



**THE HIGH COURT OF SOUTH AFRICA  
(NORTHERN CAPE DIVISION, KIMBERLEY)**

**Not Reportable**

Case no: CA & R 20/2024

In the matter between:

**MOONRIVER GUESTHOUSE PARTNERSHIP**

**FIRST APPELLANT**

**JOHANNES BERGH**

**SECOND APPELLANT**

**KAREN BERGH**

**THIRD APPELLANT**

and

**ASTFIN WESTERN CAPE (PTY) LTD**

**t/a ASSETFIN**

**RESPONDENT**

**Neutral citation:** *Moonriver Guesthouse Partnership and Others v Astfin Western Cape (Pty) Ltd t/a Assetfin* (CA & R 20/2024) [2025] 12 December 2025)

**Coram:** PHATSHOANE DJP and MAMOSEBO J

**Heard:** 21 July 2025

**Delivered:** 12 December 2025

**Summary:** **Law of Contract** - rental agreement for office automation equipment – alleged misrepresentation inducing the lessee to sign rental agreements - whether lessee bound – lessor unaware of lessee's mistake – lessor entitled to rely on appearance of liability created by lessee's signature - defence of justus error failing - lessee held liable.

---

## ORDER

---

**On appeal from:** the Magistrates' Court for the District of ZF Mgcawu held at Upington (Magistrate J Van Zyl, sitting as court of first instance):

1. The appeal is dismissed with costs on party and party scale; such costs are to include counsel's fees on scale B as set out in rule 67A read with rule 69 of the Uniform Rules of this Court.

---

## JUDGMENT

---

**Phatshoane DJP (Mamosebo J concurring)**

[1] This appeal has its origin in the Magistrates' Court for the District of ZF Mgcawu, Upington. It is directed at the whole of the judgment and order of Magistrate J Van Zyl (the trial court) in terms of which judgment was entered against the first to third appellants, Moonriver Guesthouse Partnership (Moonriver), Mr Johannes Bergh and Mrs Karen Bergh (collectively referred to as the appellants), in favour of the respondent, Astfin Western Cape (Pty) Ltd t/a Assetfin (Assetfin), for the payment of R458 440.05 together with interest and costs.

[2] Assetfin, the plaintiff in the court a quo, instituted action against Moonriver, a partnership whose partners are Mr and Mrs Bergh (the Berghs) and are married to each other. The Berghs were also cited in their personal capacities because they signed a guarantee in which they jointly and severally bound themselves as co-principal debtors for the primary continuing obligation of Moonriver and its punctual payment to Assetfin of all the amounts owing, arising out of the rental agreements it concluded with Assetfin. The three appellants were the first to the third defendants in the court a quo.

[3] Assetfin pleaded that during October 2015 it concluded the Small Business Agreement of Hire (the Master Agreement) with Moonriver. The salient terms thereof were that Moonriver hires from it certain office automation equipment from time to time. The Master Agreement and the attachment thereto, labelled the Terms of Business, applied to each Schedule to the Master Agreement (schedule(s)). The Terms of Business also applied to the equipment specified in the said schedules. Each schedule created a separate agreement in respect of the equipment set out therein. The equipment and its supplier would be selected by Moonriver. Assetfin purchased the equipment from the supplier at Moonriver's special instance and request for the purposes of renting the equipment to Moonriver. Moonriver acknowledged that it selected the equipment prior to signing the rental agreement, was satisfied with it and that no representations were made to it by Assetfin.

[4] Assetfin further pleaded that on signature of the schedule(s) all risk in the equipment passed to Moonriver. However, ownership of the equipment remained vested in Assetfin. Assetfin further ceded to Moonriver all claims which Assetfin may have against the supplier or the licensor of the equipment arising out of any express or implied guarantee, warranty or undertaking as to the condition, state or quality of the equipment or software or as to the fitness or stability thereof for any purpose or arising out of any latent defect in the equipment. The Master Agreement in issue, it is recorded, is the sole agreement between the parties regardless of any representation that may have been made to Moonriver regarding the equipment and the agreement itself. The monthly rental would increase cumulatively on the anniversary of the first rental due date as stated in the schedule(s).

[5] The agreement further stipulates that should Moonriver breach any of its conditions or fail to pay any amount payable in terms of the agreement, Assetfin shall be entitled, without terminating the agreement, to claim immediate payment of all amounts which would have been payable in terms of the agreement until the expiry of the rental period, whether such amounts are due for payment or not. In addition, Assetfin shall, pending payment of those amounts, be entitled to repossess the equipment on condition that,

against full payment, it shall return the equipment to Moonriver, which shall not be entitled to any rebate or abatement of charges or other amounts by reason of its loss of possession and enjoyment of the equipment. The agreements provide for costs on an attorney and own client scale should Assetfin instruct attorneys to recover monies owed to it in terms of underlying agreements.

