THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

Case No.: A 306 / 2005

In the matter between:

CUSTOM CAPITAL FINANCE (PTY) LTD	Appellant
and	
GRANDE KLOOF HOTELS CC	First Respondent
ALLEN TARGHI TAVAKOLI	Second Respondent

Summary:	Contract – Unenforceable Rental Agreements - Appeal Dismissed.
Coram:	Wille J *et* Magona-Dano, AJ
Heard:	20 March 2026
Delivered:	17 April 2026

JUDGMENT

WILLE, J:

INTRODUCTION

[1] This is an appeal from a lower court involving two commercial rental agreements. The trial court set aside the rental agreements and held them to be unenforceable. I will refer to the parties as they were cited in the trial proceedings, as the plaintiff and the defendants.[1]

BACKGROUND

THE PARTIES

[2] An entity styled 'Intergro' Technologies (Pty) Ltd ('*Intergo')* entered into two rental agreements with the first defendant as the 'user', and the second defendant as the surety. A cession of rights and obligations then took place with 'Intergro' as the cedent and the plaintiff as the cessionary.[2]

THE AGREEMENTS

[3] Two 'Master Rental Agreements' were concluded between the cedent and the first defendant. The cedent was defined as the 'hirer' and the 'user' was the first defendant. The goods that formed the subject of these agreements may be broadly defined as information technology products connected to a telephone and an internet connectivity system.[3]

[4] A further agreement was entered into between the cedent and the first defendant, which did not form the subject of any order in the lower court. However, this agreement is and was inextricably linked to the initial two rental agreements between the cedent and the first defendant.[4]

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1 This for ease of reference.
2 The plaintiff is a finance company.
3 It is more complicated than this, but these details are not relevant for this appeal.
4 This was the agreement regulating the internet fiber line to the business of the first defendant,

[5] It is significant that the first defendant was described as the 'user' of the goods. I say this because the dispute between the cessionary and the first defendant touches on allegations that the goods forming the subject of the rental agreements were not fit for purpose and did not function properly.[5]

THE RELATIONSHIP BETWEEN THE CEDENT AND THE CESSIONARY

[6] The plaintiff contends that the relationship between the cedent and cessionary is a commercial (arm's length) out-and-out cession of the cedent's rights to the cessionary. Put another way, it is contended that the cedent no longer has anything to do with the rental transactions concluded with the first defendant. The documentary evidence tendered in the trial court demonstrated an entirely different relationship between the cedent and the cessionary.[6]

<u>THE GROUNDS OF APPEAL</u>

[7] The grounds of appeal are that: (a) the lower court erred by finding that the disconnection of services at the instance of the appellant, coupled with the alleged misrepresentations regarding the equipment's functionality, rendered the agreements unenforceable; (b) the lower court's findings that the appellant's conduct in instructing the cedent to disconnect the unrelated services (the internet connection) to the first defendant, demonstrated unclean hands was wrong, and (c) that the finding that the second defendant's obligations as surety amounted to a justifiable error (because of the misleading nature of the documents) was wrong.[7]

[8] What has not been dealt with by the plaintiff at all in the context of this appeal was the tender by the first respondent for the return of the goods to the plaintiff.[8]

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[5] This was one of the main disputes in the trial action.
[6] There were several emails from the cessionary that indicated a continuing business relationship.
[7] The appellant persists that the surety remains liable in terms of his suretyship.
[8] This was not materially engaged with by the plaintiff.

CONSIDERATION

THE DISCONNECTION OF THE INTERNET CONNECTION

[9] The thumb of evidence against the plaintiff in this disconnection is overwhelming. It is abundantly clear that the instruction to disconnect the subscriber application agreement between the cessionary and the first defendant came from the cedent. This is of crucial importance, bearing in mind that the core contentions by the plaintiff in this appeal (and at the trial) were and are focused and directed at establishing that the cessionary and the first defendant have nothing to do with the cedent and are completely divorced from the cedent.[9]

[10] An email sent from the cedent is instructive and records in terms as follows: [sic]

'…Custom Capital has instructed us to disconnect the equipment, should they not receive payment we will receive a recovery notice, all the cabling, infrastructure and hardware will be removed from the premises…'

'…As the owner of Integro, I am more than happy to facilitate the reconnection to try and assist the situation and do so should you pay the hardware account to Custom Capital…'[10]

[11] Thus, the lower court correctly found that the plaintiff's instruction to disconnect services was unlawful and unlawfully interfered with the separate subscriber application agreement between the cedent and the first defendant.[11]

[12] Self-evidently, this conduct blurred the lines between the agreements, rendering the cession a sham. The legal consequence is that the rental agreements may become unenforceable. This must also be seen in the context of the first defendant's tender to return the equipment, which the plaintiff failed to collect despite repeated threats to do so.[12]

THE APPELLANT DID NOT PROVE ITS PLEADED CASE

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[9] The cedent sought to distance itself completely from these two commercial transactions.
[10] The email sent on 13 December 2019 by Michael Bester.
[11] This was for, inter alia, crucial internet fibre connection services.
[12] Appeal Volume 7, page 642-643 (lines 1-2).

