



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Before:

The Hon Ms Justice C M Fortuin

The Hon Mr Justice L G Nuku

The Hon Mr Justice D S Kusevitsky

Case No: A107/2024

In the matter between:

GAIL FRANCIS BUECHEL

Appellant

and

**SOUTH AFRICAN SECURITISATION
PROGRAMME (RF) LTD**

First Respondent

SASFIN BANK LTD

Second Respondent

SUNLYN (PTY) LTD

Third Respondent

Date of hearing : 21 January 2025

Date of Judgment : 26 February 2025

JUDGMENT

NUKU, J (FORTUIN J concurring):

Introduction

[1] This appeal concerns the dismissal of an application for rescission of a default judgment granted by this court against the appellant on 4 August 2022. The appellant had brought the said application in terms of Rule 31 (2) (b) of the Uniform Rules of Court. The appeal is with the leave of the court that dismissed the application (**the court a quo**).

[2] In dismissing the application the court *a quo* reasoned that whilst the appellant was not in wilful default, she had failed to establish a bona fide defence to the respondents' claims against her and that is the narrow issue that we must decide in this appeal. Before doing so it is necessary to give a factual background which I briefly set out below.

Factual background

[3] The dispute in this matter emanates from 3 (three) rental agreements concluded by Dragood Investments Proprietary Limited (**Dragood**) and the third respondent in respect of 6 (six) printing machines that Dragood leased from the third respondent during August 2020. The third respondent ceded its right, title and interest in the said rental agreements to the second respondent immediately upon their conclusion. The second respondent, in turn, ceded its right, title and interest in the said rental agreements to the first respondent on 20 October 2020.

[4] During August 2020, the appellant concluded a written guarantee in terms of which she bound herself as guarantor in writing jointly and severally as co-principal debtor for the primary continuing obligation for the proper and punctual payment by Dragood of all amounts due and payable to the third respondent or its cessionary/ies in the event of a cession in terms of the rental agreements arising out of or incidental to the rental agreements. The terms of the guarantee were, *inter alia*, that (a) a certificate signed by any manager of the third respondent or other authorised person, certifying the amount due by the appellant will on the face of it, be proof of the amount of the appellant's indebtedness, it shall not be necessary to prove the appointment of the person signing the certificate, and (b) the appellant agreed to pay costs on the scale as between an attorney and own client.

[5] Dragood breached the terms and conditions of the rental agreements in that it failed to maintain regular monthly payments. The rental agreements were cancelled, and the respondents took possession of the printing machines which were sold for an amount that was less than the cost of sale. Thereafter, the respondents instituted an action against the appellant for the payment of the sums that would have been due for the duration of the period of the lease agreement. Summons that was served at the appellant's chosen *domicilium citandi et executandi* did not come to the appellant's attention, and she having failed to deliver her notice of intention to defend, the respondents obtained default judgment against her.

[6] Upon becoming aware of the default judgment, the appellant brought the application for rescission which is the subject of this appeal. She dealt with her bona fide defences to the respondents' claims in paragraphs 14 to 16 of her founding affidavit. She has since abandoned some of the defences that she had raised and as such I only set out the defences that she persisted with.

[7] The first defence she raised is that she was fraudulently induced into providing the guarantees (**the fraud defence**). She pleaded the fraud defence as follows in the founding affidavit, namely:

'14.1 I was fraudulently induced by Willem Koegelenberg (a convicted fraudster, now deceased) (Koegelenberg) to provide the Guarantees upon which the Plaintiffs rely'.

[8] The appellant made the following factual allegations to substantiate the fraud defence:

'15.1 In **July 2020**, South Africa was in the midst of the COVID Epidemic, and I was caring for my late husband, who was suffering from advanced dementia and was in isolation, given his co-morbidities (Regretfully, despite my efforts, he died on **8 January 2021**). I was also caring for other elderly patients at the Helen Zille Unit and at Palm Gardens Retreat. In this regard, the following should be noted:

- 15.1.1 Dragood was the developer of both Palm Gardens Retreat Sectional Title Scheme and Palm Gardens Retreat (Helen Zille Wing), as separate Sectional Title Scheme;
- 15.1.2 Dragood, which owned the bulk of the Units in the Helen Zille Wing, conducted a step-down care facility from Units in the Helen Zille Wing;
- 15.1.3 a sister company of Dragood, Palm Gardens Retreat Management Services (**PGRM**), managed both Sectional Title Schemes, which shared facilities and costs, which were reconciled monthly to ensure that each Sectional Title Scheme paid its correct pro rata share of such costs. In this context, both Sectional Title Schemes often procured goods and services through Dragood;

15.1.4 this came to an end when both Dragood and PGRM were placed in Business Rescue.

