



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG**

CASE NUMBER: 2022/6034

[1]	REPORTABLE: YES/ NO
[2]	OF INTERENST TO OTHER JUDGES: YES/ NO
[3]	REVISED:
	06 July 2023 <i>Tlipshitz</i>
	DATE SIGNATURE

In the matter between:

SOUTH AFRICAN SECURITISATION

PROGRAMME (RF) LTD

Plaintiff

And

DR LUCIC, MIRJANA

Defendant

JUDGEMENT

T LIPSHITZ AJ

The matter was heard on 11 April 2023

Judgment Delivered on 06 July 2023

Introduction

1. The plaintiff is seeking summary judgment against the defendant arising from a master rental agreement concluded between the cedent, Sasfin Bank Limited ("Sasfin") and the defendant on 28 August 2018 ("the agreement"). The plaintiff is seeking specific performance in terms of the master rental agreement and is claiming the return of the office telephonic equipment and payment in the amount of **R 106 290.82**, together with interest thereon at the rate of 2% per annum from 13 January 2022 to date of payment and costs on a scale as between attorney and client. I shall refer to the parties by their nomenclatures in the main action.
2. The defendant resists summary judgment on the ground that she has *bona fide* defences to the action. She has raised four defences in both her plea and her affidavit resisting summary judgment, which includes:-
 - 2.1. A denial of the plaintiff's *locus standi*;
 - 2.2. That the master rental agreement is a credit agreement as contemplated by the National Credit Act 34 of 2005 ("NCA") and that the applicant failed to comply with the provisions of the NCA;
 - 2.3. That the Consumer Protection Act 68 of 2008 ("CPA") applies to the agreement and that she exercised her right under Section 14(b)(bb) of the CPA and cancelled the agreement. The cancellation was effective

by the latest 16 March 2021; after that, the plaintiff would not be entitled to receive or bill for further monthly instalments. Accordingly, she cannot be found to be in breach of the agreement or in arrears;

alternatively

2.4. The monetary amount claimed by the plaintiff is a penalty as envisaged by the Conventional Penalties Act 15 of 1962. The court should reduce the penalty that the plaintiff purports to charge the defendant to align with the principles espoused by the CPA and NPA.

3. The defendant, correctly so, did not persist with the *locus standi* defence in her heads of argument or during the argument.

Legal Principles Relating to Summary Judgment

4. Summary judgment has often been described as an extraordinary and drastic remedy in that if granted, “*it closes the door to a defendant and permits a judgment without a trial*”. And yet, in reality, as the Supreme Court of Appeal pointed out in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009 (5) SA 1 (SCA), “(h)having regard to its purpose and its proper application, summary judgment proceedings only hold terrors and are “drastic” for a defendant who has no defence.¹” The court went on to say that “*The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant*

¹ At paragraph 33

with a triable issue or a sustainable defence of her/his day in court. ...². The purpose of the summary judgment procedure is to afford an innocent plaintiff who has an unanswerable case against an elusive defendant a much speedier remedy than that of waiting for the conclusion of an action. However, it must be noted that if there are triable issues of fact in any cause of action or if it is unclear whether there are such triable issues, summary judgment must be refused as to that cause of action.

Issues for determination

5. The issue for determination is whether the defendant has disclosed a *bona fide* defence that is good in law in accordance with the peremptory provisions of Rule 32(3) of the Uniform Rules of Court.

Plaintiff's Claim

6. The plaintiff's claim is based on a master rental agreement concluded between the cedent, namely, Sasfin Bank Ltd ("Sasfin") and the defendant, a medical practitioner, on 28 August 2018 ("the agreement") in terms of which Sasfin financed office telephonic equipment, which the defendant would rent for a period of 60 months for a charge of R 2 424, 40 per month, which monthly rental charge would escalate by 15% annually. The monthly payment date would be on the 25th of each month. Notably, the defendant does not take ownership of the telephonic equipment at the end of the agreement; the relevance of this is that this agreement

² At paragraph 32

is not considered a lease agreement as contemplated by the National Credit Act 34 of 2005³

