

**REPUBLIC OF SOUTH AFRICA**



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

**CASE NO: 95635/15**

(1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: NO  
(3) REVISED

15 FEBRUARY 2021

  
C.J. COLLIS

In the matter between:

**TURBO FASTENERS (PTY) LTD**

**PLAINTIFF**

and

**ITEC FINANCE (PTY) LTD**

**DEFENDANT**

**This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgement is further uploaded to the electronic file of this matter on Caselines by the Judge or his/her**

**secretary. The date of this judgment is deemed to be 15 February 2021.**

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## **JUDGMENT**

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**COLLIS J**

### **INTRODUCTION**

[1] In the present action, the plaintiff instituted action proceedings against the defendant, for unjustified enrichment (Claim A). In the alternative, the plaintiff pleaded Claims B and C as formulated in its particulars of claim.

[2] In respect of Claim B, the plaintiff alleges that it was the party's intention to enter into an instalment sale agreement as opposed to a rental agreement. Herein, the plaintiff alleges, that in terms of the agreement so concluded that the plaintiff would become the owner of the equipment upon payment of the purchase price by means of monthly instalments of 36 months.

[3] In respect of Claim C, the plaintiff alleges, that the parties prior to the signing of the rental agreement, annexed as annexure "A", the parties had agreed and confirmed that the plaintiff would become the owner of the rented equipment after 36 months of compliance therewith by the plaintiff.

[4] On or about 9 June 2005, the parties concluded the underlying written lease agreement, annexed as annexure A.

[5] In terms of the lease agreement the plaintiff rented a Konica Minolta 7416 (*"the equipment"*) photocopy machine for a period of thirty-six months from the defendant, after which period, the plaintiff would become the owner of the leased property. <sup>1</sup>

[6] In its particulars of claim, the plaintiff further alleges, that it complied with all its obligations in terms of the agreement so concluded and made payment of the rental on a monthly basis. On or about 9 June 2008, it thereafter became the owner of the equipment.<sup>2</sup>

[7] Despite termination of the agreement, the defendant persisted to debit the plaintiff's bank account, in the amounts and dates as stated in the ledger annexed to the particulars of claim as Annexure 'C'. The total amount so debited is R 689 467.69 (Six Hundred and Eighty-Nine Thousand Four Hundred and Sixty-Seven Rand and Sixty-Nine Cents), which the plaintiff alleges the defendant became enriched by.

[8] In addition to support its claim, the plaintiff places reliance on annexure "B" annexed to its particulars of claim, which is a letter which serves as confirmation that ownership of the equipment will be granted to the plaintiff after the initial 36 months' rental period.

### **COMMON CAUSE FACTS**

[9] It was common cause between the parties, that the agreement concluded between the parties, consisted of annexures "A" and "B" annexed to the particulars of claim.

[10] Further, that the agreement was concluded between them on 9 June 2005, with both parties being duly represented.

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<sup>1</sup> Particulars of Claim Index 074-6 para 5

<sup>2</sup> Particulars of Claim Index 074 -6,7 para 6 & 7



[11] It is further common cause that the defendant continued to debit the plaintiff's bank account beyond the initial 36 months' period in the amount of R 689 476.69, when this amount was neither due and or owing by the plaintiff to the defendant.

[12] In order to succeed with its claim for enrichment, the plaintiff carries the burden of proof <sup>3</sup> to meet the following essential allegations.

- 12.1 The defendant must be enriched;
- 12.2 the plaintiff must be impoverished;
- 12.3 the defendant's enrichment must be at the expense of the plaintiff; and
- 12.4 the enrichment must be unjustified or sine causa. <sup>4</sup>

## **EVIDENCE**

[13] On behalf of the plaintiff a number of witnesses testified. The first being the Mr Anton Potgieter. In short his evidence can be summarised as follows:

- 13.1 He gave evidence that he is the Managing Director and Chief Executive Officer of the plaintiff since its inception in 1999.
- 13.2 Around June 2005, his company was in need of a photocopy machine and they entered into an agreement consisting of annexures "A" and "B" to the particulars of claim, with one Karin Marques acting on behalf of the defendant.
- 13.3 In essence it was agreed that the photocopy machine would be rented for a period of three years, where after, it will belong to the plaintiff.

