

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No: 764/2010

In the matter between:

QUINCE CAPITAL (PTY) LTD

Plaintiff

and

LISELE, SABATA DOMINIC

t/a LENONG SERVICES

Respondent

HEARD ON: 6 & 7 SEPTEMBER 2011

JUDGMENT BY: KRUGER, J

DELIVERED ON: 15 SEPTEMBER 2011

[1] Plaintiff claims R93 155,54 from the defendant being the outstanding payment under two rental agreements. Plaintiff no longer seeks an order that defendant return the goods because the goods were collected on 30 November 2009.

[2] It is not in dispute that on 29 May 2007 the defendant entered into a written contract of lease in terms whereof defendant leased goods described as AF3224C, serial number K7167130232 for 60 months, commencing on 1 July

2007, at a monthly rental of R825,00. The second lease was concluded on the same day. This was a lease in respect of goods described as SP1000SF, Serial Number M0869622225 for 60 months, commencing on 1 June 2007 at a monthly rental of R825,00. The goods were a Nashua copier and printer.

[3] Plaintiff sues as cessionary of the lease agreements. On the pleadings the cessions are denied. The plaintiff led evidence of the cessions and Mr Louw, for defendant, correctly did not dispute the cessions in argument.

[4] The defendant pleaded that the first agreement was cancelled by mutual consent between the parties during November 2009, precipitated by plaintiff's breach. As to the second agreement, the defendant alleges cancellation by mutual consent, but defendant does not say when. From the defendant's evidence it appeared that he was in hospital for 8 months from October 2008, and his wife wrote a letter cancelling the agreements. No such letter was handed in. His wife did not testify. It was pointed out to defendant in cross-examination that clause 19 requires cancellation to be

in writing which must be signed by the parties.

- [5] The defendant also denied that he was in arrears, but could provide no proof of payment. He said the bank closed his account in about March 2009 while he was in hospital.
- [6] Plaintiff seeks payment of all arrear and future rentals for the full five-year period. In the pleadings and in argument the parties agree that the National Credit Act 34 of 2005 does not apply.
- [7] Although the defendant in his plea denied the cessions, pleaded payment and cancellation, not one of these defences was established by the evidence, as was correctly conceded by Mr Louw. The only issues in this case are whether plaintiff has proved its quantum and whether the Conventional Penalties Act 34 of 1962 applies, and if so, whether it serves to reduce plaintiff's claim. The Conventional Penalties Act will first be addressed, and thereafter the issue of quantum.

The Conventional Penalties Act 15 of 1962 ("the Act")

- [8] Although not raised on the pleadings, I raised the question whether the penalty which the defendant is asked to pay is not out of proportion to the prejudice suffered by the plaintiff. Receiving the full balance of rentals that would have been payable over five years in one sum constitutes a penalty – **CLAUDE NEON LIGHTS (SA) LTD v SCHLEMMER** 1974 (1) SA 143 (N). Accelerated rentals as plaintiff claims here must be considered a penalty – **ABSA TECHNOLOGY FINANCE SOLUTIONS (PTY) LTD PREVIOUSLY KNOWN AS UNION FINANCE HOLDINGS (PTY) LTD v PLANNED PARENTHOOD ASSOCIATION OF SOUTH AFRICA** (Case A3059/2008, South Gauteng High Court, 29 April 2011). Once a court finds that the provision for the payment is a penalty, the next enquiry is whether the penalty is out of proportion to the prejudice suffered as contemplated in section 3 of the Act. The penalty is to be reduced if it is markedly, not infinitesimally, beyond the prejudice suffered - **WESTERN CREDIT BANK LTD v KAJEE** 1967 (4) SA 386 (N). The onus to prove that the penalty is unconscionable is on the defendant – **STEINBERG v LAZARD** 2006 (5) SA 42 (SCA) par [10].

- [9] In **PLUMBAGO FINANCIAL SERVICES (PTY) LTD t/a TOSHIBA RENTALS v JANAP JOSEPH t/a PROJECT FINANCE** 2008 (3) SA 47 (C) a judgment of Bozalek J decided on default, the facts were to a large extent similar to the facts in the present case. In **PLUMBAGO** the defendant defaulted on rentals for two photocopiers after about a year. The plaintiff elected to adhere to the contracts and claimed arrears and accelerated future rentals. Plaintiff's claim was for some R228 000,00 comprising both arrear and future rentals. When summons was issued all but R13 000,00 of this sum related to future rentals. Plaintiff also claimed interest on the R228 000,00 at 6% above the overdraft rate, costs on a scale as between attorney and own client and collection commission, and return of the goods.
- [10] Even if not raised in the pleadings, the court can deal with the issue of a penalty under the Conventional Penalties Act, by virtue of its primary function to ensure that justice is done on the basis of what is fair and reasonable under all the circumstances, subject to it being fully canvassed in evidence and in argument (**PLUMBAGO**, par [18]).