15.2 Given my late husband's condition and the emotional and physical pressure which I was under, I was persuaded to allow Koegelenberg to attend to the running of Dragood's daily affairs. In this context, he advised me that Dragood had to obtain printers for its use, as well as the use of the Palm Gardens Body Corporate (**PGBC**) and that PGBC would be paying for such printers as a shared cost, as they had done in previous years.

15.3 Sunlyn's sales representative in respect of the agreements relied upon by the plaintiffs, was a friend of Koegelenberg and unbeknown to me at the time, the leasing charges were exorbitant and completely out of kilter with leasing charges for similar equipment.

15.4 PGBC never required printers and refused to pay for same. They discovered Koegelenberg's criminal past and terminated their relationship with him.

15.5 Needless to say, had I known firstly, that the printers were not needed, secondly, that PGBC would not be paying for them, thirdly, that the leasing charges were exorbitant; and fourthly, that Koegelenberg was setting me up to take the fall, I would never have signed either the agreements, nor the guarantees upon which the plaintiffs rely.'

[9] The second defence raised by the appellant relates to the Conventional Penalties Act 15 of 1962 (**the Conventional Penalties Act defence**) and she pleaded it as follows in the founding affidavit:

‘14.5 the cancellation of the Agreements relied upon by the plaintiffs was effective from **1 October 2020**, as more fully appears from paragraphs 5.2 of Annexure “**FA2**” hereto;

14.6 the equipment was collected by the plaintiffs” duly authorised representatives in **June 2021**, as per Annexure “**FA6**” hereto, after repeated requests that same be collected, had been ignored;

14.7 the amounts claimed by the plaintiffs constitute penalties as contemplated in terms of the Conventional Penalties Act No 15 of 1962. In this regard, the plaintiffs made no reasonable effort to collect and re-let the equipment timeously. Further and given the foregoing, the amounts claimed by the plaintiffs are out of all proportion to the damages allegedly suffered by them.’

[10] Notably, the appellant did not set out any factual averments to substantiate the Conventional Penalties Defence as she had done with the fraud defence. All she stated was “*I repeat the contents of paragraphs 14.1 to 14.7 above and pray that same may be incorporated herein mutatis mutandis.*”

[11] The application was opposed by all three respondents who explained that their representatives were not involved in the process of the procurement of the printing machines. According to the respondents, Dragood procured the printing machines from the manufacturers, Custom Cut It Solutions (Pty) Ltd (**Custom Cut**). The respondents also explained that their involvement is only at the stage of financing the acquisition of the printing machines and in this instance Mr Gary Kalt (**Mr Kalt**), the third respondent’s Asset Finance Regional Manager for Cape Town recalled having dealt with the application for the financing of the printing machines which was initially declined by the second respondent but approved subsequent to an appeal with a condition that required the provision of a guarantee.

[12] The respondents explained further that Mr Kalt, having gone through the application by Dragood for the financing of the printing machines, noted that Mr Jan Nel (**Mr Nel**) who was employed by Custom Cut at the time of the acquisition of the printers witnessed the appellant's signature to all the agreements. The respondents surmised that the appellant was mistaking Mr Nel as the second respondent's sales representative.

[13] In reply, the appellant pinned her colours to the mast in so far as the fraud defence is concerned and stated that she was defrauded by Koegelenberg and Mr Nel. She went on to state that Mr Nel, as a professional, must have known that Dragood and PGBC didn't require the printers as *'No doubt, he would have asked for some detail before quoting and had he been aware of the actual volume required, he would have never suggested 6 (six) printers.'*

[14] In an attempt to draw the third respondent into a fraudulent scheme, the appellant went on to state that:

'Mr Kalt, who according to the respondents has been in the business for 25 years, must surely have been aware of the true value of the machines and of what Custom Cut and Jan Nel were seeking to do to Dragood (and to me). Yet, he not only facilitated this, but compounded by asking that I provide a guarantee for 3 (three deals) which should never have been allowed to happen in the first place. As far as I am concerned, these 3 (three) deals amount to nothing more than fraud and/ or theft and I have been advised that fraud trumps all....'

[15] The respondents, in their answering affidavit, had pointed out that the appellant *'baldly alleges that the leasing charges were exorbitant and completely out of kilter with leasing charges for similar equipment'*, an allegation which they denied. The respondents also denied that the Conventional Penalties Defence has any merits with the deponent to the answering affidavit stating that:

'I am advised that the defence that the Conventional Penalties Act 15 of 1962 is applicable is misplaced, particularly in circumstances where, in an effort to mitigate their losses through the sale of the equipment, which the plaintiffs were required to do by reason of the plaintiff's termination of the rental agreements, the plaintiffs incurred costs in relation to the recovery and sale of the equipment in excess of the sale proceeds of the equipment.'

