

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 576/2022

DATE: 10-02-2023

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED. YES

DATE 15 March 2023

SIGNATURE 

10 In the matter between

SOUTH AFRICAN SECURITISATION
PROGRAMME (RF) LTD

Plaintiff

and

ZUKISANI GQWEDE

Defendant

J U D G M E N T

WANLESS AJ

20 **Introduction**

[1] In this matter SOUTH AFRICAN SECURITISATION PROGRAMME (RF) LTD (*"the plaintiff"*) is the cessionary in title of the financier (*Sasfin*) of the equipment forming the subject matter of the rental agreement herein (a PABX system with accessories).

[2] The plaintiff applies for summary judgment against

one ZUKIZANI GQWEDE, an adult male attorney (*"the defendant"*) for the delivery of a NECSL2100 PABX Main Cab and accessories (*"the equipment"*) rented from Sasfin in terms of a Master Rental Agreement (*"the agreement"*); the payment of outstanding rentals of R113 431.47, interest on the aforesaid amount at a rate of the prime rate of interest plus 6 percent and costs on the agreed scale, as between attorney and client.

The defendant's opposition to the plaintiff's claim for
10 **summary judgment**

[3] The defendant initially raised a number of defences to the claim of the plaintiff as set out in the plaintiff's particulars of claim by way of his plea and his affidavit resisting summary judgment. Thankfully, at the hearing of this application on the opposed roll, Adv Ndlovu, who appeared on behalf of the defendant, abandoned the majority of these "defences" and restricted his argument to only two grounds of opposition to summary judgment on behalf of the defendant. These grounds of opposition were
20 the lack of authority of the deponent to the plaintiff's affidavit in support of summary judgment in that the deponent lacks the authority to depose to that affidavit (*"the lack of authority point"*) and the assertion that the action is premature as the plaintiff has failed to comply with section 129 of the National Credit Act (*"NCA"*) and this was

necessary since the agreement is a lease which is subject to the NCA (*"the NCA point"*).

[4] It is worth noting at this stage that any delay in handing down this judgment has been due to the onerous workload to which this Court has been subjected rather than the complexity of any of the issues involved herein. This fact will be clear from the relative brevity of the rest of the judgment which follows.

The lack of authority point

10 [5] The issue as to whether a deponent is authorised to depose to an affidavit has been put to rest in *Ganes and Another v Telecom Namibia Ltd*¹ where the Supreme Court of Appeal ("SCA") held that:

"There is no merit in the contention that Oosthuizen AJ erred in finding that the proceedings were duly authorised. In the founding affidavit filed on behalf of the respondent Hanke said that he was duly authorised to depose to the affidavit. In his answering affidavit the first appellant stated that he had no knowledge as to whether Hanke was duly
20 authorised to depose to the founding affidavit on behalf of the respondent, that he did not admit that Hanke was so authorised, and that he put the respondent to the proof thereof. In my view, it is irrelevant whether Hanke had been authorised to depose to the founding affidavit. The

¹ 2004 (3) SA 615 (SCA) at [19]

deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised. In the present case the proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the respondent. In an affidavit filed together with a notice of motion a Mr Kurz stated that he was a director in the firm of attorneys acting on behalf of the respondents
10 and that such firm of attorneys was duly appointed to represent the respondent. That statement has not been challenged by the appellants. It must, therefore, be accepted that the institution of the proceedings was duly authorised. In any event, Rule 7 provides a procedure to be followed by a respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an applicant.

The appellants did not avail themselves of the procedure so provided. (See *Eskom v Soweto City Council* 1992 (2) SA
20 703 (W) at 705 C-J)"²

[6] The situation dealt with in *Ganes* is precisely the scenario in the present matter. In the defendant's affidavit resisting summary judgment the defendant simply makes the bold averment that the deponent to the affidavit has not put

² *Emphasis added*

up a resolution to the effect that he has the authority to depose thereto and the defendant has taken no steps in terms of Rule 7.

The NCA point

[7] The defendant does not dispute that ownership in the equipment would never pass to him but would at all material times vest in the Hirer. The defendant in fact relies on this latter feature of the agreement as the foundation of his claim against Sasfin (this being one of the
10 defences that was abandoned).

[8] in *ABSA Technology Finance Solutions (Pty) Ltd v Michael's Bid a House CC and Another*³ it was held that: -

"A true lease, one that obliges the lessee to return the thing hired at the end of the contract, is thus not covered by the definition of a credit agreement and the relationship between the lessor and the lessee is not, if one has regard only to this definition, governed by the provisions of the National Credit Act"⁴

[9] The fact that the agreement is not subject to the
20 provisions of the NCA has the result that the plaintiff was consequently not required to comply with subsection 129(1) of the NCA prior to instituting the action.

