

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case Number: 2021/52340

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
DATE SIGNATURE	

In the matter between: -

ASCOR TRADING CC

Reg Number 2006/067185/23

1st Applicant / 1st Defendant

GONASAGREE MATHURA

Identity Number 8[...]

2nd Applicant / 2nd Defendant

and

SASFIN BANK LIMITED

Reg Number 1951/002280/06

Respondent/Plaintiff

JUDGMENT

Van Aswegen AJ

INTRODUCTION:

[1] In this matter, the Applicants are the Defendants in the main action, while the Respondent is the Plaintiff. For ease of reference, the parties will be referred to as the Plaintiff and the Defendants, respectively.

[2] The Defendants launched a Rescission application ("the application")¹ of a Default Judgment granted in favour of the Plaintiff on 5 May 2022 ("the judgment").²

[3] The order granted against the Defendants was in the following terms:

1. *Delivery to the Plaintiff of the following vehicle:*

1 x new Toshiba E-Studio 2010 AC Colour Copier with serial number C[...];

2 *Payment of R181 308.93;*

3 *Interest on the aforesaid amount at the rate of prime plus 5% from 16 October 2021 to date of final payment;*

4 *Costs of suit as between attorney and client scale.*³

CAUSE OF ACTION AND FACTUAL MATRIX:

[4] The cause of action in the main action was based on the breach of a rental agreement entered into between *Kago Finance (Pty) Ltd* (reg: 2002/013147/07) ("Kago") and the First Defendant in terms whereof *Kago* rented to the First Defendant, who hired from *Kago*, for a period of 60 months the following:

• *1 X NEW TOSHIBA E-STUDIO 2010 AC COLOUR COPIER with serial number C[...].*⁴

GUARANTEE

¹ Case Lines 12.2.1

² Case Lines 22-1

³ Case Lines 12.2-23

⁴ Case Lines 02-28

- [4] The Second Defendant signed an unlimited written deed of guarantee⁵ in terms of which she bound herself as guarantor and co-principal debtor with the First Defendant, jointly and severally, in favour of *Kago* or its cessionary/ies, in the event of a cession of whatsoever nature or howsoever arising, for the due and proper fulfilment of all the obligations of the First Defendant arising from or out of the terms of the Master Rental Agreement between the First Defendant and *Kago* and all and any other indebtedness to *Kago*, whether actual or contingent present or future and howsoever arising.

CESSION KAGO AND SUNLYN

- [5] On or about *21 May 2014* and at Randburg, *Kago* and *Sunlyn (Pty) Ltd* (formerly known as: *Sunlyn Rentals (Pty)* (Registration Number: 1988/000147/07) ("*Sunlyn*"), concluded a written Main Cession Agreement (the Main "*Kago*" Cession Agreement) in terms whereof *Kago*, *inter alia*, ceded existing and future rental agreements to *Sunlyn*.⁶

- [5.1] Subsequent to the Master Rental Agreement being concluded *Kago's* right, title and interest to and in the Master Rental Agreement were ceded to *Sunlyn* as per the provisions of the Main "*Kago*" Cession Agreement.

CESSION SUNLYN AND SASFIN

- [6] On or about *29 March 2006* and at Waverley, *Sunlyn* and *Sasfin Bank Limited* (Registration Number: 1951/002280/06) ("the Plaintiff"), concluded a written Main Cession Agreement and an Addendum thereto (the Main Cession Agreement and addendum thereto - hereinafter collectively

⁵ Case Lines 02-31

⁶ Annexure SAS3 at 02-36

referred to as the Main "Sunlyn" Cession Agreement), in terms whereof *Sunlyn*, *inter alia*, ceded existing and future rental agreements to the Plaintiff. ("the Main "Sunlyn" Cession Agreement")⁷.