[6] Assetfin pleaded, concerning the first schedule (Agreement A), that on 19 or 30 October 2015 Moonriver hired from it a new Hikvision 7 Channel CCTV system for the initial rental period of 60 months against the payment of a monthly rental of R1 387.38, which will escalate annually by 10% cumulatively. Moonriver breached this agreement in that it failed to pay rental, alternatively full rental for May 2016, and August to October 2016. Therefore, it elected to claim immediate payment of R92 539.96, being all amounts which would have been payable in terms of the agreement until the expiry of the rental period, whether such amounts were due for payment or not. This it did without terminating the agreement.

[7] In terms of the second schedule (Agreement B), concluded also on 19 or 30 October 2015, Moonriver hired from Assetfin a new Samsung OS7070 PABX system, 14 button DS keyset, three Gigaset dect phones, a battery back-up, a lightening protection, telephone management system, auto attendant, four economic DS keysets and a voice source 16 logger for the initial rental period of 60 months against payment of a monthly rental of R2 382.60 which will escalate annually by 10 % cumulatively. Moonriver breached this agreement in that it failed to pay rental, alternatively full rental for May 2016 and August to October 2016. Therefore, Assetfin elected, without terminating the agreement, to claim immediate payment of R158 921.77, being all amounts which would have been payable in terms of the agreement, had it run its course, whether such amounts were due for payment or not.

[8] The third schedule (Agreement C) was also concluded on 19 or 30 October 2015. In terms of this, Assetfin pleaded that Moonriver hired a new Triumph Adler 2500 colour copier for the initial period of 60 months against payment of a monthly rental of R2 313.06,

which rental will escalate annually by 10%, cumulatively. Assetfin stated that Moonriver breached this agreement in that it failed to pay rental, alternatively full rental for August to October 2016. It therefore elected, without terminating the agreement, to claim immediate payment of R151 919.29, being all amounts which would have been payable in terms of the agreement until the expiry of the rental period, whether such amounts were due for payment or not.

[9] The last schedule (Agreement D) was concluded on 27 November 2015. In terms of this, Moonriver hired from Assetfin a new Hikvision 4 channel CCTV system, three turbo 28 bullet cameras, a turbo varifocal bullet camera, a remote view software and a 40-inch monitor for the initial rental period of 60 months against payment of a monthly rental of R817.38, which will escalate annually by 10% cumulatively. Assetfin pleaded that Moonriver breached this agreement in that it failed to pay rental, alternatively full rental from July to October 2016. Accordingly, Assetfin elected, without terminating the agreement, to claim immediate payment of R55 059.03, being all amounts which would have been payable in terms of the agreement until the expiry of the rental period, whether such amounts were due for payment or not.

[10] The appellants deny liability. They pleaded that Assetfin was represented by IP Solutions, which employed direct marketing as set out in the Consumer Protection Act 68 of 2008 (the Act). They claim that Assetfin's representative misrepresented to them that the marketed telephone system would be cheaper than Moonriver's existing system. The representative concerned falsely represented to them that at the end of the rental period Moonriver would acquire ownership of the equipment against full payment of the rental. The appellants further pleaded that the Master Agreement and its Terms of Business formed part of the bundle of documents which Assetfin's representative handed over to them without explaining the contents thereof. Neither were the Berghs able to read the agreements' fine print.

[11] The appellants further pleaded that the terms of the agreements were *void ab initio* or unenforceable because they contravene s 5(5) read with ss 60 and 61 of the Act,

alternatively, they are against the public policy and public interest or are *contra bonos mores*. This was so because, they submitted, the delivery of equipment was incomplete; the equipment was not properly installed; not in good working condition and not subjected to an inspection by Assetfin's representative to evaluate its suitability for Moonriver's purposes. In general, the equipment did not meet Moonriver's needs or alternatively did not fulfill the purpose for which it had been hired. On this score, the appellants further pleaded that the terms of the agreements are unfair and unreasonable; are disproportionately one-sided in favour of Assetfin, and excessively prejudicial to them. They further pleaded that, when they concluded the agreements, they laboured under false or misleading representations created by Assetfin's representative and consequently they negotiated the agreements to their detriment.

[12] The Appellants additionally pleaded that the contractual terms did not make provision for Moonriver's cancellation in circumstances where the equipment was not completely delivered, properly installed, or alternatively, not properly functional and not meeting its needs. They submitted that they would not have concluded the agreements had they been made aware of the true nature of the transactions. Therefore, there was no consensus on the essential terms of the agreements. Furthermore, there was no agreement that the Berghs, in particular, would sign a guarantee which merely formed part of the bundle of documents presented to them without any explanation of their contents. They urged that Assetfin's claim be dismissed with costs.