7. On or about 18 March 2019, a written sale and transfer agreement (“the sale and Transfer Agreement”) was concluded between Sasfin and the plaintiff, in terms of which the master rental agreement was sold by Sasfin to the plaintiff. Of importance is clause 5.3 thereof, which reads as follows:- *“With effect from the Effective Date and subject to compliance by the seller and the purchaser with their respective obligations in terms of clause 4 and this clause 5, the seller shall have ceded all its right, title and interest in and to, and delegated its obligations under each Specified Equipment Lease to the purchaser, the purchaser shall have accepted each cession and delegation and the purchaser will be the full legal owner of each Specified Equipment Lease, and will be entitled to exercise all rights in regard to each Specified Equipment Lease.”*

8. The plaintiff contends that the defendant breached the agreement by failing to pay all rentals due to it in terms of the agreement, and, as of 12 January 2022, the defendant was in arrears in the amount of **R 33 084, 78**. The defendant conceded that her last payment to the plaintiff was on 25 February 2021. The defendant, however, denies that she breached the agreement or that the plaintiff was entitled to charge her rental after 25 February 2021 due to her alleging that she validly cancelled the agreement effective 16 March 2021. This will be examined below.

³ Absa Technology Finance Solutions (Pty) Ltd V Michael's Bid a House CC and Another 2013 (3) SA 426 (SCA) at paragraphs 14, 23 and 26

9. Clause 9 of the agreement stipulates that should the defendant breach the agreement, the plaintiff is entitled, in terms of the Master Agreement, to *inter alia*, “claim immediate payment of all amounts which would have been payable in terms of the Master Rental Agreement until the expiry of the rental stated in the equipment schedule, whether such amounts are then due for payment or not. The plaintiff is to take possession of the goods and only return them to the defendant on receipt of payment of all amounts owing to it. The defendant would not be entitled to withhold payment or make any deductions from any amount owing as a result of its loss of possession of the goods.”
10. This is the remedy which the plaintiff is seeking to enforce. Counsel for the plaintiff strenuously argued that this remedy amounts to a claim for specific performance and, accordingly, the amount claimed is not one for damages.
11. The plaintiff has annexed a certificate of balance to its particulars of claim which calculates the amount for arrears and future rentals (for the remaining duration of the agreement period) at **R 106 290.82**.
12. The plaintiff is seeking the return of its telephonic equipment, payment of **R106,290. 00** and ancillary relief. In paragraph 21.2 of its particulars of claim, it tenders the return of the telephonic equipment to the defendant for the remainder of the initial period on full payment of the claimed amounts, including interest and costs.

Defendant’s Plea read with her Affidavit Resisting Summary Judgment.

13. In terms of the defendant's amended plea, which was amended after the plaintiff applied for summary judgment, the defendant admitted the agreement and that she took possession of the telephonic office equipment. She further admitted that she ceased paying the plaintiff under the agreement on 25 February 2021.
14. She pleaded, however, that the plaintiff breached the agreement by increasing and decreasing the monthly instalments at various stages during the term of the agreement, and it failed to charge her in accordance with the terms of the agreement. In her affidavit resisting summary judgment, she expanded on this. She alleged that after she received no explanation for the unilateral increases in the monthly instalments, and in November 2020, she communicated with Sasfin that she was not satisfied with the unjustified escalations. In addition, she had discovered that the amount she was paying before the escalations were exorbitant compared to her colleagues. Further to the above, she alleged that due to a reduction in her income due to COVID-19, she could no longer afford to comply with the terms of the agreement. In response to her complaints and on the 24th of November 2020, she received a written response styled settlement quotation from a company called Telelink Opticomm (Pty) Ltd ("Telelink"), who quoted her an amount of R 141 146. 64 to cancel the agreement. Flabbergasted by what she considered to be an exorbitant settlement quote, she elected to cancel the agreement. She further alleges that she is entitled to cancel the agreement as the agreement is subject to the provisions of the Consumer Protection Act 68 of 2008 ("CPA"), and as such, she invoked Section 14(2)(b)(bb) of the CPA.

