THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 385/2017

In the matter between:

AUTOMATED OFFICE TECHNOLOGY
(PTY) LTD t/a AOT FINANCE **APPELLANT**

and

INTERNATIONAL COLLEGES GROUP (PTY) LTD **RESPONDENT**

Neutral citation: *Automated Office Technology (Pty) Ltd t/a AOT Finance v International Colleges Group (Pty) Ltd* (385/2017) [2018] ZASCA 31 (26 March 2018)

Coram: Navsa, Seriti and Swain JJA and Pillay and Makgoka AJJA

Heard: 8 March 2018

Delivered: 26 March 2018

Summary: Master rental agreement – written cession – interpretation of cession in context – subsequent rental agreements validly ceded.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Nuku J with Allie J concurring, sitting as a court of appeal).

1 The appeal succeeds with costs on a scale as between attorney and client.

2 The order of the Court a quo is set aside and replaced with the following order:

'(a) The appeal succeeds with costs, on a scale as between attorney and client.

(b) The order of the trial Court is set aside and replaced with the following order:

(i) Judgment is granted in favour of the plaintiff for payment of the aggregate amount of arrear rentals, in respect of the first to the ninth rental agreements, in the sum of R479 257,35.

(ii) Judgment is granted in favour of the plaintiff for payment of the aggregate amount of future rentals, in respect of the first to the ninth rental agreements, in the sum of R54 510,78.

(iii) Interest is granted on the aforesaid amounts, payable from the date of judgment being 27 November 2013 to date of payment, calculated at the prescribed statutory rate.

(iv) The defendant is ordered to pay the plaintiff's costs of suit on a scale as between attorney and client.

(v) The plaintiff is ordered to pay the defendant's wasted costs on the magistrates court party and party scale, occasioned by the adjournment of the trial on the 20 February 2013.'

JUDGMENT

Swain JA (Navsa and Seriti JJA and Pillay and Makgoka AJJA)

[1] Whether rental is owed by the respondent, International Colleges Group (Pty) Ltd to the appellant, Automated Office Technology (Pty) Ltd t/a AOT Finance, for the hire of items of office equipment, comprising a number of copiers and fax machines, is the origin of a war of attrition which has raged between the parties for the last ten years. Problems first arose between the parties in January 2008 when the respondent summarily ceased making payment of the rentals.

[2] Concerned at the unexpected turn of events, the appellant sought an explanation from the respondent, only to be informed that new owners had taken over and wished to review all of the rental agreements, before making any further payments. The appellant heard nothing further and the arrears on the accounts increased. Letters of demand for payment by the respondent of the outstanding rentals were ignored, save that a payment of R 200 000 was received during 2008, which was allocated to a portion of the arrears. No further payments were received and no clarification was furnished by the respondent, as to why payment was withheld.

[3] The appellant accordingly issued summons against the respondent in the Magistrates Court for the district of Cape Town during May 2010. Return of the equipment together with arrear and future rentals was claimed on the basis that as a result of the failure by the respondent to make payment of the rental due in terms of each of the nine written rental agreements, the appellant had cancelled them all.[1]

[1] In terms of an order granted by consent and without prejudice, the respondent was ordered by the Magistrates Court to return the equipment to the appellant.

[4] It was common cause that:

4.1 A company, Katlego Solutions (Pty) Ltd (Katlego), had entered into a master rental agreement with the respondent on 3 November 2005 for the hire of equipment to the respondent, a copy of which was annexed to the appellant's particulars of claim;

4.2 In terms of the master rental agreement, the equipment to be hired 'from time to time' by Katlego to the respondent would be 'described in signed Addendums' in accordance with the 'Proforma Addendum' annexed to the master rental agreement, which would be subject to the terms and conditions recorded in the master rental agreement;

4.3 The respondent concluded nine written rental addenda with Katlego, copies of which were annexed to the appellant's particulars of claim marked 'A' to 'J'. Each was headed 'Rental Addendum – Annexure A', specified that it was an addendum to the master rental agreement, described 'The Equipment' hired as well as the rental payable and provided that 'The terms and conditions of the Master Rental Agreement shall apply hereto, as though specifically set forth herein';

4.4 On 28 April 2006, Katlego concluded an agreement with the appellant headed 'Cession of Master Rental Agreement and Addenda' which provided that Katlego, 'hereafter referred to as the Cedent, hereby cede and transfer all of the Cedent's rights, title and interest in the Master Rental Agreement signed on 26 October 2005 and the addenda signed hereto between the Cedent. . .' and the respondent to the appellant and;

4.5 A valid cession and transfer of the rights of Katlego in the first, second and third rental agreements was effected to the appellant.

