

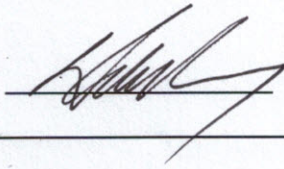
IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: 29946/2016

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO



12 JULY 2019.

In the matter between:

GBS MUTUAL BANK

Plaintiff

and

FLIGHTING BOYZ OUTDOOR CC

First Defendant

RIAAN VAN STADEN

Second Defendant

JUDGMENT

DU PREEZ, AJ:

INTRODUCTION:

1. It is common cause between the parties, among others, that:

1.1 The plaintiff has the necessary *locus standi* in this action (although same was denied in the defendants' amended plea);

1.2 On 27 June 2013 and at Pretoria:

1.2.1 Technofin (Pty) Ltd ("*Technofin*") entered into a written Master Rental Agreement ("*the MRA*") with the first defendant, duly represented by the second defendant, in terms of which the first defendant rented a Bizhub C224e Colour Copier ("*the equipment*") at a total monthly rental of R2,397.68 for a initial rental period of 60 months;

1.2.2 The second defendant granted a written guarantee in favour of Technofin in terms of which he, among others, bound himself jointly and severally as co-principal debtor and for the primary continuing obligation for the proper and punctual payment by the first defendant to Technofin;

1.2.3 Technofin in writing ceded to the plaintiff its right, title and interest in and to the rental due in terms of the MRA and ownership in and to the equipment with a 50% recourse.

1.3 The equipment was duly delivered to the first defendant;

- 1.4 On 5 November 2015, the defendants were in arrears with the rental in the amount of R2,589.69 and the plaintiff duly cancelled the MRA in writing (although the plaintiff's initial version was that the MRA was cancelled on 8 March 2016, its legal representative conceded during the trial that 5 November 2015 could be accepted as the date of cancellation);
- 1.5 The plaintiff repossessed the equipment pursuant to the cancellation of the MRA and in accordance therewith.
2. In its amended particulars of claim, the plaintiff claimed, among others, payment in the amount of:
- 2.1 R7,655.81, being the outstanding rentals as at date of the termination of the MRA;
- 2.2 R49,129.13 as pre-estimated liquidated damage of all rentals which were not yet due and payable as at date of termination of the MRA, less the value of the goods [own emphasis].
3. In paragraph 5.2 (d) of their amended plea, the defendants' asserted, among others, that if the plaintiff had *locus standi* in the action, the plaintiff was entitled to claim payment of the arrear amount due as at the date of cancellation, being 5 November 2015, and payment of the rentals which were not yet due and payable as at cancellation of the MRA less the value of the copier [own emphasis], plus VAT.

THE MAIN POINT OF DISPUTE THAT THE COURT HAS TO ADJUDICATE UPON:

4. At the commencement of the trial, the parties contended that the Court had to adjudicate upon the following disputes between them:
 - 4.1 The date upon which the MRA was cancelled (*"the cancellation aspect"*);
 - 4.2 Whether the plaintiff was entitled to the damages claimed in the amended particulars of claim (*"the damages aspect"*).
5. It is, however, unnecessary for the Court to adjudicate upon any of the two disputes between the parties, because:
 - 5.1 The plaintiff conceded that the MRA was cancelled on 5 November 2015 and not 8 March 2016 as alleged by the plaintiff in its amended particulars of claim;
 - 5.2 Upon the defendants admitting the plaintiff's *locus standi* in the action, they also admitted, if regard is had to paragraph 5.2 (d) of their amended plea, the plaintiff's entitlement to claim the said damages.
6. At the end of the trial, it is apparent that the real issue that the Court has to determine, is whether the plaintiff has proved the pre-estimated liquidated damages.

DISCUSSION:

THE RELEVANT TERMS AND CONDITIONS OF THE MRA:

7. The relevant terms and conditions of the MRA (the references to "User", "Technofin" and "goods" should respectively be read as "the first defendant", "the plaintiff" and "the equipment"), are the following (own emphasis and omissions):

"12.1 An event of default shall occur if User –

12.1.1 fails to make punctual payment of any of the payables, or

*12.1.2 breaches any term of this agreement or of any other
agreement between the parties ..."*

*"12.2 Upon an event of default ... Technofin may, at its election and without
prejudice to any other remedy which it may have in terms of this
agreement or otherwise:*

*12.2.1 without notice claim immediate payment of all payables whether
due for payment or not, provided however; that if user does not
make immediate payment Technofin may, notwithstanding the
election to claim immediate payment in terms of this sub-clause,
claim the relief set out in below: or*

*12.2.2 without notice cancel this agreement, obtain possession of the
goods and recover from User payment of all amounts due in terms
hereof which are in arrears at the date of the cancellation, together
with, as pre-estimated damages, the difference between:*

12.2.2.1 the total of the future rentals which would have been payable in terms of this agreement (whether such amounts are then due for payment or not) if this agreement had continued in force for the contract period; and

12.2.2.2 the value of the goods if recovered by Technofin as determined in accordance with clause 12.5 ...