[13] The principal issue before the trial court was whether there had been false representations to Moonriver with regard to the agreements of hire, and if so, whether such misrepresentation was made by Assetfin's representative. Mr Anton Nell is a risk manager in the employ of Assetfin, a company which provides facilities for financing and rental of business assets such as copiers, printers, telephone systems, CCTV and the like. He testified in the case for Assetfin. In August 2014 Assetfin and IP Solutions (IP), a company which markets and sells office automation equipment to clients, concluded an Agreement for the Purchase of Equipment (Non-Recourse) referred to in the evidence as the Dealers' Agreement. In broad strokes, it provided that Assetfin would finance the



office items which IP would have sold to IP's clients. Some of the salient terms of the Dealers' Agreement were these:

'1.3 The Supplier [IP] sells equipment from time to time, certain of which will be subject to rental and similar agreements.

1.4 The Supplier seeks to refer certain potential Clients to Assetfin from time to time, on the basis that Assetfin shall purchase the required equipment from Suppliers for the purpose of on-renting same to Clients of Assetfin.

...

5.1.4 Neither the Supplier nor anyone on its behalf will have given any warranties or made any representations on behalf of Assetfin to any Client.

...

10. Nothing contained herein or otherwise shall be deemed or construed as constituting or authorising the Supplier to act or hold itself out as the agent of Assetfin.'

[14] Mr Nell denied that Mr Dean Van der Hulst (Mr Van der Hulst) and Mr Reinier Landman (Mr Landman) of IP were Assetfin's authorised representatives or agents. Their role was only to ensure that the clients signed the agreements. He also gainsaid that Assetfin made false representations to the appellants. Ordinarily, IP Solutions would contact clients for the purchase of IP's equipment through monthly instalments. IP would obtain the application form from Assetfin; would have IP's quotation signed by a client for some specified equipment needed, indicating the monthly repayment thereof and the period of payment to its clients. IP would also obtain some financial information from the clients, for example, copies of their balance sheet and income statement. It would forward these documents to Assetfin for credit assessment. Upon receipt, Assetfin would assess the client's creditworthiness and decide whether to approve credit.

[15] Mr Nell testified that on 15 September 2015 the appellants signed the application forms, which signified their intention to conclude the agreements with Assetfin. According to Nell, once the application is approved, IP would complete further Assetfin's documents with clients by completing their details. It had no authority to adapt the documents nor the contractual terms. The Master Agreement and its Terms of Business; the schedules thereto; and the acknowledgment of receipt of the equipment were signed by the

appellants on 19 October and 23 November 2015. He intimated that Assetfin required some form of security from IP's clients. For this reason, the Berghs concluded a contract of guarantee in which they bound themselves to make good any losses to Assetfin resulting from the underlying agreements. Once the necessary documents had been signed by IP's clients, Ms Sandra Klopper, a business development manager of Assetfin, now retired, as in this case, would peruse the documents to determine if they were correctly completed and would sign them on behalf of Assetfin after confirmation of delivery and installation of the equipment at IP's client. These documents would be processed, and Assetfin would effect payment.

[16] Mr Nell confirmed that the type of asset hire agreement in issue did not transfer ownership of the equipment to the client. Assetfin remained the owner. However, at the end of the lease period, IP solutions would purchase the equipment from Assetfin for R500 plus VAT and could do with the assets as it pleased. To put this in proper context, clause 7 of the Dealers' Agreement stipulates:

'7.1 While this agreement is in force Assetfin hereby grants to the Supplier [IP] the following rights, namely;

7.1.1 In the event of the termination and cancellation of each and every rental agreement, pursuant to the purchase of equipment by Assetfin from the supplier, Assetfin shall sell to the Supplier the equipment which is the subject matter of the rental agreement for a purchase consideration of R500.00 plus VAT.

7.1.2 Transfer of ownership will be on a voetstoots basis and with the exclusion of warranties, expressed or implied, in regard to the state or condition of or any matter relating to the equipment, subject to the following further terms and conditions.

7.1.2.1 There is no impediment in law which would debar Assetfin from transferring ownership of the equipment.

7.1.2.2 The Client will have fully discharged his obligations under and in terms of the rental agreement and will have ceased to have any rights to the equipment.

7.1.2.3 The Supplier will at its own cost and expense take or obtain delivery / collection of the equipment from the Client or such person as may be in possession thereof, there being no obligation on Assetfin to effect delivery of the equipment.'