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<sup>3</sup> Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue [1992] 4 All SA 62 (A).

<sup>4</sup> McCarthy Retail Ltd v Shortdistance Carriers CC [2001] 3 All SA 236 (A), 2001 (3) SA 482 (SCA)

13.4 Albeit that annexure "B" was not yet drawn up at the time when discussions took place, it was furnished to them approximately a week thereafter and he was satisfied with its contents.

13.5 He testified, that the plaintiff company would not have concluded the agreement with the defendant, if they would not take ownership of the photocopy machine after three years.

13.6 Pursuant to concluding the agreement, the plaintiff complied with all its obligations in terms of the agreement, and paid all payments timeously as stipulated in terms of the agreement.

13.7. Only around October 2015, a number of years after the agreement had terminated did they realise that the defendant was still debiting the plaintiff's account and that an overpayment had taken place and it was at this juncture that correspondence in this regard was addressed to the defendant.<sup>5</sup>

13.8 A response to this letter was received from the defendant, dated 9 October 2015,<sup>6</sup> wherein they distance itself from the contents of annexure "B" which gave ownership of the photocopy machine to the plaintiff. In the same letter it was also indicated that Ms Marques had no authority to pass ownership of the photocopy machine to the plaintiff as this was contrary to clause 2.1.7 of the rental agreement concluded between the parties.

[14] During cross-examination, Mr Potgieter conceded that as per the Windeed report, that the defendant [Itec Finance (Pty) Ltd] and Itec East are two separate and distinct entities and that Ms Marques was a director of Itec East. Furthermore, he conceded that it was Ms Marques, who presented him with annexure "A" at the time when discussions took place and she was the person who later on also presented the plaintiff with annexure "B".

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<sup>5</sup> Letter from Potgieter to Itecfina dated 5 October 2015 Index 075-11

<sup>6</sup> Letter from Itecfina to the Plaintiff dated 9 October 2015 Index 075-12

[15] Ms Yvonne Van Wyk was the second witness called on behalf of the plaintiff. In short it was her testimony that at the time when the rental agreement was concluded between the plaintiff and the defendant, that she was the financial director of the plaintiff company. That, she was not present when the terms of the rental agreement were negotiated but was the person who signed the agreement on behalf of the plaintiff company. This agreement, was signed before receipt of annexure "B".

[16] During cross-examination, she conceded that the relationship between the plaintiff and the defendant was regulated by the written rental agreement concluded between them and that at the time when she signed the rental agreement that she did not read all the terms and conditions contained therein. Furthermore, that she signed annexure "A" on the advice of Mr Potgieter who had informed her that the plaintiff will become the owner of the photocopy machine after three years and that a letter to that effect will be provided to the plaintiff, i.e. annexure "B". Under cross-examination she conceded that Itec East and Itec Finance (Pty) Ltd are two different entities, and that Ms Marques was a director of Itec East and not of the defendant.

[17] This then the totality of the evidence presented on behalf of the plaintiff.



[18] Ms Lynette Van der Walt was the first to testify on behalf of the defendant. It was her evidence that initially she was employed by Itec Finance and responsible for collection of rentals from clients. She testified, that initially the rental agreements concluded between the plaintiff and its clients, would be for a period of three years, where after the rented equipment would need to be returned to the defendant and where it was not returned, the defendant would continue to bill the client as if the contract had not been cancelled. In was further her testimony, that it was not an option for the clients not to return their equipment as their agreements so concluded, was premised on a lease of their equipment and not a sale thereof and as such ownership of the property will never pass to the clients. She as a result distanced herself from the contents of annexure "B". Finally, she concluded her testimony that the signatories of annexure "B" were not employed by the defendant, and as such they could not negotiate and bind the defendant with their actions.