[11] In **PLUMBAGO** the one machine was repossessed and sold about a year after the lease commenced for R99 825,00. The other machine was repossessed and leased out by the plaintiff for 16 months at R1 035,00 excluding VAT. Thus the two machines produced an income of not less than R116 085,00 after being repossessed from the defendant. Bozalek, J held that the claim for arrear rentals is not a penalty, but the bulk of the claim related to future rentals, which claim would be a penalty as contemplated by the Act. He also held the interest provision to be a penalty. In the result he reduced plaintiff's claim of R228 000,00 by R116 085,00 (the recoupment on the sale and the 16 month further lease). He also disallowed interest at the rate claimed, and only allowed interest at the legal rate of 15,5%. He excluded collection commission from the costs order, and added an order that the goods have to be returned to defendant after receiving payment in full.

[12] In the present matter the issue of a penalty was not canvassed in the evidence, not having been pleaded. Mr Durant pointed out that although the plaintiff is in terms of the

contract entitled to a 15% or more escalation of the interest each year, the future rentals claim of R70 726,00 has been calculated at the instalment as at December 2009, without any escalation. He referred to a document in the discovery bundle (which was not dealt with in evidence) which indicated that after repossession one machine was sold on auction for R1 200,00 plus VAT.

[13] In **PLUMBAGO** there was evidence that the value of 5-years old equipment is virtually nil. The profit is only really made in the last third of a five year contract; a substantive part of the 60 months' income goes to paying the finance house.

[14] In this matter the defendant already has the benefits granted in the **PLUMBAGO** case. The escalation on future instalments has been omitted. The interest claimed is only 10,5%, although the contract makes provision for interest to be paid at 5% above prime. The costs will be on the magistrate's court scale. The recoupment of R1 200,00 is minimal, and there was no evidence on it, or the costs involved. The Act was not raised by the Defendant, and it was not canvassed in evidence. Apart from that, as stated,

the defendant's penalties have already been reduced. There is no basis for any further reduction.

The Certificate of Balance and Quantum

[15] Plaintiff relies on a certificate of balance to prove the quantum of its claim. Mr van Rensburg testified for the plaintiff on the certificate of balance. He signed one certificate of balance which reflects the balance outstanding on both contracts as one composite amount, without distinguish between the contracts. There are two errors on the certificate which Van Rensburg admitted to. The first error is a company registration number which appears after the name of the defendant. Van Rensburg explained that that number had been in the document previously printed. A more serious error is that the certificate of balance states that the last payment was received on 23 November 2009. Van Rensburg did not explain this error, but stated that the correct date of the last payment was 22 September 2009. In re-examination he referred to the plaintiff's "Schedule of Account" and pointed out that the total amount was reflected on that Schedule. According to that account, R49 038,43

was received on rental billed. 28 and 29 months respectively remain of the contracts, presumably after acceleration and return of the goods.

[16] Mr Louw on behalf of the defendant said that clause 15 of the lease agreements is a draconian provision which should be strictly interpreted. Clause 15 reads:

“15. CERTIFICATE

The amount of the Lessee’s indebtedness to the Lessor at any time, the interest rates from time to time and any other factor relating to the termination of such indebtedness as well as the due date for payment of such amount, may at the option of the Lessor be proved by a certificate signed by any manager of the Lessor. It shall not be necessary to prove the appointment and authority of the person signing such certificate. Such certificate shall be binding on the Lessee as prima facie proof of the facts contained therein and shall by agreement constitute a valid liquid document against the Lessee in any competent Court for the purpose of obtaining provisional sentence or summary judgement against the Lessee.”

Mr Louw raised the following objections to the certificate:

- i) There are two leases, but only one certificate. One does not know how the debts on the two contracts

were allocated or calculated. Van Rensburg, who signed the certificate, could in his evidence not say how the monies paid had been allocated on the two contracts.

ii) Van Rensburg in cross-examination conceded that the certificate was based on information he got from the system and his staff and was hearsay and worthless.

iii) Van Rensburg conceded to two errors on the certificate:

(a) the number which appears after the name of the defendant belongs to the debtor in respect whereof the previous certificate had been drafted.