[17] Mr Nell equated the rental agreements in issue with a vehicle finance agreement – a hire purchase agreement. He intimated, like a hire purchase, the financier is not responsible for the maintenance of the vehicle. Here too, IP's clients would be responsible for the maintenance of the equipment, including its insurance. In terms of the agreements, Assetfin ceded its remedies to the clients to act against IP for any defects in the equipment. Mr Nell confirmed that he was not present during the negotiations between the appellants and IP. He could not dispute that Mr Landman informed the appellants that ownership of the equipment would pass to them at the end of the lease; that he approached them through direct marketing, and that he merely told them to 'just sign' the agreements.

[18] Insofar as Moonriver stopped monthly rental payments to Assetfin, the latter demanded payment of the full amount owing without the cancellation of the agreements and removal of the equipment. The certificate of indebtedness signed by Mr Nell showed that the appellants were indebted to Assetfin in the sum of R458 440.25.

[19] Mr Bergh and Mr Landman testified in the case of the appellants. Mr Bergh intimated that the appellants bore no knowledge of the Dealers' Agreement that was concluded between Assetfin and IP. Its impact on the agreements they concluded with Assetfin was also not disclosed or explained to them prior to assenting to the agreements in question. Mr Bergh was equally not aware of the relationship between Assetfin and IP. Around 29 September 2015 Mr Landman, an excellent salesman, brought to the appellants 'supplier's deal pack' (the initial application forms). In approximately 40-50 minutes, he introduced himself, indicated who he worked for, and what his work entailed. He marketed IP's products orally without a brochure and explained how those products would benefit the appellants, who at the time owned about five guesthouses. Mr Landman further explained to them that the ownership of the equipment would pass on to them at the end of the lease period. They appended their signature on the documents without having read them. Neither did Mr Landman explain the contents to them.

[20] Insofar as IP operated from Cape Town, whereas the appellants resided in Uppington, Mr Bergh says he enquired from Mr Landman whether there would be an 'after purchase service' of the equipment. He replied that four technicians would be deployed to Uppington for that purpose, but this did not materialise. Mr Landman also informed them that IP sold, installed and would also finance the equipment. He only became aware that Assetfin financed the equipment when it commenced collecting its monthly rentals from his bank account through the debit orders.

[21] Mr Landman visited the appellants again on 19 October 2015 and brought what he told them were further forms which they had to sign. These forms, which Mr Bergh says were already completed, were in fact the Master Agreement, Terms of the Business, schedules to the Master Agreement, acknowledgement of receipt of equipment and a guarantee. Mr Bergh says the appellants signed them without having been afforded the opportunity to read through. Neither were their terms explained nor copies thereof furnished to them after they had been signed. He intimated that Mr Landman only explained that these were standard agreements which protected both the contracting parties. According to Mr Bergh, the appellants would not have assented to these agreements had they been alerted to their terms because they did not provide protection to them.

[22] Mr Bergh further testified that he did not read the acknowledgement of receipt of the equipment, which in the relevant part stipulated that:

'I/We hereby state that I/we have received all of the goods as scheduled above.

The goods have been installed at the address(es) stated above.

The goods are exactly what I/we ordered.

I/We have tested it and found it to be in good working order.

You, the hirer, may pay for the purchase of the goods.'

He stated that when they signed the agreements, the installation of the equipment was still underway. Therefore, they could not have inspected it.

[23] Mr Bergh went on to say that after the installation of the equipment none of the items properly functioned. From the outset, the telephone system did not do what the Berghs were told it was designed to do. It did not voice record and did not ring. They put eight and later four channel camera system. They discovered later, when attempting to retrieve the previous data, that the cameras could not play back. The photocopier was also dysfunctional. A technician repaired it. Not long afterwards it once more failed to operate. He contacted Mr Landman, who directed the appellants to IP's maintenance department, but they never sorted out the problems. The appellants continued to pay the monthly rentals for a period of eight months, even though the items were not in working order, in the hope that IP would repair the systems, which never happened. Mr Bergh stated that he unsuccessfully made several telephone calls to IP. In the end, he removed and stored the equipment as it was of no use to the appellants. He stopped payments and sought legal assistance.

[24] During 2015 Mr Landman and Mr Van der Hulst of IP, on IP's instructions, conducted door-to-door sales of office equipment in the Northern Cape. Mr Landman testified that they made their presentation to the appellants on 29 September 2015 on behalf of IP and Assetfin. Under cross-examination he conceded that all their instructions came from IP and he acted for the latter, not Assetfin. He recommended that the appellants install a Samsung telephone system, Hikvision CCTV camera system and Triumph Adler copier. He completed the deal pack, the first set of documents, which Mr Bergh said were presented to the appellants. Mrs Bergh signed the documents. Mr Landman confirmed that the Berghs were informed that at the end of the lease period ownership of the equipment would be given to them. He further informed the Berghs that there was only one technician in Upington and that IP had promised that four technicians would be stationed in that area. He spent approximately 50 minutes with the Berghs and did not furnish them with copies of the deal pack.