[19] During cross-examination she disavowed herself with the contents of annexure "B", but conceded that on a plain reading of it, read together with annexure "A" that the plaintiff would become owner of the rented equipment if it complied with all its obligations in terms of the agreement. She however remained adamant, that annexure "B" did not form part of the rental agreement concluded with the plaintiff company. Furthermore, that it terms of annexure "A" and at the end of 36 months' rental period that the agreement would automatically terminate and that the defendant thereafter would only continue to debit the clients account on a month to month basis, if the rented equipment was not returned by the client. She was unable to explain why the defendant would admit in its Amended Plea<sup>7</sup> that the agreement concluded between the parties, consisted of both annexures "A" and "B", when this is in contradiction with clause 2.1.7 contained in the rental agreement.

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<sup>7</sup> Amended Plea Index 074-36 para 2

[20] The last witness to testify on behalf of the defendant was Ms Nada Ford. It was her testimony, that she had only been employed by the defendant for a period of just over two and a half years and that Itec Finance (Pty) Ltd and Itec East are two distinct and separate entities. Furthermore, that at the time that the rental agreement in question was concluded between the plaintiff and the defendant, that she had not as yet taken up employment with the defendant and as such she bears no personal knowledge of how the agreement was concluded between the parties.

[21] This then the totality of the evidence presented by the defendant.

## **ANALYSIS**

[22] In determining whether the plaintiff can succeed with its Claim "A" for enrichment, the plaintiff must have presented evidence that it has met the requirements for a claim for enrichment.

[23] On the undisputed evidence presented before this Court, the plaintiff would have obtained ownership of the rented equipment (*the photocopy machine*) after 36 months if it indeed had complied with all its obligations in terms of the rental agreement.

[24] It is common cause between the parties, that the plaintiff complied with all its obligations in terms of the rental agreement concluded between the parties.



[25] If it is then to be accepted that the plaintiff became the owner of the rented equipment after 36 months, the rental agreement would have terminated around June 2008 and it follows, that the defendant would not have been entitled to deduct any further premiums from the plaintiff's account (as per annexure "C") for the lease of the equipment.

[26] The legal basis being; that these deductions were not due and/or owing by the plaintiff and in so doing the defendant have enriched itself at the expense of the plaintiff.

[27] On the undisputed evidence presented before this Court, these deductions were made unjustified and under the circumstances without a *sine causa*.

## **DEFENCES**

[28] The defendant in order to escape liability had raised a number of defences in its Amended Plea. The first being that in terms of annexure "A", and more specifically clause 2.1.7 thereof, that it will remain the owner of the leased equipment upon termination of the agreement.

[29] In this regard it was the evidence on behalf of the plaintiff that annexure "B" granted it ownership of the rented equipment upon termination of the lease agreement and this agreement was presented to them and signed by Ms Marques.

[30] In this regard, the defendant failed to present any evidence in rebuttal, in the form of Ms Marques, distancing herself from the contents of annexure "B" and in the same vain it is also not denied by the defendant, that the very same Ms Marques, presented the plaintiff with the terms as set out annexure "A", which they themselves admit is the rental agreement concluded between the plaintiff and themselves.

[31] The second defence raised by them, relates to them continuing to debit the plaintiff's bank account because the plaintiff remained in possession and continued to use the rented property. In this regard, they had pleaded that they had addressed a letter dated 9 October 2015, wherein they had demanded the return of their property, but despite this correspondence no response was received from the plaintiff. To date the plaintiff remains in possession of their rented equipment and it is for this reason that they continue to deduct its bank account.