[5] The defence advanced by the respondent fell within a highly technical narrow compass. It was simply that a valid cession of Katlego's rights in the remaining six rental agreements was not effected to the appellant, because they were all concluded after the written cession agreement. In other words, these later rental

agreements were not included in the cession, because the reference to 'the addenda signed hereto' in the written cession agreement only referred to the first three rental agreements in existence at the time of the cession. In other words, the written cession did not operate in respect of rental agreements to be concluded in the future.

[6] Accordingly, the only issue to be determined by the trial court was whether the appellant had discharged the onus of proving that the rights, title and interest of Katlego in the six rental agreements had been validly ceded to the appellant. It held that the appellant had failed to do so and therefore granted judgment in favour of the appellant only for the payment of arrear and future rental in respect of the three rental agreements not in dispute, but dismissed its claim in respect of the remaining six rental agreements, with costs. A subsequent appeal to the Western Cape Division of the High Court, Cape Town was dismissed with costs. The appeal is with the special leave of this court.

[7] The only evidence upon which the trial court and the court a quo relied in dismissing the claims of the appellant in respect of the six rental agreements in issue, was the evidence of Mr Gregg Coull, a director of the appellant, as the respondent closed its case without leading any evidence. He stated that he had signed the master rental agreement and all nine rental agreements on behalf of Katlego. He was duly authorised to do so, because Katlego was a Johannesburg based company and when they opened a branch in the Western Cape, they did not have sufficient resources and asked him to be a signatory on their rental agreements.

[8] The relationship between the appellant and Katlego dated back to 2003 when Mr Coull had represented the appellant in orally agreeing with Katlego that each time Katlego entered into a rental agreement, it would automatically be financed and ceded to the appellant. He expressed the view that the rights, title and interest in the first three rental agreements were ceded to the appellant on the date of the written cession, being 28 April 2006 and that the rights, title and interest in the remaining six rental agreements in issue, were ceded to the appellant on the dates that he signed each of them on behalf of Katlego, and simultaneously accepted their cession to the appellant, on its behalf. He was of the view, however, that the cession of the rights,

title and interest in the six rental agreements in issue, took place in accordance with the 2003 oral agreement.

[9] When cross-examined, he however, stated that when Katlego signed each rental agreement with the customer, it could on an ad hoc basis choose to sell and cede the agreement to the appellant, in order to finance the transaction and raise funds upfront. He was unable to explain how it could be at Katlego's choice if there was an oral agreement in 2003 that the rental agreements would automatically be ceded to the appellant, but later reiterated that from the inception of the agreement, the rights in the rental agreements would automatically be ceded. When asked about the purpose of the written cession agreement in 2006, he replied it was to record the oral cession agreement.

[10] The grounds upon which the trial court dismissed the appellant's claim in respect of the six rental agreements in dispute, were as follows:

10.1 The appellant, in its particulars of claim, had pleaded and relied upon the written cession of agreement concluded on 28 April 2006 and had failed to plead and rely upon the oral cession concluded in 2003, which provided that all the agreements entered into by Katlego would be financed by and ceded to the appellant, as a matter of practice.

10.2 The appellant failed to call a witness from Katlego to confirm the oral cession agreement and the court was unable to rely upon the evidence of Mr Coull, because he represented the appellant and not Katlego in the conclusion of this agreement.

[11] On appeal the court a quo dismissed the appeal for the same reasons, making the following findings:

11.1 The appellant's case was based upon the written cession agreement concluded between the appellant and Katlego on 28 April 2006, but the evidence of Mr Coull that the six rental agreements in issue were ceded to the appellant as a result of the 2003 oral cession agreement, did not accord with the case as pleaded

by the appellant. His evidence accordingly could not assist the appellant as it was trite that a litigant is bound by its pleadings.

11.2 Although Mr Coull testified that he was authorised to sign the master rental agreement as well as the addenda on behalf of Katlego, he did not testify that he was authorised to cede the agreements on behalf of Katlego.

11.3 The appellant had therefore failed to prove the cessions of the six rental agreements in issue, by Katlego in favour of the appellant.