The findings of the court a quo

[16] The court a quo, in dealing with the fraud defence, found that fraud that involves Koegelenberg and Mr Nel, both of whom have no association with any of the respondents, could be no basis for setting aside the guarantee and as such it is no bona fide defence to the respondents' claims.

[17] The court a quo then proceeded to consider the possible involvement of Mr Kalt, an employee of the third respondent, in the fraudulent scheme. In this regard it observed that *'On the evidence in the founding papers, there is no basis to conclude that Kalt was involved... and that Kalt is only linked to the fraud in reply, and not by evidence but by inference ... that he must have known of the fraud, and therefore been complicit in it, because the charges were exorbitant.'*

[18] Having made the above observation, the court a quo pointed to the obvious problem with the appellant's case, namely that of raising an issue for the first time in reply, in light of the general rule to the effect that applicants "must stand and fall by their founding papers." It concluded that this is not one of those cases which justifies the relaxation of the general rule because this would deprive the respondents and Mr Kalt of an opportunity to deal with the new allegations.

[19] Turning to the Conventional Penalties defence, it was contended on behalf of the appellant that the penalty is out of proportion with the respondents' loss. Before dealing with this submission, the court a quo reminded itself that it is not its call to determine

whether the penalty is indeed out of proportion with the respondents' loss and that its role is limited to determining whether there is a triable issue. In order to determine whether there is a triable issue, the court a quo proceeded, it was important to know where the onus to show disproportionality between the penalty and prejudice lies, and its view was that the onus is on the appellant.

[20] The court a quo was of the view that the real issue in relation to the Conventional Penalties defence was the respondents' failure to relet the printing machines. It held that the Conventional Penalties defence based on the respondents' failure to relet the printing machines is bad in law because, on the authority of **Corner Savings**¹, the respondents – who are financiers not suppliers – are not required to rehire the equipment.

[21] The court a quo also considered a further defence that the appellant had raised in reply, that is whether the respondents should have realised value from the sale of the equipment, and whether their failure to do so would justify the reduction in the penalty. In this regard it found that the appellant's failure to plead the facts in her founding affidavit was fatal. The result was the court a quo's finding that the appellant had not established a bona fide defence to the respondents' claims.

Applicable legal principles

[22] The requirements for an application for rescission under subrule 31 (2) (b) have been stated to be as follows:²

- '(a) He (i.e. the applicant) must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to his gross negligence the Court should not come to his assistance.

¹ Absa Technologies Finance Solutions (Pty) Ltd v Leon Hatting t/a Corner Savings Supermarket [2009] ZAGPPHC 37

² Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O) at 476-7

- (b) His application must be bona fide and not made with the intention of merely delaying plaintiff's claim.
- (c) He must show that he has a bona fide defence to plaintiff's claim. It is sufficient if he makes out a prima facie defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour.'

[23] As already stated, the reason why the applicant's application for rescission failed was because of the court a quo's finding that she had failed to establish a bona fide defence to the respondents' claims. In order to make out a *prima facie* defence to a claim an applicant must set out averments which, if established at the trial, would entitle him or her to the relief asked for.³ It suffices if the applicant shows a prima facie case or the existence of an issue which is fit for trial.⁴ The applicant is not required to deal fully with the merits of the case but the grounds of defence must be set forth with sufficient detail to enable the court to conclude that there is a bona fide defence.⁵

Appellant's submissions in this Court

[24] It was submitted on behalf of the appellant that the court a quo misconstrued the test of establishing a bona fide defence for the purposes of a rescission application, set the bar too high in respect thereof and failed to have regard to the fact that:

- 24.1 the appellant was being sued as a guarantor;
- 24.2 the agreements giving rise to the respondents' claims arose after she had signed as guarantor;

³ Erasmus Superior Court Practice 2nd ed Vol 2 at pD1-366

⁴ Brown v Chapman 1928 TPD 320 at 328

⁵ Brown v Chapman *supra*

24.3 the appellant was not a party to, nor privy to the negotiations giving rise to the conclusion of these agreements; and

24.4 the appellant was only provided with a clear picture of the facts, when she received the answering affidavit and accordingly addressed same in rebuttal in reply.

[25] It was further submitted that the court a quo erred in finding that the appellant had impermissibly sought to make out her case in reply and that the rule should not be relaxed, given the nature of the application, the fact that the appellant was not involved in the negotiations preceding the conclusion of the rental agreements as well as the fact that she only obtained a clear picture of facts after receipt of the answering affidavit.

[26] The court a quo was criticised for stating “*Precisely when and how it (Dragood) failed is unclear...*” in circumstances where it was clear that agreements were concluded in August 2020 and Dragood was placed in business rescue a few weeks later on 25 September 2020. It was further criticized for failing to take cognisance of the following in para 14.5 of the founding affidavit “*the cancellation of the agreements relied upon by the plaintiffs was effective from 1 October 2020, as more fully appears from paragraph 5.2 of Annexure “FA2” hereto*” and a point being made was that the dates referred to in para 13 of the judgment are not the correct dates to apply and the earlier date of 20 October 2020 impacts on the date that the equipment was finally collected.