- [7] *Sunlyn* and the Plaintiff fulfilled all their respective obligations as per the Main "Sunlyn" Cession Agreement and subsequently *Sunlyn's* right, title and interest in the Master Rental Agreement were ceded to the Plaintiff as per the provisions of the Main "Sunlyn" Cession Agreement.
- [8] The Plaintiff acquired the right, title and interest in the Master Rental Agreement as cessionary.
- [9] The National Credit Act, Act 34 of 2005 ("NCA") was not applicable, as the agreement was not a lease as defined in section 1 of the NCA as read with section 8(4)(e) thereof. The First Defendant was furthermore a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, at the time the agreement was entered into, equalled or exceeded the threshold determined by the Minister in terms of section 7(1) of the NCA from time to time.
- [10] *Kago*, performed all of its obligations arising from the Master Rental Agreement, specifically *Kago* purchased the Toshiba copier at the special request of First Defendant and the copier was delivered and made available for the use of the First Defendant.
- [11] The First Defendant, however, breached the Master Rental Agreement by neglecting and/or failing to pay all rentals due in terms of the agreement.
- [12] Based upon the First Defendant's breach of contract the Plaintiff became entitled to claim payment of arrear rentals as well as rentals due for the balance of the rental period, amounting to *R181 308.93*.

⁷ Annexure SAS4 at 02-38

[13] The claim against the Second Defendant arose as a result of the written guarantee entered into.⁸

[14] The Defendants' indebtedness was proven, as agreed to between the parties, in clause 9 of the Terms of Business, by a Certificate of balance, electronically prepared (in terms of in terms of the Electronic Communications and Transactions Act 25 of 2002) by the Plaintiff's Litigation manager.⁹

RESCISSION APPLICATION:

[15] The Defendants' Rescission application is brought in terms of Rule 42(1) of the Uniform Rules of Court and the common law.

RULE 42

[16] Turning to Rule 42, rule 42(1)(a) it stipulates as follows:

- (1) *The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary –*
- (a) *an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby; (my emphasis)*

[17] When it comes to rescission under Rule 42(1)(a), a judgment is considered to be issued in error if, at the time it was made, there was a fact unknown to the court that would have prevented the judgment from being granted. If the court had been aware of this fact, it would not have granted the judgment.¹⁰

⁸ Case Lines 02-31

⁹ Annexure SAS5 at 02-43

¹⁰ Van Heerden v Bronkhorst 2020 JDR 2363 (SCA) at [10]; Lodhi 2 Properties Investments CC and Another v Bondev Developments (Pty) Ltd 2007 (6) SA 87 (SCA)

COMMON LAW

[18] Under common law, an Applicant seeking rescission of a Default Judgment must demonstrate "*good cause*". This requires the following:

"[t]he Courts generally expect an Applicant to show *good cause*

- (a) by giving a reasonable explanation of his default;
- (b) by showing that his application is made *bona fide*; and
- (c) by showing that he has a *bona fide* defence to the Plaintiff's claim which *prima facie* has some prospect of success."¹¹

DEFENDANTS' GROUNDS FOR RESCISSION

[19] The Defendants rescission grounds, as set out in their Founding Affidavit, were categorised and stipulated as follow:

[19.1] The Defendants never received notice of the summons;
(hereafter "*the service-defence*")¹²

[19.2] The Court lacks jurisdiction as the agreement (upon which the judgment was based)("the agreement") was concluded in Port Elizabeth;
(hereafter "*the jurisdiction-defence*");¹³

[19.3] The Second Defendant's understanding was that the agreement had been consensually cancelled;
(hereafter "*the cancellation-defence*")¹⁴

[19.4] The Defendants dispute that the Plaintiff had *locus standi* in the action and contend that the rights in the agreement allegedly

¹¹ Colyn v Tiger Foods Industries Ltd t/a Meadow Feeds Mills (Cape) 2003 (6) SA 1 (SCA) at [5] to [6]

¹² Paragraph 11 at 12.2-11

¹³ Paragraph 13 at 12.2-11

¹⁴ Paragraph 28.3 at 12.2-17

vested in the Plaintiff's subsidiary, South African Securitisation Programme (RF) Ltd;
 (hereafter "the disputed *cession-defence*")¹⁵