[25] Mr Landman intimated that the second batch of documents, which the Berghs signed on 19 October 2015, were completed by Assetfin but handed over to him by IP to see to it that the appellants signed them. He told the Berghs that these were agreements

for the rental of office equipment. He did not know the terms of the agreements, thus he did not explain them to the Berghs or afford them the opportunity to read through. He merely showed them where they had to sign. Shortly thereafter, he received complaints from Mr Bergh regarding the fitted equipment. He then informed IP's technical division.

[26] In holding the appellants liable the trial court relied on the *caveat subscriptor* rule, a principle which essentially entails that a person who signs a document, which contains contractual terms, may be held bound thereto because of the impression of assent created by the signature. The seminal statement of the rule is that of Innes CJ in *Burger v Central South African Railways* 1903 TS 571:

'It is a sound principle of law that a man, when he signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear over his signature. There are, of course, grounds upon which he may repudiate a document to which he has put his hand. But no such grounds have been shown to exist in the present case. Consider the circumstances under which this note was signed. Neither fraud nor misrepresentation have been alleged; nothing was said by any railway official which misled the signatory; the language of the document was one which the consignor understood: no pressure of any kind was exercised. All that can be said is that the consignor did not choose to read what he was signing, and after he signed did not know the particulars of the regulations by which he had agreed to abide. For the Court to hold upon these facts that the appellant is legally justified in repudiating his signature would be a decision involving far-reaching consequences, and it would be a decision unsupported by any principle of our law. The mistake or error of the signatory in the present case was not such justus error as would entitle him to claim a *restitutio in integrum*, or as could be successfully pleaded as a defence to an action founded upon the written contract, and therefore it cannot be used for the purpose of attacking that contract when the railway seeks to rely upon it.'<sup>1</sup>

[27] The trial court held that Mr Bergh was not uneducated. He was a fitter and turner; a salesman of John Deere tractors for many years; he conducted business in the hospitality industry for a considerable period; and concluded several agreements when purchasing vehicles. Mrs Bergh worked for at least two banks as a home loan consultant.

---

<sup>1</sup> At 578.

[28] The trial court was of the view that the Berghs had the choice to read the agreements before appending their signatures on them. There was no evidence, reasoned the trial court, that the appellants exercised their right to have reasonable time to read through the agreements. Based on their background they ought to have insisted on this. The trial court did not gain the impression that Mr Landman would have refused to give the appellants the opportunity to do so. In addition, there was no evidence suggesting that the appellants requested copies of the agreements. They also did not seek legal assistance before signing the agreements.

[29] The court found, on the balance of probabilities, that the equipment had been installed and was in good working condition. It noted that the certificate of balance, showing the amount the appellants owed to Assetfin, was not placed in dispute and that the appellants, as the guarantors, bound themselves jointly and severally for the proper and punctual payment by Moonriver of all the amounts owing arising out of the underlying agreements. The trial court was of the view that the appellants failed to exhaust remedies as set out in the agreement in addressing their dispute with Assetfin prior to cessation of payment of monthly rentals. The appellants also failed to show that the cancellation of the agreements was valid.

[30] On the available evidence, the trial court held that it could not come to a conclusion that the terms of the agreements were unreasonable, unfair or *contra bonos mores*. In the final analysis, the trial court found that the appellants did not prove any of their defences and that Assetfin proved its claims. Accordingly, judgment was entered in favour of Assetfin for the payment of the total amount it claimed.

[31] In this Court, the appellants argued that the lessor (Assetfin) at common law is obliged to place the leased goods in a condition reasonably fit for the purpose for which they are let and to maintain them. The office automation equipment fitted at the appellants' premises was of poor quality. The appellants further contended that clauses 16 and 23 of the Terms of Business exempted Assetfin from compliance with its common law obligations because it excluded all warranties implied by common law. It also required



Assetfin to cede to the appellants all claims which Assetfin may have had against the supplier (IP) regarding the condition of the goods or their fitness to fulfill the purpose. A complete recitation of clauses 16 and 23 thereof is apposite:

‘16. You acknowledge and agree:

16.1 that you [the appellants] selected and inspected the goods prior to signing this Agreement and/or the Schedule and are satisfied with the goods and that they suit your purpose;

16.2 that all warranties implied by the Common Law, and subject to the Consumer Protection Act 68 of 2008, are excluded and that no representations of any nature have been made by or on behalf of us [Assetfin];

16.3 that once the Schedule to the Agreement is signed by you, all the risk in the goods pass to you.