[27] The court a quo was further criticised for its analysis of the fraud defence dealt with in **paras 29 to 35** of the judgment and it was submitted that it erred in not taking cognisance of the fact that, but for the role of Kalt, the fraud could not have been perpetrated by Koegelenberg and Nel as Kalt’s role was critical in 2 respects, firstly, in insisting on the appellant signing as guarantor and secondly, in approving the transaction, which saw the printing machines being financed for astronomical amounts, which were paid to Nel, with no justification and which the respondents then sought to recover from Dragood and from the appellant.

[28] It was further submitted that having found that the appellant had laid the foundation for exorbitant rental charges in her founding affidavit, the court a quo erred in finding that the respondents were permitted to merely respond with a bare denial. The court a quo, it was submitted, ought to have found that it was incumbent on the respondents, at the very least, to show that the rates charged were consistent with the rates charged for similar agreements, involving similar machines as these are issues for trial. To this should be added the allegation that new printing machines that cost R121 494 as per annexures “RA1”, “RA2” and “RA3” could be sold less than 11 months later, after only having been used at the most, for a number of weeks, for **1%** of their value, as alleged in paragraph 66 of the respondents’ answering affidavit. There is no allegation that same were damaged in any way and there is no explanation as to why it was necessary to sell them, at all as opposed to renting them out again, since same were barely used. This should be fully ventilated at trial.

[29] It was further submitted that the court a quo impermissibly addressed the probabilities, in **paras 39 and 40** of the judgment when this was the function of the trial court and ought not to have played a role in determining whether a *bona fide* defence had been established for purposes of a rescission application. With regard to **para 41** of the judgment, it was submitted that the court a quo failed to take cognisance of the following:

- 29.1 In ***Combined Developers v Arun Holdings and Two Others*** 2015 (3) SA 215 (WCC) (**Arun**), the Court (Davis J) refused to allow the appellant to use a trivial default to trigger the acceleration clause, to gain a commercial advantage over the respondent. This is of application in the present case, where Dragood was placed in business rescue on 25 September 2020, only weeks after concluding the agreements. However, despite cancellation by the BRP effective from 1 October 2020, the respondents delayed an inordinate period of time in collecting the machines.

- 29.2 In reaching such conclusion, Davis J had regard to section 39 (2) of the Constitution and to **Sasfin (Pty) Ltd v Beukes** 1988 (1) SA 1 (A) (**Beukes**). He came to the conclusion that the spirit, purport and objects of the Constitution must be upheld alongside the values of Ubuntu. Davis J also had regard to **Juglal v Shoprite Checkers (Pty) Ltd** 2004 (5) SA 248 (SCA), where it was held that no party can give effect to the provisions of a contract in a manner that the court deems unconscionable, illegal or immoral. This should also be seen in the context of **Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd** 2012 (1) SA 256 (CC), where, insofar as bargaining power is concerned, the court placed a burden on the more powerful party to act in good faith, when enforcing a claim.
- 29.3 In **Barkhuizen v Napier** 2007 (5) SA 323 (CC), the Court held that a contract or a provision/ term will be enforced provided that giving effect thereto, will not be unreasonable. In the present instance, to hold the appellant to the provisions of the guarantee in the present circumstances was clearly unreasonable. As the Constitutional Court held in **Mohlomi v Minister of Defence** 1997 (1) SA 124 (CC), the reasonableness of a clause in a contract must be assessed by taking into account the circumstances surrounding the contract including the financial capability of the parties (**Barkhuizen para 64**).
- 29.4 In **Botha v Rich** 2014 (4) SA 124 (CC), the Court restated the position that contractual relationships are subject to the values of good faith, fairness and other values that underlie the Constitution (at **paras 45-46**). This was reinforced in **Beadica 231 CC v Trustees for the time being of the Oregon Trust** 2020 (5) SA 247 (CC) (**Beadica**). Public Policy takes into account the “necessity to do simple justice between individuals and is informed by the concept of Ubuntu” (at **para 175**). Accordingly, the

respondents' somewhat simplistic reliance on *pactum sunt servanda*, is with respect, misplaced (at **paras 86-87**). Contractual freedom and autonomy must be balanced with constitutional fairness in a manner that "*ensures objectivity, reasonable practicality and certainty*" (at **para 108**).

