

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

**Case Nr: CA & R 73 /2012
Hearing : 17 September 2012
Judgment : 21 September 2012**

In the matter between:

**ANSA MCGREGOR PROPERTIES CC
ANNA MARGARETHA MCGREGOR
CHARL GAVIN MCGREGOR**

**1st APPELLANT
2nd APPELLANT
3rd APPELLANT**

and

CORPORATE FINANCE SOLUTIONS (PTY) LTD

RESPONDENT

Coram: Olivier J et Phatshoane J

JUDGMENT

Olivier J:

- 1]. The first, second and third appellants, Ansa McGregor Properties, Anna Margaretha McGregor and Charl Gavin McGregor, were respectively the first, second and third defendants in an action instituted by the respondent, Corporate Finance Solutions (Pty) Ltd, in the Magistrates' Court for the district of Kimberley.
- 2]. The respondent's cause of action was a written contract in terms of which Technofin (Pty) Ltd had rented a copier to the first appellant.

The second and third appellants bound themselves as sureties and co-principal debtors for due payment of the monthly rental by the first appellant. It was common cause that Technofin had ceded its rights in terms of the contract to the respondent.

3]. In its summons the respondent alleged;

3.1 that it had complied with all its obligations and had delivered the copier to the first appellant;

3.2 that the first appellant had failed to make punctual monthly rental payments;

3.3 that the respondent had therefore *“elected to claim immediate payment of all amounts due and all future rentals which would have fallen due”*.

4]. The respondent based its alleged election on the provisions of clause 13.9 of the contract, which entitled the respondent, in the event of such a failure on the part of the first appellant and after having *“given the ...(first appellant) 7... days written notice to remedy such breach...”* to;

“13.9.1 terminate this Agreement, repossess the Device, claim all arrears owing at date of termination, claim in its sole discretion as pre estimated liquidated damages all

outstanding rentals which, but for the termination, would have been payable for the remainder of the initial Hire Period,;or

13.9.2 without terminating this Agreement, to treat as immediately due and payable all rentals which would otherwise have become due and payable in terms hereof during the initial Hire Period to claim and recover from the Hirer forthwith the aggregate amount of such rentals as well as all rental and other sums then in arrears in terms of this Agreement. (The respondent) shall, pending payment of those amounts, be entitled to be possessed of the Device and to retain possession thereof on condition that against such full payment (the respondent) shall return the Device to the Hirer who shall not be entitled to any rebate or abatement of rentals or other amounts by reason of its loss of possession and enjoyment of the device while the same will have been in (the respondent's) possession."

5]. It was on this basis that the respondent, in the particulars of claim, claimed payment of the amount of R27 624.60, interest on this amount and costs on the attorney and client scale ¹.

6]. A notice of intention to defend was filed on behalf of all three

¹ As provided for in the contract.

appellants, whereupon the respondent applied for summary judgment in these terms.

7]. In an opposing affidavit the following was stated;

- a. It was apparently admitted that the first appellant had failed to make punctual monthly rental payments.
- b. It was alleged that by 1 March 2010 the arrears amounted to R8 310.66 and judgment in this amount² was consented to.
- c. It was furthermore stated; however:
 - i. that the respondent had repossessed the copier, without a court order, on 3 March 2010;
 - ii. that the copier had since then not been in the possession of any of the appellants;
 - iii. that the respondent had therefore not complied with its obligations in terms of the contract;
 - iv. that the balance of the amount claimed was made up of monthly rental amounts for the period from 1 March 2010 onwards;
 - v. that the respondent was not entitled to any rental in respect of the period after the

² As well as interest thereon and costs.

repossession of the copier; and

vi. that the application for summary judgment should be dismissed with costs as far as that part of the respondent's claim was concerned.

8]. The magistrate apparently found that the opposing affidavit did not disclose a defence and granted summary judgment as prayed.

9]. In my view the appellants had *“‘fully’ disclosed the nature and grounds of (their) defence and the material facts upon which it (was) founded”*³. The material facts on which their defence was founded are the allegations:

9.1 that the copier was repossessed on 3 March 2010;
and

9.2 that part of the amount claimed represents monthly rental for the period after such repossession.

10]. The *“nature and grounds”* of their defence was quite simply that the respondent had not been entitled to monthly rental after the repossession of the copier, because it had, in respect of that period and because of the fact that the first appellant had been dispossessed of the copier, not complied with its obligations in terms of the written rental contract.