16.4 that you have entered into this agreement for purposes wholly or partly related to your business or profession.

...

23.1 We hereby cede to you, who agrees to accept cession thereof, all claims which we may have against the Supplier or the licensor of the goods arising out of any express or implied guarantee, warranty or undertaking [as] to the condition, state or quality of the goods or software or as to the fitness or stability thereof for any purpose whatsoever or arising out of any latent defect in the goods.

23.2 The cession in terms of 2[3].1 operates as a complete and absolute discharge of any liability which we may have to you in respect of any corresponding claim which is not excluded in this Agreement. Nothing contained in this Agreement shall derogate from your obligation in terms of this Agreement notwithstanding that you may have no right against the Supplier(s) of the goods or components thereof in terms of any of our rights ceded to you in terms of this Agreement.

23.3 We make no warranty or representations as to the availability or enforceability of any right you may have against any of the Supplier(s).

23.4 The cession of rights against the Supplier(s) in terms of this clause 2[3] shall by the very fact terminate on termination of this Agreement and the rights hereby ceded shall by that very fact be deemed to have been re-ceded by you to us.’

[32] The abovementioned clauses, the appellants argued, constituted “a trap for the unwary”. Therefore, there was a legal duty on Assetfin, so it was argued, to explain or draw the appellants’ attention to the onerous terms and to enquire from them whether



they appreciated the import thereof. It was further argued that Assetfin lured the appellants into believing that they need not peruse every clause, or alternatively, caused the situation where the appellants did not read through the agreements carefully before assenting thereto. Ultimately, the underlying agreements were unenforceable or tainted by a lack of consensus. In addition, the appellants' unilateral mistake was reasonable. Therefore, they could validly cancel the agreements, so ran the argument.

[33] As support for their argument that they were misled, the appellants called in aid the decision of the Supreme Court of Appeal (SCA) in *Brink v Humphries and Jewell (Pty) Ltd*.<sup>2</sup> It is important to remember that in deciding whether a misrepresentation was made, all the relevant circumstances must be taken into account and each case will depend on its own facts.<sup>3</sup> Although, generally, a contract is founded on consensus, contractual liability can also be incurred in circumstances where there is no real agreement between the parties but one of them is reasonably entitled to assume from the words or conduct of the other that they were in agreement.<sup>4</sup>

[34] It is well settled that courts should come to the rescue of parties who have been misled or induced to enter into agreements of the kind under discussion, which includes contracts of suretyship and guarantee. In that event, Navsa JA dissenting in *Brink*<sup>5</sup> reminds us of what was stated in *National & Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A) at 479G - H:

"... "Our law allows a party to set up his own mistake in certain circumstances in order to escape liability under a contract into which he has entered. But where the other party has not made any misrepresentation and has not appreciated at the time of acceptance that his offer was being accepted under a misapprehension, the scope for a defence of unilateral mistake is very narrow, if it exists at all. At least the mistake (*error*) would have to be reasonable (*justus*) and it would have to be pleaded. In the present case a plea makes no mention of mistake and there is no basis in the evidence for a contention that the mistake was reasonable."

---

<sup>2</sup> 2005 (2) SA 419 (SCA).

<sup>3</sup> *Ibid* para 3.

<sup>4</sup> See *Be Bop A Lula Manufacturing & Printing CC v Kingtex Marketing (Pty) Ltd* [2008] 1 All SA 529 (SCA); 2008 (3) SA 327 (SCA) para 10; see also *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) para 72.

<sup>5</sup> *Brink v Humphries & Jewell (Pty) Ltd* 2005 (2) SA 419 (SCA) para 34.

See also Christie *The Law of Contract* 4th ed (2001) at 365, where the following appears after a discussion of this case:

“This summary of the law is borne out by the cases, which show the possibility of *justus error* to be very limited, unless the other party knew or ought to have known of, or caused the mistake”.

[35] The key question in determining whether there had been misrepresentation was laid down in *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis*<sup>6</sup> as follows:

‘. . . [D]id the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention? . . . To answer this question, a three-fold enquiry is usually necessary, namely, firstly, was there a misrepresentation as to one party’s intention; secondly, who made that representation; and thirdly, was the other party misled thereby? . . . The last question postulates two possibilities: Was he actually misled and would a reasonable man have been misled? *Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd* 1983 (1) SA 978 (A) at 984D - H, 985G - H.’

[36] It bears repeating that Mr Bergh is a businessman who worked as a tractor sales representative with experience in finance contracts. Mrs Bergh also has experience in the financing sector as she had worked as a home loan consultant in major South African banks. The Berghs owned about five guesthouses. Save to state that the meetings between the appellants and Mr Landman were of a limited duration, there is no evidence that he brought undue pressure to bear on the appellants to sign the underlying agreements. There is also no evidence to suggest that they were required to sign the document in haste. There is also no reason why they did not request adequate time to study the agreements. The appellants were always free not to give their assent if they were not amenable to the terms.