[12] In reaching these conclusions the trial court and the court a quo erred, for the following reasons:

12.1 Whether the six rental agreements in issue were validly ceded to the appellant, requires an interpretation of the written cession agreement, read together with the master rental agreement and the individual rental agreements. The written cession agreement was pleaded in the following terms, in the appellant's particulars of claim:

‘15. On 28 April 2006 and at Cape Town, Plaintiff and Katlego entered into a cession agreement in terms of which Katlego agreed to cede and transfer all of its rights title and interest in the master rental agreement, and the addendums thereto, to the Plaintiff.

15.1 A true copy of the aforesaid cession agreement is annexed hereto, marked "D".

16. Pursuant to the aforesaid cession agreement:

16.1 Katlego ceded and transferred all of its rights, title and interest in the master rental agreement, and in the first, second and third agreements, to the Plaintiff on about 28 April 2006;

16.2 Katlego ceded and transferred all of its rights, title and interest in:

16.2.1 the Fourth agreement to the Plaintiff on about 8 May 2006;

16.2.2 the Fifth and Sixth agreements to the Plaintiff on about 6 August 2006;

16.2.3 the Seventh, Eighth and Ninth agreements to the Plaintiff on about 31 August 2006.’

In other words, the first three rental agreements were ceded to the appellant on the date of the written cession agreement, but the remaining six rental agreements in issue were ceded to the appellant in terms of the written cession agreement, on the dates when each of them were concluded.

12.2 The view of Mr Coull that the six rental agreements concluded after the written cession agreement, were ceded in terms of the 2003 oral cession and not the written cession agreement, is irrelevant to an interpretation of the 2006 written cession agreement, particularly as he stated that the purpose of the written agreement was to record the oral cession agreement. In addition as stated in *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* [2015] ZASCA 111; 2016 (1) SA 518 (SCA) para 27, it is the role of the court and not witnesses to interpret a document.

12.3 When interpreting the written cession agreement, the significance of the prior oral cession agreement lies in the context and circumstances in which the written cession agreement came into being. As stated in *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 (SCA) para 12:

'Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is "essentially one unitary exercise".'

12.4 The central enquiry is the meaning of the sentence contained in the written cession agreement which provides as follows:

'. . . hereby cede and transfer all of the Cedent's rights, title and interest in the Master Rental Agreement signed on 26 October 2005 and the addenda signed hereto between. . .' Katlego and the respondent, to the appellant.

In other words, do the words 'addenda signed hereto' refer only to those written rental agreements ie addenda, in existence and signed at the time of signature of the written cession agreement, or do they include written rental agreements to be concluded in the future?

12.5 It is clear that the rights, title and interest of Katlego in the master rental agreement were validly ceded to the appellant, in terms of the written cession agreement. In terms of the master rental agreement, it is provided that 'the customer' ie the respondent:

'. . . agrees to hire from Katlego the equipment which will be described in signed Addendums, as per the Proforma Addendum annexed hereto marked "A", subject to terms and conditions recorded overleaf.'

On the reverse of the master rental agreement detailed terms and conditions are set out which govern the rental of any equipment by the respondent from Katlego. The master rental agreement also provides that:

'The description of The Equipment, serial numbers, and Rental charge payable will be as agreed to in the Rental Addendums.'

12.6 Each of the written rental agreements is headed 'Rental Addendum – Annexure "A"' with the subheading, 'Addendum No ---------- To the Master Rental Agreement.' A description of 'The Equipment', the serial numbers of the equipment, the quantity of each item of equipment supplied and the rental payable, is set out in each written rental agreement. The following clause is included, with provision for signature by the parties to acknowledge its existence:

'The terms and conditions of the Master Rental Agreement shall apply hereto, as though specifically set forth herein.'

12.7 It is therefore clear that the rights and obligations of Katlego and the respondent in respect of the hire of particular equipment by the respondent from Katlego, could only be determined by reading the master rental agreement together with each rental agreement, applicable to the equipment in question. Each of the written rental agreements could not stand alone and had to be read in conjunction with the master rental agreement.

12.8 As stated in *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 26:

‘An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.’

To place an interpretation on the words, ‘. . . and the addenda signed hereto . . .’ in the written cession agreement, to mean that only signed rental agreements in existence at the time of the cession were ceded, would lead to impractical, unbusinesslike and oppressive consequences and would stultify the broader operation of the master rental agreement, as well as the individual rental agreements concluded after the written cession agreement. This is because the later rental agreements would be inchoate and unenforceable, because Katlego no longer possessed any rights, title and interest in and to the master rental agreement, having ceded them to the appellant.