In addition Technofin shall be entitled to claim from the User the amount of any Value Added Tax ("VAT") payable in respect of such damages.

If the goods are returned to or repossessed by Technofin, it shall be entitled to dispose of same in such manner and on such terms and conditions as it may in its sole discretion determine.

12.2.3 *Where User before or after termination of of this agreement has failed to fulfil any obligation hereunder, Technofin shall be entitled (but not obliged) to perform or procure performance of such obligation on User's behalf. Technofin may claim the cost of such performance from User on demand.*

12.4 ...

12.5 On termination of the agreement as provided for in this clause, and should it be necessary for the goods to be valued, on termination of the agreement as provided for in this clause 12, User authorises Technofin to appoint a sworn appraiser nominated by Technofin, to determine the value of the goods. User agrees and undertakes to accept such valuation. If the goods

are not recovered by Technofin for any reason whatsoever, the value shall be deemed to be nil."

8. On a proper interpretation of the aforesaid provisions of the MRA in respect of the present matter, it follows that as the plaintiff claims the pre-estimated liquidated damages provided for in the MRA:

8.1 Such pre-estimated liquidated damages comprise the difference between the future rentals which the first defendant would have paid in terms of the MRA and the value of the equipment after the plaintiff had repossessed same;

8.2 The said value of the equipment should be determined by a sworn appraiser;

8.3 The value of the equipment will only be nil if the plaintiff is unable to recover the equipment from the first defendant;

8.4 Even though the plaintiff is entitled to dispose of the equipment, the proceeds do not play any role in determining the pre-estimated liquidated damages¹ – same is ascertained by the difference between the future rentals and the value of the equipment as determined by the appraiser.

¹ Cf *Mufamadi & Others v Dorbyl Finance (Pty) Ltd* 1996 (1) SA 799 (A) regarding a contract where the plaintiff had an election to use either the proceeds of the sale or a valuation to determine the pre-estimated liquidated damages.

9. Any other interpretation will fail to give effect to the true intention of the parties and will not make business sense.

THE PLAINTIFF'S CASE:

10. The plaintiff's only witness was Mrs Chantelle Booysen, an employee of Technofin, who testified, among others, on the conclusion of the MRA, the first defendant's default, the plaintiff's repossession of the equipment and the fact that the original supplier of the equipment did not want to repurchase the equipment as same was an outdated model.
11. As the plaintiff has repossessed the equipment, it follows that the value of the equipment cannot be deemed to be nil.
12. The plaintiff did not present any admissible evidence as to the value of the equipment and the fact that the plaintiff was unable to sell the equipment, is irrelevant as far as the determination of the value of the goods is concerned.²
13. It follows that the plaintiff has failed to prove the pre-estimated liquidated damages that it claims.
14. The plaintiff's reliance on an unreported judgment by Murphy, J³ does not meet muster, because the relevant contractual provisions in that matter differs from the

² In terms of clauses 12.2.2 (including 12.2.1 and 12.2.1) and 12.5.

³ *Absa Technology Finance Solutions (Pty) Ltd v Stopforth & Others* (70737/20120 [2014] ZAGPPHC 446 (20 March 2014))

present one, because it did not provide for an appraiser's sworn valuation to be used to determine the value of the goods.

15. This Court is unable to deduct from the evidence presented what the amount of the alleged pre-estimated liquidated damages is.
16. The plaintiff is, on the defendants' admission, entitled to judgment in respect of the arrear rentals.

COSTS:

17. The defendants also conceded that the plaintiff is entitled to the costs of suit, but contended that same should be on a Magistrate's Court Scale.
18. Although the Court has a wide discretion as far as costs are concerned, the defendants' contention as to costs is correct, especially because none of the plaintiff's claims fell outside the jurisdictional limitations as far as Magistrate Courts are concerned.

ORDER:

19. The Court accordingly grants the following order:

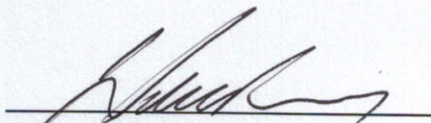
- 19.1 Judgment in respect of the arrear rentals as on 5 November 2015 in favour of the plaintiff and against the first and second defendants jointly and

severally, the one to pay the other to be absolved, in the amount of R2,589.69;

19.2 Interest *a tempore morae* on the judgment amount of R2,589.69 at 10,25% per annum;

19.3 Costs of suit on the Magistrate's Court Scale;

19.4 In respect of the plaintiff's claim for pre-estimated liquidated damages, absolution from the instance is granted.



DB DU PREEZ

**ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

12 JULY 2019

Counsel for the plaintiff: MR T MINNIE (ATTORNEY)

Instructed by: THOMAS MINNIE ATTORNEYS

Counsel for the defendants: ADV D HEWITT

Instructed by: BARNARD INC