15. The plaintiff argued that the CPA does not find application to this agreement on the basis that firstly, Sasfin is not a supplier but rather a financier of the telephonic office equipment and secondly, that Sasfin as a bank is exempted from the provisions of the CPA. In the argument, counsel for the plaintiff conceded that he would not persist with the second leg of his argument. From a perusal of the definitions in Section 1 of the CPA, it is patent that the definition of a “*supplier*” is given a broader meaning than a party who manufactures and sells goods. A supplier is defined as “*a person who markets any goods or services*”. “*Services*”, in turn, is defined as including but also not limited to “*any banking services, or related or similar financial services*”. Accordingly, the plaintiff as a financier in the agreement falls within the purview of the definition of supplier under the CPA. It follows that the CPA is applicable to the agreement. This was similarly so found in the decision of South African Securitisation Programme (RF) Limited and Prelene Jaglal - Govindpershad (5835/2022) [2023] ZAGPJHC 728 (26 June 2023), which is on all fours with this matter.

Cancellations of the agreement

16. Section 14(2) of the CPA set out as follows:-

(2) If a consumer agreement is for a fixed term-

(b) despite any provision of the consumer agreement to the contrary-

(i) The consumer may cancel that agreement-

(bb) at any other time, by giving the supplier 20 business days' notice in writing or other recorded manner and form, subject to subsection (3) (a) and (b)

17. Accordingly, Section 14(2)(b)(bb) of the CPA makes it plain that a consumer can cancel a fixed-term agreement for any reason but must do so in writing to the supplier and on 20 business days' notice.

18. In the defendant's plea and her affidavit resisting summary judgment, she set out that she cancelled the agreement on three occasions. These cancellations need to be carefully considered.

19. In her plea, she alleges that on 30 November 2020, and in writing, she informed Sasfin that she would cancel the agreement. This correspondence is annexed to her plea, and the following is important:- the correspondence is addressed to Sasfin and Telelink and is written by her office manager, namely Amore Smit. The relevant reference to cancellation is as follows *"We want this contract terminated with immediate effect"*. This allegation is not repeated in her affidavit resisting summary judgment ("30 November 2020 cancellation notice").

20. It can be gleaned from her version that she contends that she continued using the telephonic office equipment and making the monthly instalment payments and does not factually cancel the lease with immediate effect.

21. In her affidavit resisting summary judgment, she baldly alleges that she cancelled the agreement with Sasfin on 16 December 2020, which decision she

communicated to Sasfin. She does not allege whether this communication was in writing or whether she provided 20 days' notice ("16 December 2020 cancellation").

22. Lastly, she both pleads and sets out in her affidavit resisting summary judgment that on 16 February 2021, her attorney of record addressed written correspondence to Sunlyn and Telelink wherein the following was set out:-

" We hereby inform you that our client wishes to terminate her agreement with you.

All payments made to you, in respect of the master agreement, will stop on 25 February 2021

We request you to immediately uplift the leased unit from our client's premises situated at Suit 16 Ground Floor, Parklane."

("16 February 2021 cancellation notice")

23. The defendant explains in her affidavit resisting summary judgment that Telelink is Sasfin's accounts department. She does not expressly set out how she arrives at this conclusion. She further does not explicitly explain in her affidavit resisting summary judgment her reason for addressing this correspondence to Sunlyn and Telelink or her failure to address this correspondence to Sasfin. From a perusal of the affidavit resisting summary judgment, she appears to have concluded that Telelink is Sasfin's accounts department as a direct result of Telelink responding to her requests to Sasfin to cancel the agreement by way of providing a settlement

quote. She further appears to have come to Sunlyn because she alleges that when she concluded the master rental agreement, she signed two agreements; one bore Sunlyn's name, and the other bore Sasfin's name. She has annexed to her affidavit resisting summary judgement a copy of the master rental agreement, which bears Sunlyn's name. The defendant states that she does not know how these companies are related.

Has the defendant validly cancelled the agreement?