(b) The certificate reflects the date of the last payment as 23 November 2009, whereas the correct date of the last page was 22 September 2009. Van Rensburg did not explain this error.

iv) The "Statement" explaining the certificate dated 11 March 2010, and the "Schedule of Account" up to 31 December 2009, both state that an amount of R2 500,00 was paid on 22 September 2009, but allow a credit of only R451,48. There was no explanation in

the evidence as to how the R2 500,00 was dealt with in the account. Van Rensburg was not asked about this, and did not explain it.

Mr Louw says because plaintiff has not proved its quantum, absolution from the instance should be granted.

[17] On behalf of plaintiff, Mr Durant responds to these points as follows:

(i) One Certificate, two leases.

In plaintiff's books, these two leases were in one account reflected as Number 604454. Defendant made payments on both leases into this account, without distinguishing between the two leases. This is evidenced by the two deposit slips whereby defendant made payment after his bank account was closed early in 2009. These two deposit slips appear on the second last and third last pages of Bundle "B". The reference number 604454 appears on both as the only reference to the debt. This defendant did not ask for any separate allocation in respect of the two leases. In defendant's evidence he did not say that he ever intended to pay separately on each contract. He treated the two leases

as one debt.

(ii) Van Rensburg's concession that the certificate is based on hearsay and is worthless.

Mr Durant points out that the court must consider the certificate together with plaintiff's Statements of Account number 604454 dated 11 March 2010 which confirms the balance on the certificate, and plaintiff's Schedule of Account, which refers to the leases and shows the payments and calculations of the further rentals. In **SENEKAL v TRUST BANK OF AFRICA LTD** 1978 (3) SA 375 (A) at 382G Miller JA said: "At the end of the case, when all the evidence (which includes the certificate) is in, the court must decide whether the party on whom the *onus* rests has discharged it on a proper balance of probabilities."

Mr Durandt also referred to the plea, where defendant simply denies plaintiff's quantum.

(iii) Two acknowledged errors on the certificate.

The insertion of an incorrect number on the certificate at defendant's name does not detract from the certificate. The

name of the defendant and the account number are correct and accord with plaintiff's financial statements.

The date of the last deposit is correctly reflected on the deposit slips, plaintiff's Statement and Schedule of Payments, from which the certificate of balance was drawn up.

Nothing turns on these two errors.

(iv) In respect of the R2 500,00 deposit only a credit of R451,48 is shown.

Both plaintiff's Statement and Schedule of Payments list the receipt of the R2 500,00 on 22 September. Plaintiff was aware of that payment and took it into account in its calculations. The amount of R451,48 must be the result of a calculation. In cross-examination Van Rensburg said the R2 500,00 was allocated to the last amount which was unpaid. Allocation is done automatically.

Mr Durant contends that it is not sufficient for a defendant merely to cast suspicion on the correctness of the facts established by the certificate of balance; mere theories or

hypothetical suggestions will not avail the defendant; the defendant's attack upon the certificate must be based on some substantial foundation. **TRUST BANK OF AFRICA LTD v SENEKAL** 1977 (2) SA 587 (W) at 593D – F, which decision was confirmed in **SENEKAL v TRUST BANK OF AFRICA LTD** 1978 (3) SA 373 (A). It appears that in the **SENEKAL** case the fact that the Bank had previously issued two certificates of balance which varied in certain respects from the certificates relied upon in court, did not assist Senekal in destroying the *prima facie* evidence created by the certificate relied therein (see counsel's argument at 379E – F).

Conclusion

[18] The only issue remaining for decision is whether plaintiff has established its quantum. Van Rensburg was a poor witness. But the Certificate of Balance must, in line with the **SENEKAL** – case (above) be assessed in the light of all the evidence. Van Rensburg's concession that the certificate is worthless is one bit of evidence which must be considered in the light of all the evidence. The defendant has done no

more than cast suspicion on the certificate, and made hypothetical suggestions. I agree with the points raised by Mr Durant in relation to the certificate. The defendant's evidence shows that he treated the two leases as one debt. Allocation of payments was never a problem for him. The certificate, read with the plaintiff's Statement and Schedule of Payments, establishes the indebtedness *prima facie*. That *prima facie* proof has not distributed by defendant's evidence, the cross-examination of Van Rensburg or argument. Judgment must be given for the plaintiff. As the amount claimed falls within the jurisdiction of the magistrate's court, only costs of that court are to be allowed.

[19] **ORDER**

Defendant is ordered to pay plaintiff –

1. R93 115,54.
2. Interest on R93 155,54 from 22 February 2010, being the date of service of summons at the rate of 10,5% per annum to date of payment.
3. Costs of suit on the magistrates' court scale.

A. KRUGER, J

On behalf of the plaintiff:

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