[13] The evidence demonstrated that the representative of the cedent presented the rental agreements to the second defendant without any explanation of their terms. It is alleged that the immediate cession and the surety provisions were also not explained.[13]

[14] What is of grave concern to me is that despite a request by the court during the appeal hearing, coupled with an undertaking by the plaintiff's counsel to have legible copies of the terms and conditions of the two rental agreements delivered to my chambers post the hearing, this was only done a week later. Thus, if the plaintiff was unwilling (or neglected) to have legible copies of the two rental agreements immediately made available to the court upon request, it is challenging to find that the second defendant was even able to read these terms and conditions when the two rental agreements were entered into.[14]

[15] The plaintiff seeks to rely on the 'acceptance certificates' in the agreements. These 'acceptance certificates' leave a lot to be desired. I say so because they, in essence, amount to a premature, complete, and unconditional indemnity that the equipment delivered by the cedent had been inspected and was satisfactory in every conceivable respect, with no recourse to the cedent.[15]

[16] Without having to deal with the law concerning this issue, the evidence demonstrated that no prior inspections took place by the second defendant, and no evidence refuted the second defendant's testimony that he would not have signed the rental agreements had the cession and its implications (including the appellant's power to instruct the service disconnection) been explained to him. Most importantly, the cession agreement did not permit the plaintiff to interfere with a separate service subscriber agreement with the cedent.[16]

THE DEFENDANTS' SHIELDS

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[13] One of the agreements was signed in a parking lot on the bonnet of a car.
[14] Brink v Humphries and Jewell (Pty) Ltd 2005 (2) SA 419 (SCA) at para [9].
[15] This amounts to a complete waiver of all the defendants' rights.
[16] This was a common cause issue.

[17] It has been repeatedly held that, in view of the advantages enjoyed by a trial court in seeing and hearing witnesses and in being steeped in the atmosphere of the trial, an appeal court, as a general proposition, is loath to disturb the factual findings made by a trial court. The lower court's factual findings that the equipment that formed the subject of the two rental agreements failed and were accordingly not 'fit for purpose' would be difficult to disturb on appeal.[17]

[18] Coupled with this, the disconnection conduct at the instance of the plaintiff does not help the cause on appeal. The lower court held that this was unlawful because none of the rental agreements permitted the disconnection. Thus, this conduct demonstrated substantial wrongdoing concerning the rights as asserted by the plaintiff.[18]

[19] In an attempt to 'justify' the unlawful disconnection of services to the first defendant, the plaintiff submits that the service issues were irrelevant to the rental claims of the cessionary. This is challenging to understand. I say this because the equipment was rented by the first defendant for the purpose of running a guesthouse enterprise, and it would, as a matter of pure logic, be rendered useless following the disconnection by the cedent.[19]

[20] This is reinforced by the plaintiff's failure to explain why it did not collect the equipment despite the threat by the cedent and the tender by the second defendant. In the unfortunate emails sent by the cedent, the cedent references all the agreements (the two rental agreements and the subscriber agreement), stating that not only will the services provided under the subscriber agreement be cancelled, but the first defendant's hardware account will also remain suspended.[20]

THE SURETY OBLIGATION

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[17] It was clear that serious problems were encountered with the workings of the system.
[18] Villa Crop Protection v Bayer Intellectual Property 2024 (1) SA 331 (CC).
[19] This also remained unchallenged.
[20] This shows a continued business relationship between the cedent and the cessionary.

