

BACKGROUND

The First and Fourth Defendants entered into a service level agreement (“SLA”), in terms of which the Fourth Defendant was to render certain services to the First Defendant. The Fourth Defendant would present invoices to the First Defendant for payment for services rendered.

On 14 March 2012, 26 June 2012 and 13 June 2013, the Fourth Defendant and the Plaintiff entered into a cession wherein the Plaintiff purchased certain invoices totalled at R887 900.

Clause 23.1 of the SLA provided that, *“No cession, delegation, assignment or sub-contract of all or any of the rights and/or obligations of either party shall be of any force or effect unless and until the other party has been consented thereto in writing”*.

The issue before the court was whether clause 23.1 of the SLA constituted a non-variation clause, and if so, whether written consent was obtained by the parties to enter into the cession. The onus was on the Plaintiff to prove that the parties consented to the cession. In *Brayton Carlswald (Pty) Ltd and Another v Brews* 2017 (5) SA 498 (SCA), the Supreme Court of Appeal defined cession as a bilateral juristic act in terms of which a right is transferred by agreement between the transferor (cedent) and transferee (cessionary). Generally, no formalities are required for an act of cession. The parties may agree on the formalities with which the cession is to comply. A cession may be express or tacit. Furthermore, it is held that a non-variation clause entails that the parties will be bound by the written terms of the agreement and that any oral variations will not be valid, thus eliminating disputes as a result of oral variations.

In the case of *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A) it was held that where there is a non-variation clause, a requirement of written consent to a cession cannot be avoided by means of an actual agreement between the parties, let alone a waiver by one of them.

The court held that the clause does constitute a non-variation clause, and that the SLA envisaged that the parties must consent to a cession in writing. The court rejected the Plaintiff’s attempts to prescribe to the court what the intentions of the parties were when entering the SLA, as the Plaintiff was not a party to the agreement. It would negate the whole clause if a third party would need to give its consent, and not the actual parties to the SLA, as contended by the Plaintiff.

The Plaintiff alleged that the Defendant consented to the cession, by signing an Invoice, which read reads as follows:

“We confirm that we have entered into an Invoice Discounting Facility NLK Forestry CC with registration number 2004/049048/23 of which invoice are purchase by ourselves and will then be forwarded to for payment. This arrangement may be confirmed with the following person: Neil Holshausen an active director of the company”.

The court agreed with the Defendant’s counsel that the wording of the invoice does not contain any words referring to consent, and the document, properly construed, does not constitute a consent to a cession of the Fourth Defendant’s rights in the SLA as contemplated in clause 23.1.

HELD

The court held that there can be no question that consent for the cession was never obtained (from any party) before the first invoice discounting facility agreement (“**IDA**”) was entered into. Accordingly, the Plaintiff and the Fourth Defendant entered into a cession agreement, which is valid between the two, however, cannot be enforced against the First Defendant. The court accordingly dismissed the Plaintiff’s claim with costs.

VALUE

Where an agreement contains a non-variation clause requiring the written consent of the parties, a party cannot enter into a cession agreement with a third party without first obtaining the written consent of the parties to the original agreement. Any cession agreement concluded without the requisite consent would be binding between those two parties, however, would not be enforceable against a third party that would be liable to the cedent.

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