The standard to meet to defeat summary judgment

[10] The principles pertaining to the standard which a

³ 2013 (3) SA 426 (SCA) at [14 and 26]

⁴ *Emphasis added.*

defendant must meet at summary judgment stage to avoid having summary judgment granted in favour of the plaintiff, are fairly trite. Nevertheless, they are worthy of brief mention.

[11] In the context of the amended Uniform Rule 32, it was held by Binns-Ward J in *Tumileng Trading CC v National Security and Fire (Pty) Ltd, E and D Security Systems CC v National Security and Fire (Pty) Ltd*⁵ that the "classical formulations" in *Maharaj*⁶ and *Breitenbach v Fiat*
10 SA⁷ remain the standard that defendants have to meet.

[12] Further, in the matter of *Breitenbach* it was held:
"Another provision of the sub-rule which causes difficulty, is the requirement that in the defendant's affidavit the nature and grounds of his defence, and the material facts relied upon therefore, are to be disclosed "fully". A literal meaning of that requirement would be to impose on a defendant the duty of setting out in its affidavit the full details of all the evidence which he proposed to rely upon in resisting the plaintiff's claim at the trial. It is inconceivable,
20 however, that the draftsman of the Rule intended to place that burden upon a defendant. I respectfully agree ... that the word "fully" should not be given its literal meaning in Rule 32(3), and that no more is called for than this: that the statement of material facts be sufficiently full to persuade

⁵ 2020 JVR 0747 (WCC)

⁶ *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A)

⁷ 1976 (2) SA 226 (T)

the Court that what the defendant has alleged, if it is proved at the trial, will constitute a defence to the plaintiff's claim. What I would add, however, is that if the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the court to consider in relation to the requirement of *bona fides* ..."⁸

[13] Finally, in *Arend and Another v Astra Furnishers (Pty) Ltd*⁹ it was held that:

- 10 "The Court must be apprised of the facts upon which the defendant relies with such completeness as to be able to hold that if these statements of fact are found at the trial to be correct judgment should be on the defendant, and that the defendant's defence appears to be a *bona fide* one ... Accordingly, if for instance the statements of fact are equivocal or ambiguous or contradictory or failed to canvass matters essential to the defence raised, then the affidavit does not comply with the rule"¹⁰

- [14] In the premises, the defences as set out by the
20 defendant and as dealt with earlier in this judgment clearly falls short of setting out a *bona fide* defence which is good in law and if proved at trial would constitute a good defence (or even a triable issue) to the plaintiff's claim. Under the circumstances summary judgment should be granted in

⁸ *Emphasis added*

⁹ 1974 (1) SA 298 (C) at 304 A

¹⁰ *Emphasis added*

favour of the plaintiff.

[15] A final word in this matter is in respect of the sterling argument put up on behalf of the defendant by Adv Ndlovu. This was particularly so in respect of the NCA point. Regrettably, that argument was based upon a misinterpretation of the matter of *ABSA v Michael's Bid a House (supra)* relied upon by the plaintiff and the interpretation by the SCA of *Parvey, Bridgeway and Tucker*, as dealt with therein. This resulted in Adv Ndlovu
10 mistakenly relying on subsection 8(4) of the NCA in the present matter which was incorrect. This judgment will not be burdened unnecessarily by carrying out a detailed examination thereof. It is abundantly clear from a reading of *ABSA v Michael's Bid a House (supra)*.¹¹

Order

[16] This Court makes the following order. It is ordered that summary judgment is granted in favour of the plaintiff against the defendant for:

1. Return of the following goods, 1 X NECSL2100
20 PABX Main Cab and accessories with serial number A16494S9Z00172.
- 2 Payment of the sum of R113 431.47;
- 3 Interest on the aforesaid sum at the prime interest rate plus 6 percent per annum from 6 November

¹¹ At paragraphs [14]; [18 to 28].

2021 to date of final payment; and

- 4 Costs of suit on the scale as between attorney and own client.

I hand down that order, which, as I have indicated to c Counsel earlier, the Court would do. That order has been marked X for the purposes of identification. It has been signed and dated by me and it will be uploaded onto CaseLines as soon as possible.

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WANLESS AJ

ACTING JUDGE OF THE HIGH COURT

DATE: 15 MARCH 2023
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