[30] Finally it was submitted that applying the principles enunciated above to the facts of this case, the Court in its discretion, judiciously exercised, ought to have granted the application for the rescission of the default judgment and to have allowed the matter to proceed to trial. Regarding the court a quo's finding in para 52 of the judgment, it was submitted that the court erred in placing reliance on a single sentence "*the costs in relation to the sale of the goods exceeded the value of which the goods were sold for*" as no details were provided as to what the costs were and what the goods were sold for and these figures were first made available in the answering affidavit and were properly and correctly rebutted in reply. As these were almost brand new and almost unused machines which were sold for 1% of their value, it was submitted that the court a quo ought to have taken same into account as establishing a triable issue.

Respondents' submissions in this Court

[31] The respondents' answer to the appellant's fraud defence was that in order to establish a defence premised on fraud, the appellant is required to allege and prove⁶ (a) a representation by the representor to the representee, (b) fraud, i.e. that the representor knew the representation to be false, (c) causation, (d) and if damages are claimed, it must be alleged that the representee suffered damages. It was submitted that the appellant failed to make any of the required averments when one has regard to paragraph 15.5 of the founding affidavit.

[32] It was further submitted that it is important to note that the appellant, in the founding affidavit and even in the replying affidavit, does not allege any involvement of any employee of the plaintiffs (agency or a representation of agency) as far as the

⁶ Amler's Precedents of Pleadings, Harms, Ninth Edition, page 204

alleged fraud was concerned. Instead, she relies on an alleged fraud committed on her by her own employee, Koegelenberg and Nel, the supplier of the equipment.

[33] The respondents' answer to the appellant's Conventional Penalties Defence was that "*the founding affidavit contains a single allegation (a conclusion of fact) that the charges are exorbitant*" and that the "application contains no allegations in support of the claim for a reduction."

[34] It was further submitted on behalf of the respondents that the first respondent carried no obligation to mitigate its damages because the buying and selling of printing machines does not fall within the scope of its main business. In support of this proposition, this court was referred to ***Absa Technology Finance Solutions***⁷ (***Absa Technology Finance Solutions***) where Murphy J stated that "*A financier normally should not be expected to become a dealer in second-hand equipment.*"

Discussion

[35] I have set out the averments made by the appellant in her founding affidavit as well as the submissions made on her behalf in her heads of argument. What is readily apparent in her founding affidavit is that she feels that she was hard done by Mr Koegelenberg who had stepped into her shoes at a time when she had to attend to her family affairs. It is also clear that the appellant did not know about the involvement of Mr Kalt in the negotiations leading up to the acquisition and financing of the printing machines. This explains why she could not make any averment pointing to the involvement of Mr Kalt in the fraudulent scheme that she believes was being perpetrated by Mr Koegelenberg. The appellant can thus not complain about being criticised that she has not made any averments pointing to the involvement of any of the respondents in the fraudulent scheme.

⁷ Absa Technology Finance Solutions (Pty) Ltd v Leon Hatting t/a Corner Savings Supermarket (Unreported judgment of the North Gauteng High Court, Pretoria, Case No. 5580/06 delivered on 29 April 2009) at para 33

[36] The appellant is then left with the averments in her replying affidavit and in respect of which she suggests the court a quo erred in not taking them into account in assessing whether she has established a bona fide defence. As submitted on behalf of the respondents, in order for the appellant to succeed with her defence based on fraud she is required to allege (a) a representation by the representor to the representee, (b) fraud, i.e. that the representor knew the representation to be false, and (c) causation.

[37] The appellant mentions Mr Kalt only once in her replying affidavit and even then, she does not even allege that he made any representations, thus failing to establish the very first requirement for a defence based on fraud. The closest she gets to implicating Mr Kalt is that he must have known about the fraudulent scheme, and he compounded it by insisting that the appellant provides a guarantee. This, in my view, falls far too short of what the appellant is required to set out in her affidavit for her defence based on fraud to succeed. Even accepting momentarily that the court a quo erred, a finding I do not make, in not taking into account the averments in the replying affidavit, such error has no bearing on the outcome. The appellant has failed to set out averments which, if established at trial, would entitle her to the relief. There is, in my view, no basis to interfere with the court a quo's finding that the fraud defence is bad in law.

[38] Turning to the Conventional Penalties Act defence, the appellant's first difficulty is her failure to set out the averments, which if established at trial, would entitle her to the relief. To add to that, on the authority of **Absa Technology Finance Solutions**, the indications are that the Conventional Penalties Act defence is the one that is available as against the suppliers of goods and not necessarily the financiers. As none of the respondents are suppliers of goods, the Conventional Penalties Act defence may very well be unavailable to the appellant and thus there would be no triable issue as against the respondents. It must follow, in my view that there is no basis to interfere with the court a quo's finding on this score.

[39] The appellant referred to a number of authorities dealing with some issues that were not foreshadowed in the papers. These include using trivial defaults to trigger the

acceleration clause (Arun), that the spirit, purport and objects of the Constitution must be upheld alongside the values of Ubuntu (Beukes), and good faith, fairness and other values that underlie the Constitution (Beadica). These authorities cannot come to the assistance of the appellant absent the essential averments that the appellant is required to set out in her application.