[32] Now as already mentioned, the lease agreement expired around 9 June 2008. One would therefore have expected of the defendant being the owner of the leased equipment to at the time have directed correspondence to the plaintiff seeking the return of their leased equipment alternatively confirmation as to whether the plaintiff wanted to carry on leasing the equipment in question on a month to month basis. In this regard likewise, no evidence was presented by the defendant, seeking confirmation from

the plaintiff as to whether that they wish to continue with the lease agreement on a month to month basis. Instead what one finds is instead a response by them to correspondence directed to them at the instance of the plaintiff seeking an explanation as to why they continue to make deductions from its account and it is only then that they enquired about the return of their leased equipment failing which that the agreement will continue on a month to month basis.

[33] A third defence raised by the defendant relates to the authority which it contends, Ms Marques lacked in order to bind the defendant. In this regard it was argued by counsel for the defendant, that Ms Marques was never a director of the defendant and as such she had no authority nor was she ever employed by the defendant. In this regard it is rather improbable, that Ms Marques acting with no authority on behalf of the defendant, would present the plaintiff with an agreement drawn up by the defendant, on terms agreed to by the defendant and which agreement was ultimately signed by the defendant.

[34] Counsel appearing for the defendant had submitted that as the agreement was signed by both parties, both of them, should be held to the terms set out in annexure "A".

[35] Furthermore, that at best annexure "B" should be seen as a purported confirmation of an oral agreement granting ownership to the plaintiff and



taking into account the contents of both these annexures, it is clear that they cannot exist in conjunction with one another.

[36] In addition the defendant had also placed great emphasis on the failure on the part of the plaintiff to have read and familiarise themselves with the terms contained in annexure "A", and if it had done so, it would have noted that annexure "A" did not provide for ownership to pass to the plaintiff.

[37] Furthermore, clause 14 contained in annexure "A" specifically provides that any amendment to a term or condition contained in the agreement should be made in writing and signed by both parties and with regards to annexure "B" it makes no reference to any term of the agreement contained in annexure "A".

[38] It is on this basis that counsel had argued, that it cannot be found by this court that indeed annexure "A" had in fact been amended by annexure "B".

[39] As I see it, it is not the plaintiff's case, that annexure "B" amended annexure "A". It is the plaintiff's case that annexure "A" was concluded with the understanding that ownership of the equipment will pass over to the plaintiff upon the termination of the lease agreement. Thus, annexure "B" merely served as confirmation of the terms which the parties had reached,

that ownership of the equipment will pass upon the expiry of the initial three years, rental period.

[40] Having regard to the conspectus of evidence presented, I am satisfied, that the plaintiff has discharged its *onus* in proving that the defendant has been unjustifiably enriched at the expense of the plaintiff.

[41] A determination in respect of Claim A (the main claim) in my view is dispositive of the plaintiff succeeding with its claim, and as such no need exists for this Court to express an opinion on any of the alternative claims.

## **ORDER**

[42] Consequently, the following order is made:

42.1 Payment of the amount of R 689 467.69

42.2 Interest of the aforesaid amount at the applicable rate as Prescribed by Section 1 of Prescribed Rate of interest Act, 55 of 1975, from time to time, applicable to the payments made as attached to the particulars of claim as annexure "C" and is attached hereto, payable from date on which the respective payments have been made after 9 June 2008, respectively;

42.3 Costs of suit, inclusive costs consequent upon the employment of two counsels, where so employed.



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**C.J. COLLIS**  
**JUDGE OF THE HIGH COURT**

**Appearances**

|                            |                                           |
|----------------------------|-------------------------------------------|
| For the Plaintiff          | : Adv. R. Raubenheimer &<br>Adv M. Jacobs |
| Attorney for the Plaintiff | : Coombie Commercial Attorneys            |
| For the Defendant          | : Adv. I. Sebothoma                       |
| Attorney for the Defendant | : Rahman & Rahman Inc.                    |
| Date of Hearing            | : 04 and 09 October 2020                  |
| Date of Judgment           | : 15 February 2021                        |

**Judgment transmitted electronically.**