[37] By signing the agreements without reading them, the appellants led Assetfin to believe that the intention conveyed by their signatures to be bound by the terms of the agreements reflected their true intention. Mr Bergh conceded that, on the face of the

---

<sup>6</sup> 1992 (3) SA 234 (A) at 239I – 240B.

signed agreements, Assetfin had no reason to doubt that the appellants assented to the terms. He also admitted that the appellants had been negligent in signing the documents without perusal.

[38] It was not incumbent on Assetfin to inform the appellants of the terms of the underlying agreements. The present situation is almost akin to that which applied in *Slip Knot Investments 777 (Pty) Ltd v Du Toit*<sup>7</sup>. There it was said:

‘A contracting party is generally not bound to inform the other party of the terms of the proposed agreement. He must do so, however, where there are terms that could not reasonably have been expected in the contract. The court below came to the conclusion that the suretyship was "hidden" in the bundle, and held that the respondent was in the circumstances entitled to assume that he was not personally implicated. I can find nothing objectionable in the set of documents sent to the respondent. Even a cursory glance at them would have alerted the respondent that he was signing a deed of suretyship . . . Slip Knot was entitled to rely on the respondent’s signature as a surety, just as it was entitled to rely on his signature as a trustee. The respondent relied entirely on what was conveyed to him by his nephew through Altro Potgieter. Slip Knot made no misrepresentation to him, and there is no suggestion on the respondent’s papers that Slip Knot knew or ought, as a reasonable person, to have known of his mistake.’

[39] The striking feature of this case is that Assetfin took no part in negotiating the underlying agreements with the appellants. A third party, IP, did so. Clause 10 of the Dealers’ Agreement, which provides that “nothing contained [in the agreement] or otherwise shall be deemed or construed as constituting or authorizing the Supplier [IP] to act or to hold itself out as the agent of Assetfin”, belies any suggestion that Mr Landman, when offering to supply office automation equipment to the appellants, was acting for Assetfin. In addition, clause 5.1.4 of the said agreement makes it plain that neither the Supplier [IP] nor anyone on its behalf will give any warranties or make any representations on behalf of Assetfin to any client. After several vacillations Mr Bergh conceded that Mr Landman was not authorised by Assetfin to represent it.

---

<sup>7</sup> [2011] ZASCA 34; 2011 (4) SA 72 (SCA) para 12.

[40] Mr Nell's evidence to the effect that the rental agreements in issue were standard templates used for half of Assetfin's clients was not seriously challenged. Under cross-examination he said "ons het duisende kliente wat dit gebruik en hulle is heel oukei daarmee." The rental agreement had been evaluated and accepted by Assetfin's attorneys and its bank and had been in use for ages. Where a client took issue with the terms of the agreement Mr Nell testified that they would discuss with the client what would be legally acceptable with due regard to the credit risk. To my mind, this suggests that the agreements could never have constituted a trap for the unwary.

[41] In any event, the acknowledgement of receipt of equipment carries a conspicuous and clear caveat in capital letters: "NOT TO BE SIGNED UNTIL DELIVERY HAS BEEN EFFECTED". On the guarantee just before the recital of its terms, there appears a caption in highlight which says, 'It is recommended that the guarantor/s obtain independent legal advice to ensure that they understand their commitments in terms hereof and the potential consequences of their decision to bind themselves as guarantor/ees and co-principal debtors.' Mr Bergh says their eyes did not look at the captions. They "just signed" where they were advised to do. As already alluded to, the Berghs have adequate experience in financial transactions akin to the agreements in issue. On the foregoing exposition, there could never have been any false and material misrepresentations that had been made to the appellants which induced the conclusion of the rental agreements. In my view, a reasonable man in the position of the appellants, with their experience, would not have been misled.

[42] Counsel for Assetfin submitted that it is not uncommon or unduly cumbersome for the risk in leased goods to pass to the lessee when the lessor bought the goods at the lessee's special instance and request for purposes of renting it to the lessee. This is particularly so, when the leased items are office automation equipment that are movable with a limited lifespan and rapidly depreciating in value and over which the lessor has no physical control. With this submission, I agree.

[43] Insofar as the appellants submitted that the goods were not in good condition from the outset, Mr Bergh acknowledged that the appellants ought to have engaged IP in resolving that grievance not Assetfin. He also agreed that he was better placed compared to Assetfin to take up any issue he had with the equipment with IP because Moonriver was in possession of the equipment. It bears repeating that the Berghs signed the acknowledgement of receipt of the equipment in which they declared that the goods were exactly what they ordered, they had been installed, tested and found to be in good working order and that Assetfin could pay the supplier (IP), which it did, thus triggering the appellants' corresponding obligation to make good their undertaking to pay their rental to Assetfin.