[40] What is required of an applicant is to set out the averments, which if proved at trial, would entitle him or her to the relief. The court, in assessing whether a bona fide defence has been established, has to accept the averments set out by the applicant and ask itself whether the averments are such that they, if proved during trial, would entitle the applicant to the relief he or she seeks. This requires of legal practitioners to pay attention when drafting affidavits in support of applications for rescission of judgment to ensure that primary facts are pleaded as that places the court in a good position to assess whether the facts pleaded are such that they would entitle the applicant to the relief he or she seeks, if proven at trial. It is insufficient to plead conclusions without pleading facts on the basis of which these conclusions are made. For all the above reasons I am of the view that the appeal must fail.

Costs

[41] The respondents have been successful and in my view the costs should follow the result. The guarantee that is at the centre of this appeal entitles the respondents to costs on an attorney and client scale and no sufficient justification has been provided from deviating from the parties' agreement as embodied in the guarantee. Costs will thus be awarded on an attorney and client scale including the costs relating to the application for leave to appeal.

Order

[42] In the result I propose the following order:

The appeal is dismissed with costs on an attorney and client scale including the costs of the application for leave to appeal.

L G NUKU
JUDGE OF THE HIGH COURT

I agree and it is so ordered

C M J FORTUIN
JUDGE OF THE HIGH COURT

KUSEVITSKY J (dissenting)

[43] I have read the judgment of Nuku J (“the main judgment”) and I am unfortunately not able to agree with the conclusion thereof for reasons that follow. The requirements for an application of a rescission of judgment, as stated in the main judgment, is trite. More particularly, having regard to the seminal *dicta* in *Grant v Plumbers*⁸ all an applicant needs to demonstrate, *inter alia* is that they have a *bona fide* defence, which *prima facie*, if established at the trial, would entitle them to the relief sought. The use of the word ‘*prima facie*’ is key. This phrase denotes a position at *first sight*⁹, or ‘on the face of it.’ This means that without more, an applicant need not deal with the merits of the case and produce evidence that the probabilities are actually in her favour - it is sufficient that the averments made, if established, would entitle them to the said relief. The threshold in my view is low for a reason – it prevents a duplication of proceedings. In short, the court hearing an application for rescission is not the trial court, should not

⁸ *supra*

⁹ Concise Oxford English Dictionary

demand evidence, nor engage with the subject matter and merits as if it were the trial court. To do so would be a misdirection.

[44] Two defences feature in this appeal. I agree with the main judgment that no case has been made in respect of the first defence of fraud. I am however of the view that the Appellant has *prima facie* made out a case in respect of the defence raised in relation to the Conventional Penalties Act, 15 of 1962.

[45] In the judgment *a quo*, the court noted that by relying on the acceleration clause in the rental agreements, the Respondents were enforcing a penalty as defined in the Conventional Penalties Act. It ostensibly dismissed this defence on two grounds, the first that the Appellant did not make out a case in her founding affidavit and more particularly, her failure to deal with the price for which the goods were sold, in her founding affidavit¹⁰, and second and in any event, that this defence did not raise a triable issue and as a result, no *bona fide* defence had been established.

[46] From the pleadings, the following is apparent: Three rental agreements were entered into, the first agreement on 7 August 2020 and the second and third agreements on 11 August 2020 respectively¹¹. The equipment was delivered on 24 July 2020. On 25 September 2020, the principal debtor went into a voluntary business rescue. On 8 March 2021, the business rescue practitioner sent an email to the Second Respondent (“Sasfin”), requesting a consensual cancellation of the three rental agreements; that if accepted the cancellation would be effective from 1 October 2020 and furthermore advised them of their duty to mitigate their damages. It is further evident that the business restructuring practitioner¹² sent an email on the 26 March 2021 to Sasfin to collect the printers. On 11 April 2021, Sasfin advised that they would collect the equipment. The printers were collected by Sasfin three months later on 2 June 2021. The four printers were later sold on auction on 8 July 2021 for the sum total

¹⁰ paragraph 55 of the judgment *a quo*

¹¹ Claims A, B and C in the Particulars of claim

¹² Gragood Development (Pty) Ltd was placed into business rescue by way of voluntary resolution on 25 September 2020. In terms of an amended business rescue plan adopted on 9 March 2021, approval was granted for the disposal of company assets in terms of section 152 of the Companies Act 71 of 2008.

of R 1 495.00, having incurred additional costs of R 3 450 for removal costs and R 650 for storage costs.