Submissions

24. The central argument of the plaintiff is that for a consumer to invoke Section 14(2)(b)(bb) of the CPA, a consumer must expressly provide in her notice of cancellation that she is exercising her right in terms of Section 14(2)(b)(bb) of the CPA and that she is providing 20 business days' notice to the supplier. The plaintiff argues that the 30 November 2020 cancellation notice does not comply with what is required of a consumer to trigger Section 14(2)(b)(bb) of the CPA and, in fact, expressly notified the supplier of an "*immediate cancellation*" which she was not entitled to do. Moreover, the 16 February 2021 cancellation notice, similarly, was not in compliance with the requirements for Section 14(2)(b)(bb) in that it failed to expressly set out that she was exercising her right in terms of Section 14(2)(b)(bb) of the CPA. In addition, counsel for the plaintiff argued that the consumer did not communicate such notice to the supplier, Sasfin, but rather to third-party companies unrelated to Sasfin. Thus, he continued that the purported cancellations were null or the agreement was never validly cancelled.

25. The defendant's counsel argued that the defendant provided the plaintiff with two cancellation notices. Whilst the cancellation notices did not expressly set out that she was exercising her right in terms of Section 14(2)(b)(bb) of the CPA and that she would be giving 20 days' notice to the plaintiff, she *de facto* provided the plaintiff with more than 20 days' notice, if one has regard to both the 30 November 2020 cancellation notice and the 16 February 2021 cancellation notice (considering the cancellation would be effective at the latest on 16 March 2021 and next due date for payment on 25 March 2021). He further argued that the plaintiff's argument was formalistic. If regard is had to the substance of Section 14(2)(b)(bb) of the CPA, the defendant had complied therewith and had validly cancelled the agreement. Accordingly, she could not be found to be in arrears and in addition, the plaintiff is not entitled to seek specific performance on a validly cancelled agreement. The defendant's counsel further argued that the issue of the relationship between Sasfin and Telelink, and/or Sunlyn and whether her notification conveyed to these third parties constitutes communication of the cancellation on the supplier is an issue for trial, especially in light of Telelink's responding to her complaints to Sasfin with the settlement quote and the second master rental agreement bearing Sunlyn's name.

26. The issue for determination flowing from this argument is whether Section 14(2)(b)(bb) of the CPA requires:-

26.1. the consumer to expressly provide in its notice of cancellation that 20 business days will be afforded to the supplier; and

- 26.2. the consumer to expressly assert that she is exercising her right in terms of Section 14(2)(b)(bb) of the CPA.

The interpretation of the Act and Section 14(2)(b)(bb)

27. It is trite that statutory provisions must be interpreted purposively and in context.

That context includes the legislative background and the purpose for establishing the Act.⁴ The interpretative process involves ascertaining the intention of the legislature but considers the words used in the light of all relevant and admissible context, including the circumstances in which the legislation came into being⁵. It has further been held in the Endumeni decision that “*a sensible meaning is preferred to one that leads to insensible or unbusinesslike results*”⁶.

28. The Supreme Court of Appeal in Eskom Holdings Ltd V Halstead-Cleak 2017 (1) SA 333 (SCA) interpreted the CPA with reference specifically to Section 61 of the CPA. Its expose of the CPA, and the CPA’s purpose is instructive where it was held⁷:-

The long title of the Act provides that it is to promote a —

‘fair, accessible and sustainable marketplace for consumer products and services and for that purpose to establish national norms and standards relating

⁴ Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) paras 18-23; Cool Ideas 1186 CC v Hubbard and Another 2014 (4) SA 474 (CC) at para 28.

⁵ Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) paras; Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd 2016 (1) SA 518 (SCA) ([2015] ZASCA 111) para 27.

⁶ Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) paras 18

⁷ Eskom Holdings Ltd V Halstead-Cleak 2017 (1) SA 333 (SCA) at paragraphs 10-16

to consumer protection, to provide for improved standards of consumer information, to prohibit certain unfair marketing and business practices, to promote responsible consumer behaviour, to promote a consistent legislative and enforcement framework relating to consumer transactions and agreements . . . '.

The Green Paper discussion of the Act makes it clear that a broad spectrum of consumers needed protection:

'Perhaps one of the greatest pitfalls in most consumer protection laws in South Africa, is the absence of a uniform definition of a consumer. This has resulted in a difficulty for enforcers to accurately identify individuals that the State seeks to protect. Consumers must be defined broadly as individuals who purchase goods and services, and must include third parties who act on behalf of the consumer. . . .'