³ See *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (AD) at 426 B-C

- 11]. The rental contract conferred reciprocal obligations on the parties thereto⁴. It obliged the respondent to deliver to the first appellant the copier for the latter's "*use and enjoyment*" thereof and to "*refrain from doing anything which would deprive the lessee of the benefits for which he contracted.*"⁵ ,in return for which the first appellant would be obliged to pay rental as agreed⁶.

Compare **Sanddune CC v Catt**⁷:

"If for some reason the applicant should refuse or be unable to make the leased premises available to the respondent, his obligation to pay rental would fall away."

- 12]. The first appellant's failure to pay the monthly rental punctually would in the normal course of events have given the respondent with two options. It could have elected to either enforce the contract and claim due rental payments as specific performance or to terminate and cancel the contract and claim supplementary relief (like damages)⁸. In this case the contract went further and also provided for a claim for future rentals, an issue to which I will revert in due course.

- 13]. The respondent's election would have been final and the respondent

⁴ And therefore also the respondent as cessionary.

⁵ **The Law of Sale and Lease**, 3rd edition, AJ Kerr, pp 294 & 296

⁶ **Ibid**, p 349

⁷ [1998] JOL 1813 (SE), p 6

⁸ **The Law of South Africa**, 2nd edition, volume 14, part 2, p24: **The Law of Sale and Lease**, *supra*, pp 361, 379 & 388.

will bear the onus of proving what its election was⁹.

- 14]. An election to cancel has to be conveyed to the other party, and must be clear and unequivocal¹⁰. It can be communicated in a summons¹¹.
- 15]. It may however be implied or inferred in certain circumstances, for example from the service of a summons in which damages are claimed¹².

“Whether he has made an election one way or the other is a question of fact to be decided by the evidence. If with knowledge of the breach he does an unequivocal act, which necessarily implies that he has made his election one way, he will be held to have made his election that way;

this is however not a rule of law, but a necessary inference of fact from his conduct”¹³.

⁹ **Custom Credit Corporation (Pty) Ltd v Shembe** 1972 (3) SA 462 (A) at 469 H.

¹⁰ **The Law of Contract in South Africa**, 5th edition, Christie, p 539; **Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd** 1985 (4) SA 809(A) 830 E; **Kragga Kamma Estates CC v Flanagan** 1995 (2) SA 367 (A) at 375 E - F

¹¹ Compare **Middleburgse Stadsraad v Trans-Natal Steenkool Korporasie Bpk** 1987 (2) SA 244 (T) at 249 A- G; **Win Twice Property (Pty) Ltd v Binos** 2004 (4) SA 436 (W).

¹² **Du Plessis v Government of Republic of Namibia**, [1995] 4 All SA 66 (Nm) at 67 (1995 (1) SA 603 (Nm) at 605.

¹³ **Segal v Mazzur** 1920 CPD 634 at 644- 645; **Du Plessis and Another NNO v Rolfes Ltd** 1997 (2) SA 354 (A); And compare **SA Wood Turning Mills (Pty) Ltd v Price Bros (Pty) Ltd** 1962 (4) SA 263 (T) at 266 H.

- 16]. When regard is had to the remedies provided for in clause 13.9 of the contract it appears that the combination of the repossession of the copier and a claim for future rentals would only be available where the respondent had elected to terminate the contract¹⁴.
- 17]. No such termination is alleged in this particulars of claim.
- 18]. It could possibly be argued that the respondent's repossession of the copier amounted to an election to cancel the contract¹⁵, that the first appellant had in the circumstance through the repossession been made aware of this election and that the contract had in the process effectively been cancelled. The respondent would, however, not have been entitled to rely on this argument for purposes of its application for summary judgment.

[18.1] This was not the case pleaded in the particulars of claim. No repossession was alleged. It was also not alleged that the contract had been cancelled (even impliedly) and no cancellation thereof was claimed.

"The whole procedure of summary judgment was created to benefit the plaintiffs. At the very least, therefore, it is expected of a plaintiff, in presenting his case, to place himself squarely within the four corners of the remedy. Any defects in

¹⁴ Clause 13.9.1.

