Bank – The court concluded that the defendant cannot insist that a contract existed upon which he could sue in a counterclaim when the document he relies on as the written Agreement has not been signed by all the parties thereto and therefore invalid and unenforceable – Consequently, the court dismissed the counterclaim with costs, limited to disbursements reasonably incurred by the plaintiffs in resisting the counterclaim.

Held, in an action based on cession, the contract of cession must indicate clearly who the cedant was, who the cessionary was and what the ceded obligation was because it is the cessionary who is entitled to sue in his (her) own name on the ceded obligation.

Held, further, a party relying on a cession must allege and prove the contract of cession.

Held, further, a written contract comes into existence when, and only when, it has been signed by all the parties thereto.

ORDER

1. The defendant's counterclaim is dismissed with costs; and costs are limited to disbursements reasonably incurred by the plaintiffs in resisting the counterclaim.
2. The matter is finalized and removed from the roll.

JUDGMENT

PARKER AJ:

[1] The plaintiffs instituted action against the defendant. The matter concerned the plaintiffs' claim of unjust enrichment of the defendant at the expense of the plaintiff, a claim for the return of a truck that was in the defendant's possession, and a claim for the return of nine plastic tanks in the possession of the defendant.

[2] At the close of the plaintiffs' case, the defendant brought an application for absolution from the instance. The court granted the application. What remained to be considered was the defendant's counterclaim. Ms Janser represents the defendant (the plaintiff in reconvention); and the second plaintiff (the second defendant in reconvention) in person represents the plaintiffs (the defendants in reconvention).

[3] In the counterclaim the defendant alleged that upon a cession agreement ('the Agreement') concluded by and between the plaintiffs and the defendant, the defendant undertook certain construction works. The defendant alleged that it was a term of the Agreement that the defendant shall purchase all equipment necessary to complete the works and that the plaintiffs would reimburse the defendant the cost of the equipment so purchased. It is the defendant's case that he complied with his obligation under the Agreement and while executing the works he incurred a loss in the amount of N\$286 037.62 which he now claims from the plaintiffs.

[4] Thus, for the counterclaim, the defendant relies on the so-called 'Cession Agreement' ('the Agreement'). The defendant pleaded that the first plaintiff represented by the second plaintiff and the defendant in person and at Windhoek

concluded the 'Cession Agreement' during June 2019. And pursuant to rule 45(7) of the rules of court, the defendant annexed a true copy of the Agreement to the pleading marked Annexure 'A'.

[5] The defendant pleaded that the Agreement was entered into by and between the first plaintiff and the defendant, yet the contracting parties included not only the first plaintiff and the defendant, but also the 'Small Medium Enterprise(s) Bank' as appears at both the beginning, and in the testimonium clause, of the Agreement. Thus, the following crucial questions arose on the pleadings; and no evidence was led by the defendant to deal with them. There appears to be three parties to the Agreement, that is, the plaintiffs, the defendant and the Small Medium Enterprise(s) Bank ('the SME Bank'). In the maze of uncertainty and absurdity, the important questions that arise are these: Who is the cedant, who is the cessionary, and what is the ceded obligation? These questions are crucial in the instant proceeding because it is the cessionary who is entitled to sue in his or her own name on the ceded obligation.¹

[6] As respects signatures appended to the Agreement, Patrick John Britz signed on 6 June 2019; and there is a signature of a witness. There is no signature for the SME Bank. And Hendrik Henrich Sali signed on 7 June 2019; and there is a signature of a witness.

[7] Although there is no signature for the SME Bank, there are terms in the Agreement entitled 'Responsibility of the SME Bank', indicating that the SME Bank was a party to the Agreement, but, as I have said *ad nauseam*, the defendant pleaded that the Agreement was entered into between and by the plaintiffs and the defendant only. Similarly, there are terms entitled 'Responsibility of Mr Britz' and 'Responsibility of Mr Sali'. Mr Britz is the defendant in convention and the plaintiff in reconvention. Mr Sali is the second plaintiff in convention and the second defendant in reconvention, as aforesaid.

[8] The weakness of Mr Britz's case is accentuated by the fact that the Agreement is not a valid agreement. As a matter of law, Mr Britz cannot insist that a contract existed upon which he could sue in a counterclaim when the written

¹ I Isaacs, *Beck's Theory and Principles on Pleading in Civil Actions*, 5 ed (1982) at 304.

agreement he relies on has not been signed by all the parties and therefore invalid. A written contract comes into existence when, and only when, it has been signed by all the parties thereto.² After all, a party relying on a cession must allege and prove the contract of cession.³ Mr Britz, the plaintiff in reconvention, has failed to prove the existence of such contract.

[9] Keeping in my mind's eye the foregoing analysis and conclusions in paras 4-8, I come to the ineluctable conclusion that the counterclaim must fail; and it fails. On the pleadings and the evidence, I find that there is no valid cession agreement which the court is entitled to enforce against the plaintiffs. The defendant has failed to establish any legal basis upon which his counterclaim could be sustained. The pleading and the evidence do not establish a right in the relief claimed. It is therefore not safe to uphold the defendant's counterclaim against the plaintiffs.

[10] Based on these reasons, the counterclaim is rejected. In the result I order as follows:

1. The defendant's counterclaim is dismissed with costs; and costs are limited to disbursements reasonably incurred by the plaintiffs in resisting the counterclaim.
2. The matter is finalized and removed from the roll.

C PARKER
Acting Judge

² RH Christie *The Law of Contract in South Africa*, 3 ed (1996) at 118; and the cases there cited.

³ LTC Harms *Amler's Precedent of Pleadings*, 4 ed (1993) at 59; and the cases there cited.

APPEARANCES:

PLAINTIFFS: In person

DEFENDANT: J JANSER
Of Shikongo Law Chambers, Windhoek