[44] In terms of clause 23.1 of the Terms of Business, Assetfin ceded all claims which it may have had against IP arising out of any expressed or implied guarantee, warranty or undertaking with regard to the condition of the goods, to the appellants. The commercial rationale for this stipulation is manifest. Fatal to the appellants' course, Mr Bergh conceded that this clause protected them against IP's representations on the quality of the goods. However, they never instituted action against it.

[45] The appellants' argument that the agreements were unfair because they would not have acquired ownership of the equipment upon the expiry of the leases, is without substance. Mr Landman confirmed that ownership would pass to them. He referred to this as a rent-to-own agreement, which exists between IP and its recruited clients. In the papers this agreement is titled 'Application to Render Services for Supply, Delivery, Installation, Commissioning and Activation of Automated Office Equipment. Clause B specifically records:

'The consumer (appellants) has also been explained that the ownership of the above-mentioned equipment will be passed on to the consumer from the supplier (IP) after termination of rental agreement.'

That position obtained regardless of clause 7 of the Dealers' Agreement, referred to earlier. In any event, in terms of clause 7, IP was in a position to pass ownership to the



appellants as it would have gained such ownership by purchasing the goods concerned from Assetfin at a nominal amount.

[46] For the first time on appeal, the appellants took issue with the validity of clause 8 of the Terms of Business, which provides that:

'A certificate signed by any of [Assetfin's] managers or other authorised persons, certifying the amount due by [Moonriver] will on the face of it, be proof of the amount of your indebtedness. It shall not be necessary to prove the appointment of the person signing such certificate.'

As support for their argument that the certificate was invalid the appellants relied on *Nedbank Limited v McGlashan*<sup>8</sup> Where it was held that a clause, virtually identical to the present, is invalid for offending public policy because the terms purported to oust the jurisdiction of the Courts to inquire into and determine the accuracy and the validity of the issue covered by the certificate. Where the certificate was authored by an independent third party, that was different and permissible. However, where a certificate was authored by the other contracting party, the objection applied.

[47] I refrain from considering the validity or otherwise of the certificate of balance for the following reason. Mr Nell testified that he signed this certificate which he said confirmed the total debt owed in terms of the rental agreements. Stated differently, the certificate showed the total unpaid monthly instalments, which at that stage had been handed over to the attorneys for collection. This evidence was not challenged during Mr Nell's cross-examination. He was merely questioned on the dates the market value of the items would have been determined, and how such value was calculated, for which he could not give an account. Nothing was placed in dispute with regard to the amounts the appellants owed as reflected in the certificate of balance. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct.<sup>9</sup> In my view, this should settle any debate on the quantum of the claim.

---

<sup>8</sup> 2016 JDR 1648 (GJ) paras 14-22.

<sup>9</sup> *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) para 61.



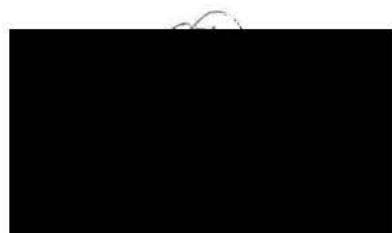
[48] In conclusion, the Berghs failed to discharge the onus that Assetfin knew or ought to have reasonably known of their mistake. The trial court cannot be faulted for having found that the appellants failed to establish an entitlement to be exempted from the *caveat subscriptor* rule. It follows that the appeal must fail.

[49] The record of appeal comprised 6 volumes, which were properly indexed as required by rule 50 of the Uniform Rules of this Court. Although the record is not bulky, it became a difficult task to work through as the transcript had not been cross-referenced to the bundles which constituted the evidence referred to during the trial. This ought to have been done because the record before us has been renumbered, which pagination differs from that of the trial court. For this reason, I am disinclined to award costs on an attorney and own client scale even though they are provided for in the underlying agreements. They shall follow the result on party and party scale.

[50] In the result, the following order is made:

**Order:**

1. The appeal is dismissed with costs on party and party scale and such costs are to include counsel's fees on scale B as set out in rule 67A read with rule 69 of the Uniform Rules of this Court.

---

M V PHATSHOANE  
DEPUTY JUDGE PRESIDENT

**Appearances**

For the appellants: HJ Benade  
Instructed by: Van der Wall Inc, Kimberley

For the respondent: A du Toit  
Instructed by: Snyman Attorneys, Paarl  
Mohlhamme Pino Attorneys, Kimberley.