¹⁵ Compare **ABSA Technology Finance Solution (Pty)Ltd v Leon Hattingh trading as – Corner Savings Supermarket** [2009] HOL 23504 (GNP) para [16]

*the presentation of his case which are not merely technical and, for that reason, cannot be condoned, will have as a consequence a refusal of summary judgment, even if no **bona fide** defence has been disclosed by the defendant. A court will not assist a plaintiff by breathing life into a poorly presented case – on the contrary the court will consider itself bound to the terms in which the plaintiff has elected to formulate his claim. Should it appear that the plaintiff does have a claim, but not that presented as the cause of action in the summons, the court will refuse summary judgment as it cannot be granted on a cause of action other than that pleaded.”¹⁶ .*

[18.2] The respondent’s application for summary judgment can also not be supplemented by the contents of the opposing affidavit¹⁷.

[18.3] In any event, the inference¹⁸ of such an implied election to cancel would not in my view have been possible at the stage of the application for summary judgment, and in the absence of further evidence¹⁹. It would, on the papers, not have been possible to exclude the possibility that the repossession may have been intended as a temporary measure and as a part of the specific performance remedy provided for in clause 13.9.2 could not be excluded on the papers.

16 **Summary Judgment * A Practical Guide**, *Van Niekerk et al*, p 10 para 11.2.3, -

17

18 From the repossession of the copier.

19 **ABSA Technology Finance Solution (Pty)Ltd v Leon Hattingh t/a Corner Savings Supermarket**, *supra*, para [21].

- 19].
- 20]. The respondent's cause of action is formulated as one would expect in the case of a claim for specific performance. It is alleged that "*The Plaintiff has complied with all its obligations..... and the goods have been delivered.....*" and that "*the Plaintiff has elected to claim immediate payment of all amounts which are due and all future rentals which would have fallen due*". The claim for "*immediate*" payment of future rentals corresponds with the wording of clause 13.9.2, which envisages no termination of the agreement and therefore specific performance. There is no reference in the particulars of claim to the future rentals representing "*pre estimated damages*" as envisaged in clause 13.9.1.
- 21]. An unqualified and permanent repossession of the copier, whether by a court order not, would be irreconcilable with a claim for specific performance²⁰. If proved, it would therefore provide the appellants with a *bona fide* defence insofar as the respondent's claim may be for specific performance.
- 22]. In my view the magistrate should therefore not have granted summary judgment in respect of the part of the claim which pertains to the period after the repossession of the copier.
- 23]. The particulars of claim in fact also contains no allegation to the effect that the notice required in clause 3.9 had been given to the

20 **ABSA Bank Ltd v De Villiers & another** [2008] JOL 22874 (C) para [17]; **Varalla v Jayandee Properties (Pty) Ltd** 1969 (3) SA 203 (T) at 206 E-207 A.

first appellant. Whether the particulars of claim, in the absence of such an allegation, disclosed any cause of action at all, was however not raised on appeal and not argued before us.

24]. Summary judgment in respect of only the amount of the arrear rentals²¹ would have meant that the respondent would have been only partially successful in its application for summary judgment. On the other hand there was no indication that the appellants had tendered the arrears at an earlier stage. In these circumstances it would in my view have been fair to let each party pay its own costs of the application.

25]. As far as the costs of the appeal are concerned, there is no reason why it should not follow the result.

26]. It follows that the appeal must succeed.

[27]. I the premises I make the following orders:

1. The appeal succeeds.

2. The magistrate's order is set aside and substituted with the following orders:

"2.1 Summary judgment is granted in the amount of R8310.66 and interest thereon at the rate on 15.5% per annum from 18 June 2010.

²¹ As at the beginning of March 2010.

- 2.2 Summary judgment for the balance of the amount of R27 624.60, claimed in paragraph 1 of the application for summary judgment, is refused and the defendants are granted leave to defend the action in respect of such balance.**
- 2.3 Further pleadings and notices are to be filed as if notice of intention to defend the action was filed on 21 September 2012.**
- 2.4 There will be no order for costs and each party will pay its own costs.”**
- 3. The respondent is ordered to pay the costs of the appeal on a party and party scale.**

**C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION**

I agree:

**V M PHATSHOANE
JUDGE
NORTHERN CAPE DIVISION**

**For the Plaintiff: Adv
Instructed by: KIMBERLEY**

**For the Respondent: Adv
Instructed by: KIMBERLEY**