[47] At the hearing of the matter *a quo*, the parties acknowledged that considering the decision in *Plumbago Financial Services (Pty) Ltd t/a Toshiba Rentals v Janap Josephs*¹³, that the damages granted in the default judgment constituted a ‘penalty’ for the purposes of the Conventional Penalties Act. This approach is of course correct. The Conventional Penalties Act is generally triggered where a penalty stipulation is imposed in a contract, usually couched in terms such as an acceleration clause upon breach. On this point, I am unable to agree with the finding in the main judgment, relying on the authority of *Absa Technology Finance Solutions*¹⁴ that the Conventional Penalties Act may not be available as a defence to the Appellant since such a remedy is only available as against suppliers and not financiers. Generally, most goods or assets of substantial value procured from suppliers, unless subject to rental agreements, are financed through finance houses such as the First and Second Respondents.

[48] Section 1(2) of the Conventional Penalties Act defines a “penalty” as “any sum of money for the payment of which or anything for the delivery or performance of which a person maybecome liable”. A “penalty stipulation” is a stipulation

“whereby it is provided that any person shall, in respect of an act or omission in conflict with the contractual obligation be liable to pay a sum of money or to deliver or perform anything for the benefit of any other person... either by way of a penalty or as liquidated damages”.

Such a penalty stipulation is capable of being enforced in any competent court but a creditor is not entitled to recover both a penalty and damages. Furthermore s 3(1) of the Conventional Penalties Act prohibits the recovery of a penalty which is out of proportion

¹³ 2008 (3) SA 47 (C) at 52H-I

¹⁴ *Absa Technologies Finance Solutions (Pty) Ltd v Leon Hatting t/a Corner Savings Supermarket* [2009] ZAGPPHC 37

to the prejudice suffered by the creditor. In that instance, the court may, if the penalty is excessive, reduce it to such extent as may be equitable in the circumstances.¹⁵

[49] *Plumbago* similarly dealt with the leasing of photocopy machines and a subsequent claim for arrear and future rentals. Bozalek J in the evaluation as to whether or not an acceleration clause constituted a penalty for purposes of the Act considered the *dicta* in *Caude Neon Lights SA Ltd v Schlemmer*¹⁶ where Leon J stated as follows:

“What was there accelerated were several debts which had never previously been owing by the lessee to the lessor and which were reciprocal to the performance by the lessor of its obligations in terms of the lease. Any acceleration of payments not yet due gives an advantage to the lessor over and above what would be his normal remedy for the breach, namely cancellation and ejectment, or, in the case of a lease of movables, repossession. A right given to a lessor to require the lessee to pay, in accelerated form, the rent up to the terminal date of the lease being something additional to, and over and above, the normal remedy of a lessor might well be regarded as being in terrorem the lessee”.¹⁷ (“own emphasis”)

[50] Thus, it is the provisions in the agreement which would constitute a penalty in the event of a breach which would invoke the Conventional Penalties Act and the status of the contracting parties are of no moment. I am also of the view that the *obiter* remarks in *Absa Technology* does not find application since in any event, the obligation rests on a creditor to mitigate its loss and more often than not, where the leasing or purchasing of goods are at issue, it would be the ultimate re-letting or realisation of those goods the value of which would determine whether or not prejudice has been suffered by the creditor for purposes of the Act.

¹⁵ *Plumbago* at para 23

¹⁶ 1974 (1) SA 143 (N) at 147C-E

¹⁷ at 628C-E; *Plumbago* para 28, at 56A-C

[51] When one has regard to the judgment *a quo*, I am of the view that the court firstly misdirected itself by evaluating the merits of the matter when, in fact, it was cognisant of the fact that it was only called upon to decide whether the issue was triable.¹⁸ The court dealt with the onus and opined that the onus rested on the Appellant to show the Respondents' actual prejudice and then show that the penalty is out of proportion to the prejudice. In *Smit v Bester*¹⁹, the Appellate Court held that in the case where a court is concerned with a penalty under section 3 of the Conventional Penalties Act, the onus is on the debtor to show that the penalty is disproportionate to the prejudice suffered by the creditor and that it should thus be reduced and to what extent. This was reiterated in *Plumbago* where the court found the debtor had the onus to prove that the penalty is disproportionate relative to the prejudice suffered by the creditor.²⁰ However, when the debtor *prima facie* proves that the penalty should be reduced, then there is an onus on the creditor to rebut, so as to refute the *prima facie* case of the debtor. In my view, the court *a quo* failed to acknowledge this leg of the enquiry.

[52] The court then proceeded in paragraphs 45 to 54 of the judgment to evaluate the probabilities of the Appellant's defence when it was not called upon to do so – that being the function of the trial court in due course after the hearing of oral evidence. The court *a quo* went beyond that which it was tasked to do, which was simply to have identified a *prima facie* defence and once established, grant the rescission so that the Appellant would be given the opportunity to ventilate same. This in my view constitutes a misdirection.