In terms of the provisions of s 2(1), the Act must be interpreted in a manner that gives effect to the purpose of the Act as set out in s 3. That purpose is to promote and advance the social and economic welfare of consumers, in particular vulnerable consumers, in South Africa. If there is an inconsistency between the Act and any other legislation, both Acts, to the extent that it is possible. If it is not possible, the provisions that extend the greater protection to a consumer prevail over the alternative provisions.

From the definitions, the preamble and purpose of the Act, it is clear that the whole tenor of the Act is to protect consumers.... The Act must therefore be interpreted keeping in mind that its focus is the protection of consumers.

29. A further decision which is apposite to consider is that of Transcend Residential Property Fund (Pty) Ltd V Mati and others 2018(4) SA 515 (WCC), which dealt with the interpretation of Section 14(2)(a)(ii) of the CPA wherein the Holderness AJ found as follows:- *“To my mind, this reads too much into what is required in terms of the CPA. There is no requirement, express or implied, that the consumer must be expressly notified of the fact that he has twenty business days to remedy his defect. The fact of the matter is that the letter of cancellation was only delivered after the full 20 business days had elapsed, and he, therefore, had the full statutory prescribed period within to remedy his defect To my mind, the applicant was therefore entitled, in terms of section 14 of the CPA, to cancel the agreement, and the cancellation was accordingly valid.”*

30. Section 14(2)(b)(bb) of the CPA requires a consumer to provide written notice of cancellation to the supplier, which must afford the supplier 20 business days' notice; however, I do not find that it is a requirement that the notification of cancellation must expressly set this out or must expressly set out that the consumer is invoking Section 14(2)(b)(bb) of the CPA. In other words, should the consumer provide written notice of the cancellation and afford the supplier 20 days' notice before the consumer acts on the cancellation, the cancellation would be effective under Section 14(2)(b)(bb) of the CPA. This is more so, having regard to the Transcend Residential Property decision referred to above, as Section 14(2)(b)(bb) of the CPA makes it plain that the election to invoke the cancellation is that of the consumer. The cancellation binds the supplier after the 20-day notice period. Accordingly, this interpretation cannot prejudice the supplier in contrast to the requirement in Section 14(2)(b)(ii) of the CPA, which requires the supplier to

afford the consumer 20 business days to remedy its default before the cancellation can be effective. This interpretation provides the consumer with greater protection as the CPA requires Courts to do.

31. Accordingly, I find that the 30 November 2020 cancellation notice, which was addressed to SASFIN, was a valid cancellation under the CPA on the basis that she clearly and unequivocally notified Sasfin of her intention to cancel the agreement. Whilst it expressly set out that the cancellation would be of immediate effect, the defendant did not act on the cancellation immediately and only ceased making payments to the plaintiff on 25 March 2021 (her last payment being on 25 February 2021), more than 20 business days from date of notification. Whilst the defendant did not tender the return of the telephonic office equipment in the 30 November 2020 cancellation notice, the defendant is not required to have done so⁸. I am mindful that the defendant did not deal with this cancellation in her affidavit resisting summary judgment and that such allegations only appear in the plea. However, I cannot close my eyes to the 30 November 2020 cancellation notice annexed to the defendant's plea, especially in the context of a summary judgment application.

32. I agree with the plaintiff's counsel that a cancellation must be communicated to the supplier to be effective. This is also patent from the provisions of Section 14(2)(b)(bb) of the CPA. The defendant could not provide, with sufficient clarity, what the third parties' roles are in the transaction and whether or not they are agents of Sasfin or the plaintiff; however, this information would be peculiarly in the

⁸ Extel Industrial (Pty) Ltd v Crown Mills (Pty) Ltd 1999 (2) SA 719 (SCA) p732

knowledge of the plaintiff, and the defendant cannot be criticised for failing to deal with this in greater particularity. Telelink's involvement in providing a settlement quote to the defendant and Sunlyn's participation in its name appearing on a master rental agreement creates a triable issue regarding the nature of their involvement in the transaction, and it will only be through evidence that it can be determined whether they are agents of Sasfin and/or the plaintiff.

