

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	REPORTABLE: No
(2)	OF INTEREST TO OTHER JUDGES: No
<u>1/2/2021</u>	
DATE	SIGNATURE

Case No.: 4028/2018

In the matter between:

MAIN STREET 1052 (PTY) LIMITED t/a NASHUA CENTRAL

Plaintiff

and

GABRIEL TSHEPO MATHOPO

Defendant

JUDGMENT

This judgment was handed down electronically by circulation to the parties' legal representatives by email and is deemed to be handed down upon such circulation.

Gilbert AJ

1. The plaintiff rented to the defendant certain equipment in terms of a written rental agreement. There is a dispute as to what to what was included in that equipment but it is common cause that the primary equipment was a photocopier.
2. The plaintiff seeks summary judgment against the defendant for payment of what it contends are outstanding arrear rentals and for pre-estimated damages for the balance of the 60-month rental period.
3. The summary judgment application was launched before the amendment to Uniform Rule 32 came into effect.
4. The defendant has raised various defences that he wishes to pursue at trial and so seeks that leave to defend be granted.
5. One defence is that the plaintiff failed to include in the equipment rented to the defendant an LCD monitor and server in circumstances where the plaintiff had fraudulently represented to him that such equipment would be included in the leased equipment. The description of the goods rented under the rental agreement as set out in the relevant schedule to the agreement is described as the following items:
 - 5.1. *"MPC3003/MPC2003 SB"* with serial number E204RA60162;
 - 5.2. *"Softlog 8 User"* with serial number DMS0002117;
 - 5.3. *"iPad"*.

6. The plaintiff in its particulars of claim describes the equipment that it rented as *“MPC-3003/MPC-2003SP with serial number E204RA60162 and Softlog for 8 users with serial number DMS0002117”*.
7. It is common cause that the equipment would include at least a photocopier. But what cannot be determined from the description of the goods in the schedule to the rental agreement, or the plaintiff's description of the equipment, is whether those goods as described included an LCD monitor and a server.
8. In my view, there is at least a triable issue in relation to what the parties agreed would be rented to the defendant under the rental Agreement, what was in fact rented under the rental agreement and whether some or other fraudulent misrepresentation took place in relation thereto.
9. The defendant also raises various other defences based upon the application of section 14 of the Consumer Protection Act, 2008 (“CPA”). On the papers it is common cause that the CPA applies. The rental agreement itself refers extensively to the CPA.
10. The defendant relies upon section 14(2)(a) of the CPA, which provides that the term of a fixed term consumer agreement must not exceed the maximum period, which in this case is 24 months. The present rental agreement is 60 months. Therefore, the maximum prescribed period has been exceeded. The defendant in his opposing affidavit states that in terms of the applicable regulations a fixed term agreement can only be concluded if it would be to the financial advantage to the consumer and

the supplier, in this instance the plaintiff, demonstrates such an advantage to the consumer. No case is made out in the particulars of claim by the plaintiff as the supplier that it was to the financial advantage of the defendant as the consumer to conclude a fixed term agreement of 60 months. In the circumstances, this defence too raises a triable issue.

11. The defendant also contends that he cancelled the rental agreement based upon his statutory right to do so before the end of the fixed term as provided for in section 14(2)(b)(i)(bb) of the CPA. Section 14(3)(b) of the CPA provides that in the instance of such cancellation before the end of the fixed term the supplier, in this instance the plaintiff, *“may impose a reasonable cancellation penalty with respect to any goods supplied, services provided, or discounts granted, to the consumer in contemplation of the agreement enduring for its intended fixed term, if any.”* The defendant has in his resisting affidavit referred to the regulations which set out various factors to be taken into account when determining a reasonable cancellation penalty.
12. There is a dispute as to whether the defendant did in fact give notice of termination of the rental agreement. The defendant only attached the covering email that purported to attach the termination letter but not the termination letter itself, apparently because of an oversight. Further, the plaintiff disputed that in any event notice had been properly furnished to the plaintiff, particularly when regard is had to the terms of the rental agreement.

13. Although the defendant failed to attach the actual termination letter itself, I am prepared to accept for the purposes of these summary judgment that the defendant, as he stated under oath, did furnish a termination letter as the details furnished in his resisting affidavit demonstrates sufficient *bona fides* on his part. (The resisting affidavit is lengthy, consisting of 22 pages and 59 paragraphs, with considerable detail). Further, such arguments that would have to be had as to what would constitute compliant notice in terms of section 14(2)(b)(i)(bb) of the CPA or whether such notice is necessary at all as a precursor to the plaintiff as supplier being bound to charge a “reasonable cancellation penalty” as provided for in section 14(3) is best left for trial.
14. It was no longer business as usual for a supplier of goods in terms of a consumer agreement once the CPA came into effect. It is no longer open to a supplier of goods that falls under the CPA to without more claim as pre-estimated liquidated damages the sum of all amounts payable under over the unexpired period of the agreement. To do so, as the plaintiff has done in the present instance, may fall foul of section 14(3)(b), which provides for “a reasonable cancellation penalty”.
15. This raises the question whether the claiming of such a reasonable cancellation penalty can be considered to be “*for a liquidated amount in money*” and therefore be capable of sustaining summary judgment in terms of Uniform Rule 32. As this particular issue was not squarely raised on the papers or addressed in any detail before me, that question can be left for another day.

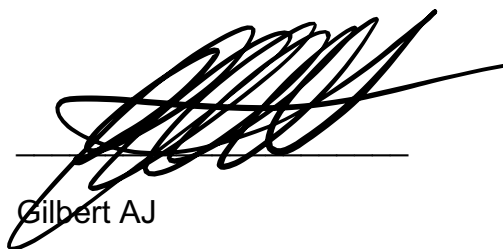
16. In my view, the defendant has satisfied the court that he has *bona fide* defences that may be good in law to the claim and in the circumstances, leave to defend is to be granted.

17. Although the defendant sought that the plaintiff pay the costs of the summary judgment application if dismissed, such evidence as would be adduced at trial will demonstrate whether the defendant was *bona fide* in his defences, including in asserting a fraudulent misrepresentation on the part of the plaintiff.

18. The following order is made:

18.1. The application for summary judgment is dismissed and the defendant is granted leave to defend.

18.2. Costs are reserved for the trial court.



Gilbert AJ

Date of hearing:	28 January 2021
Date of judgment:	1 February 2021
Counsel for the Plaintiff :	Ms S van Aswegen
Instructed by:	Swartz Weil Van der Merwe Greenberg Inc.
Counsel for the Defendant:	Mr K Naidoo
Instructed by:	Madlela Gwebu Mashamba Inc