[53] Furthermore, the court *a quo* held that the Appellant impermissibly made her case out in reply, and suggested that she should have made out her case in her founding affidavit. The court opined that the Appellant was sufficiently apprised of the fact that '*the costs in relation to the sale of the goods exceeded the value which the goods were sold for*', this phrase having been mentioned in a letter dated 19 January 2023 that she herself attached to her founding affidavit and which was pleaded in the

¹⁸ paragraph 44 of the judgment *a quo*

¹⁹ *Smit v Bester* 1977 (4) SA 937 (A) at 942D-G

²⁰ *Plumbago Financial Services v Janap Joseph* 2008 (3) SA 47 (C) at 52H-I

particulars of claim. Based on this, the court reasoned, the Appellant *‘therefore knew when she brought the application for rescission, that the sale of the printers realised R0.’*

[54] However, if one has regard to the pleadings, it is evident that this was not the case. In the summons, the only averment that is pleaded in support of a claim against the principal debtor and the Appellant is the following averment:

“The plaintiffs have taken possession of the rented goods and sold same, however the cost of sale of the goods exceeded the amount the goods were sold for, as such the plaintiffs are claiming all outstanding rentals as pre-estimated liquid damages including legal costs on the attorney and own client scale.”²¹

[55] The Appellant did not know the extent to which the printers were disposed of, the details thereof were only made known to her in paragraph 66 of the answering affidavit and the attendant auctioneers statement²² which reflected the breakdown of the sale and attendant costs. It was only on receipt of this information that the Appellant could amplify her defence by noting the perplexing situation whereby printing machines that had been purchased for R 121 494.00, could be sold less than 11 months later, without damage or much use, for barely 1% of its value. The Appellant also contended the duty on the Respondents to have mitigated their damages by failing to collect the printers timeously.

[56] Further evidence that the Appellant did not have the particularity of the costs, contrary to what was found in the judgment *a quo*, is evident from the founding affidavit in a letter dated 20 December 2022 directed to the attorneys of record for the Respondents in which the Appellant’s legal representative, having informed of their intention to file an application for rescission of judgment, requested “*whether there are any further relevant documents other than those attached to the summons? If there are*

²¹ paragraph 25 of the Particulars of claim

²² Annexure AA14 to the answering affidavit

any such relevant documents, please will you provide us with copies thereof?” In response on 12 January 2023, the Respondents attorney of record advised that it was impossible for them to properly respond to exactly what documents were needed other than those attached to the summons ‘without a clear indication as to what further documents were sought’. They again merely reiterated in a letter dated 19 January 2023 that “*unfortunately, the costs in relation to the sale of the goods exceeded the value which the goods were sold for.*”

[57] It is therefore clear that the Respondents failed to advise the Appellant of the exact costs of the sale of the printers and that it was only after this information was disclosed in the answering affidavit that the Appellant could make the averment that the selling of the printers at 1% of its value and the subsequent claim constitutes penalties as contemplated in the Conventional Penalties Act and that consequently the amounts claimed are out of proportion to the damages allegedly suffered by them. As I have indicated, the evaluation of merits in the above-mentioned paragraphs constituted a misdirection, but even if I am wrong on this score, the evaluation itself was based on incorrect facts not supported by the evidence in the pleadings. This too is a misdirection.

[58] Finally, if one has regard to the *obiter* remarks in the judgment *a quo*, it is apparent that the court recognized that the Respondents appeared to achieve a massive windfall²³; that the rentals did seem high and the failure to realise any value from the printers after they were repossessed compounded the unfairness²⁴. In *Plumbago*, the facts which eerily mirror this case, the parties in that matter did not raise the defence of or applicability of the Conventional Penalties Act. Bozalek J held the following:

“[18] In the present matter the issue was not raised on the pleadings. To my mind this is no bar to it being raised by the Court in the circumstances of the

²³ paragraph 55 of the judgment *a quo*

²⁴ paragraph 58 of the judgment *a quo*

present case. Although it was suggested in *Bank of Lisbon International Ltd* that the Court should not consider a reduction of a penalty in an opposed matter unless it has been alleged and approved, a more flexible approach was advocated in *Courtis Rutherford and Sons CC and others v Sasfin (Pty) Ltd*, a full bench decision of this division. Van Zyl J observed that it is, and remains, the court's primary function to ensure that justice is done on the basis of what is just fair and reasonable under all circumstances. By implication, he expressed approval of a court dealing with the question of an excessive penalty even where that was not formally pleaded, subject to it being fully canvassed in evidence and argument." ("own emphasis")

On this basis alone, the court *a quo* based on its own observation of the prejudice and unfairness to the Appellant of the penalty, ought to have granted the rescission of judgment and a failure to do so was a further misdirection.

[59] For these reasons, I would have upheld the appeal and granted the Appellant the rescission of judgment.

D KUSEVITSKY
JUDGE OF THE HIGH COURT

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