33. I furthermore note that the plaintiff may have a claim against the defendant under Section 14(3)(a) and (b) of the CPA for a reasonable cancellation penalty; however, this is not the plaintiff's case, and accordingly, I need not deal with this.

34. On this defence, as raised by the defendant, I am convinced that the plaintiff has a *bona fide* defence and a reasonable possibility that the defence that she has advanced may succeed at trial. Accordingly, summary judgment must be refused. For this reason, I intend only briefly to deal with the other defences raised.

Conventional Penalties Act Defence

35. In the alternative to the cancellation defence, and in the event that it is found that the CPA is not applicable to the agreement, the defendant pleads that the plaintiff's monetary claim constitutes a penalty or estimated liquidated damages as contemplated by Section 3 of the Conventional Penalties Act 15 of 1962, which she alleges is out of proportion to the damages suffered by the plaintiff. The defendant does not set out by what the penalty should be reduced, and the only allegations relating to the disproportionality of the penalty include in paragraph 19.2.5.1 "*The plaintiff suffered no damages due to the alleged breach by the*

defendant; alternatively, the penalty clause is out of proportion to the damages suffered by the plaintiff; and/or “ the claim as pre-estimated damages is out of proportion as all of the future instalments are claimed by the plaintiff of which instalments were to increase up to the alleged breach with 15% per annum, and future instalments were to be calculated at a rate of 15% per annum; and/or the plaintiff received instalments for the rental of the goods from inception to 31st of March 2021 with increases.”

36. The plaintiff's counsel correctly argued that its claim is one for specific performance, and as such, the Conventional Penalties Act finds no application. Even if I am wrong in this regard, I would agree with the plaintiff's counsel that the defendant has not established a sufficient basis for her allegations that the penalty is disproportionate to the damages suffered by the plaintiff in that she has failed to quantify the extent to which the damages should be reduced and has failed to set out sufficient facts which she will use to establish the extent of the abatement of the penalty which she will seek.⁹

37. In addition to the above, the defendant pleaded that:-

37.1. the agreement is subject to the National Credit Act 13 of 2002, with which provisions the plaintiff failed to comply. The NCA is not applicable to this transaction as has been found by the Supreme Court

⁹ Citibank NA V South African Branch V Paul N.O and Another 2003 (4) SA 180 (T); Company Unique Finance V Johannesburg Northern Metropolitan Local Council 2011 (1) SA 440 (GSJ) and Absa Technology Finance Solutions (Pty) Ltd V Leon Hattingh t/a Corner Savings Supermarket 2009 JDR 0382 (GNP)

of Appeal in the decision of Absa Technology Finance Solutions (Pty) Ltd V Michael's Bid a House CC and Another 2013 (3) SA 426 (SCA);

and

37.2. The plaintiff lacked *locus standi* as she had contracted with Sasfin, not the plaintiff. As set out above, this defence was not persisted with, and accordingly, no more will be said in this regard.

38. The defendant brought a conditional counterclaim wherein she is seeking a declaratory order that the agreement was validly cancelled and ancillary relief, alternatively, the amount claimed by the plaintiff as pre-estimated damages be reduced to an amount the Court finds reasonable in the circumstances. I have already dealt with these issues, as these very self-same issues form part of the defendant's defence.

Costs

39. The defendants sought the costs of the summary judgment application, including the costs of two counsels. Where summary judgment is refused, the usual course is to order costs to be in the cause of the main action. I see no reason to deviate from the 'normal' rule.

40. Consequently, I make the following order:

Order

The application for summary judgment is dismissed with costs to be in the cause of the main action.



T Lipshitz AJ

Acting Judge: Gauteng Division

Johannesburg

(electronic signature appended)

06 July 2023

Attorneys for the Plaintiff

ODBB Attorneys

Counsel for the Plaintiff

J G Botha

Attorneys for the Defendant

Subrayan Naidoo Attorneys

Counsel for the Defendant

A Berkowitz

V Heideman