12.9 Counsel for the respondent, however, submitted that the clause in each of the rental agreements which provided that, ‘The terms and conditions of the Master Rental Agreement shall apply hereto, as though specifically set forth herein’ meant that the terms of the master rental agreement were incorporated by reference into each of the six rental agreements, by agreement between Katlego and the respondent. As a result these rental agreements were not inchoate and unenforceable. The submission is without foundation. Having divested itself of all of its rights, title and interest in and to master rental agreement in favour of the appellant, Katlego could not re-acquire them simply by agreement with the respondent. What was required was a re-cession of the ceded rights, title and interest by the appellant as cessionary, back to Katlego, their previous holder. There is no evidence that the appellant as cessionary agreed to transfer the ceded rights, title and interest it held in the master rental agreement to Katlego, at the time each of the later rental agreements was concluded.

12.10 This interpretation is in accordance with the background and context in which the written cession agreement was concluded namely, the prior oral cession agreement transacted in 2003 in terms of which Katlego, according to the evidence of Mr Coull, agreed to cede to the appellant its rights, title and interest in future rental agreements to the appellant. The vacillation in his evidence as to whether in terms of

the prior oral cession agreement Katlego's rights in future rental agreements were automatically ceded, or whether this only occurred on the election of Katlego, cannot lead to an unbusinesslike and impractical interpretation being placed upon the terms of the written cession agreement, read together with the master rental agreement and the six rental agreements in issue. In addition, as pointed out in *Novartis*, it is the role of the court, not witnesses, to interpret a document.

[13] Accordingly, in terms of the written cession agreement properly construed, the rights, title and interest of Katlego in each of the six rental agreements in issue, were validly ceded to the appellant on the date on which each of these rental agreements were concluded. The appeal must accordingly succeed.

[14] As regards the issue of costs, clause 18 of the master rental agreement provides that:

'In the event of Katlego instructing its attorneys to take steps to enforce any of its rights under the agreement, The Customer shall pay to Katlego on demand all collection charges and other legal costs which it incurs with its attorney, on the attorney and client scale.'

In *Sapirstein and others v Anglo African Shipping Co (SA) Ltd* 1978 (4) SA 1 (A) at page 14 E-F, the following was stated:

'I do not consider it necessary to decide whether the Court retains a residual discretion to refuse to enforce such an agreement in certain circumstances, or to deprive a successful party, relying on such an agreement, or any portion of his costs, because, whatever the position may be, in the present instance no grounds exist for depriving the plaintiff of such costs or any portion thereof. From these authorities it is clear, in my view, that the approach is not, as suggested by Mr Louw, that the agreement to pay attorney and client costs will only be enforced where there is reprehensible conduct on the part of the unsuccessful litigant (the appellant in the present appeal) but rather that the Court is bound to enforce such an agreement unless the Court finds that there is conduct which justifies it in depriving the successful litigant (the respondent in the present appeal) of part or all of its costs.'

There is no conduct on the part of the appellant which would justify an order depriving the appellant of part, or all of its costs, on the attorney and client scale.

[15] The following order is granted:

1 The appeal succeeds with costs on a scale as between attorney and client.

2 The order of the Court a quo is set aside and replaced with the following order:

‘(a) The appeal succeeds with costs, on a scale as between attorney and client.

(b) The order of the trial Court is set aside and replaced with the following order:

(i) Judgment is granted in favour of the plaintiff for payment of the aggregate amount of arrear rentals, in respect of the first to the ninth rental agreements, in the sum of R479 257,35.

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(iii) Interest is granted on the aforesaid amounts, payable from the date of judgment being 27 November 2013 to date of payment, calculated at the prescribed statutory rate.

(iv) The defendant is ordered to pay the plaintiff's costs of suit on a scale as between attorney and client.

(v) The plaintiff is ordered to pay the defendant’s wasted costs on the magistrates court party and party scale, occasioned by the adjournment of the trial on the 20 February 2013.’

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K G B Swain

Judge of Appeal

Appearances:

For the Appellant:	P A Botha
	Instructed by:
	Laubscher & Hatting
	c/o CK Friedlander Shandler Vloks, Cape Town
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For the Respondent:	E A Limberis SC
	Instructed by:
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