[21] It is trite that a suretyship obligation is accessory to the relationship between the creditor and the principal debtor and the obligations under it. The sureties' obligations are coterminous with those of the principal debtor. Thus, if the principal debtor's debt is discharged, the surety's debt is discharged.[21]

[22] The second defendant's potential liability arises only from the time the first defendant was in default. The plaintiff seeks to claim from the second defendant and must comply with the ordinary rules of pleading in connection with the two rental agreements. The second defendant may rely on any defence available to the first defendant, provided that the defence is *in rem* and not *in personam*. In this case, the defence raised concerns an out-and-out obligation, which was available to the second defendant.[22]

THE COUNTERCLAIM

[23] The lower court upheld a portion of the defendants' counterclaim, to the limited extent of the granting of an order setting aside the two rental agreements. An order was also made confirming that the extant payments constitute sufficient performance by the defendants. The defendants' damages claim was dismissed and does not form the subject of this appeal. As a matter of law, I have no issue with the setting aside of the two rental agreements.[23]

[24] What was not before me was the issue of the defendants' 'sufficient' and 'complete' performance under the two rental agreements, to the extent that their extant payments (already made in terms of the two rental agreements) constituted 'sufficient' and 'complete' performance. As I have said, this was not before me, and thus I fortunately do not have to consider whether this order was a competent one by the judicial officer in the trial court.[24]

CONSTITUTIONAL ISSUES

[21] Liberty Group Ltd v Illman 2020 (5) SA 397 (SCA) at para 20.
[22] Ideal Finance Corp v Coetzer 1970 (3) SA 1 (A).
[23] In my view, this was correct.
[24] With reference to Section 46 of Act 32 of 1944.

[25] The second defendant signed the acceptance certificates. The plaintiff relies heavily on these acceptance certificates. Thus, what we are left with is a debate about the permissibility of the infringement of the second defendant's constitutional rights. The proper inquiry in this case is the ordinary one undertaken by our courts when determining whether a clause in a contract or its enforcement is consistent with public policy. The applicable principles are the following:

'…On the one hand, public policy, as informed by the Constitution, requires in general that parties should comply with contractual obligations that have been freely and voluntarily undertaken. This consideration is expressed in the maxim pacta sunt servanda, which, as the Supreme Court of Appeal has repeatedly noted, gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor, as it will determine the weight that should be afforded to the values of freedom and dignity. The other consideration is that all persons have a right to seek judicial redress…'[25].

[26] In determining whether to enforce a contractual clause, the court must consider whether the clause was concluded between parties with equal bargaining power, whether the party in breach understood what they were agreeing to, and the reason why the party in breach has not complied with the clause. The onus is upon the party seeking to avoid the enforcement of the clause to demonstrate good reasons for failing to comply with it.[26]

[27] Self-evidently, the power to invalidate, or refuse to enforce, contractual terms should only be exercised in worthy cases. The degree of restraint to be exercised must be balanced against the backdrop of our constitutional rights and values.[27]

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[25] Barkhuizen v Napier 2007 (5) SA 323 (CC) at [57].
[26] Barkhuizen v Napier 2007 (5) SA 323 (CC) at [58].
[27] Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others 2020 (5) SA 247 (CC) [89]-[90].

[28] It cannot be said that in this case, the defendants knew what they were agreeing to. I say so because it was nearly impossible to read all the terms and conditions in the two rental agreements printed on the reverse side. As I have said, legible copies of the terms and conditions of the two agreements were only produced to the court a week after the hearing. Also, these terms and conditions had to be 'enlarged' to make them legible. They are still difficult to read. Thus, the extent to which the contract was 'freely and voluntarily' concluded is clearly a vital factor for consideration because it determines the weight that should be afforded to the values of freedom and dignity.[28]

[29] Self-evidently, the 'acceptance certificates' were not freely and voluntarily signed because, factually, the second defendant had no insight or prior knowledge of the sophistication in relation to the equipment supplied by the cedent and whether it was fit for purpose. Also, it was acknowledged that tests had been completed on the equipment, and the results were satisfactory.[29]

[30] The acceptance certificates also refer to the terms and conditions of the rental agreements, which are very difficult, if not impossible, to read in their original format, and there was no evidence led by the plaintiff in rebuttal of the testimony by the second defendant that these terms and conditions (including the proposed cession) were never brought to his attention.[30]

[31] This must also be viewed in the context of the common cause facts that at least one of these contracts was signed on the bonnet of a car in a car park. These are then all factors that a court is enjoined to consider, determining, through a constitutional lens, as to whether the contract was 'freely and voluntarily' concluded. These factors cumulatively may influence and determine the weight that should be afforded to the values of freedom and dignity in these commercial circumstances.[31]

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[28] Barkhuizen v Napier 2007 (5) SA 323 (CC) at [57].
[29] This was not done before the acceptance was signed.
[30] This seemed to be a common cause issue.
[31] This is a weighing up exercise which is discretionary.

CONCLUSION

[32] For all these reasons, the appeal must fail, and the following order is granted.

1. The appeal is dismissed.

2. The appellant shall be liable for the costs of and incidental to the appeal on the scale as between party and party (as taxed or agreed) together with the costs of counsel on scale B.

WILLE, J

I agree:

MAGONA-DANO, AJ