[19.5] In so far as the Second Defendant is concerned, she contends that she was misled into signing the written guarantee (in terms of which she was held liable jointly and severally with the First Defendant) as she was never told that she was agreeing to a personal guarantee.
 (hereafter "the *misrepresentation-defence*")

[20] At the outset I was informed that the Defendants aborted the cancellation and *locus standi* defences (as referenced in paragraphs [19.3] and [19.4] here in above)

[21] I will sequentially deal with and evaluate the grounds raised commencing with the service defence.

SERVICE DEFENCE:

[22] In considering whether there was proper service of the action the following became apparent:

[22.1] Both the Defendants had elected *domicilium citandi et executandi* addresses in the Master Rental Agreement and the Guarantee respectively.

[22.1.1] The First Defendant's chosen *domicilium* address as per the terms of business to the Master Agreement is as set out in note ii), being the

¹⁵ Paragraphs 36 and 37 at 12.2-18

installation address namely 1[...] J[...] Road, B[...] B[...], Port Elizabeth.¹⁶

[22.2.2] The Second Defendant, as guarantor, chose the address set out in the guarantee as per clause 11 as her *domicilium* address, namely 4[...] Y[...] Road, B[...] B[...], Port Elizabeth.¹⁷

[22.2] The summons was served upon the First Defendant at its chosen *domicilium* address on 12 November 2021. The Sheriff served the summons on a person, a Mrs. Mtamo, apparently not less than 16 years of age.¹⁸

[22.3] The summons was served on the Second Defendant at her *domicilium* address on 12 November 2021, with the Sheriff affixing the summons "[to] the principal door".¹⁹

[23] Both the Defendants however pleaded that the summons did not come to their attention as they never received same.

[24] The First Defendant specifically pleaded that it had ceased trading at its chosen *domicilium* address. The premises at 1[...] J[...] Road, B[...] B[...], Port Elizabeth, which is owned by the Second Defendant, were occupied by an Educational Tenant. The Second Defendant has no idea who Mrs. Mtamo is and can only assume it was an employee of the Tenant.

[25] The First Defendant had no knowledge (and was not notified by the Tenant) that a Summons had been served.

[26] In respect of service on the Second Defendant it is clear that her residential address is also her chosen *domicilium* address. The Sheriff indicated that he affixed copies of the documentation to the principal door as the premises were locked.

¹⁶ Case Lines 02-50

¹⁷ Case Lines 02-49

¹⁸ Case Lines 02-47

¹⁹ Case Lines 02-48

- [27] The Second Defendant however pleaded that it was impossible to gain access to the principal door of the residence as there is a surrounding wall, gate and security. It could therefore not have been left at the front gate, if at all. She similarly did not have knowledge of the summons.

CONSIDERATION OF SERVICE DEFENCE

- [28] In *Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of South Africa t/a The Land Bank* 2011 (3 SA 1 (CC) at para [57] the Constitutional Court explained the gravity of the right to a fair hearing by quoting *De Beer N.O. v North-Central Local Council and South-Central Local Council*:

‘This section 34 fair hearing right affirms the rule of law, which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court is a prerequisite to an order being made against anyone is fundamental to a just and credible legal order.’

- [29] The section 34 right necessarily includes being informed of court proceedings and being able to participate in them; otherwise, both the text and values it embodies would be rendered meaningless.
- [30] The most basic right of a Defendant is to be informed of the proceedings against him/her, to be apprised of the case, and to be afforded proper time to respond to the claim and be granted the opportunity to be heard.
- [31] In the matter of *First National Bank of SA Ltd v Schweizer Drankwinkel (Pty) Ltd* 1998 (4) SA 565 (NCD) at 568 C- D the court referred to service as one of the cornerstones of our legal system and that it is therefore required that a Defendant is entitled to be informed of the process against him/her.

- [32] In instances where default judgment is pursued, it is required that evidence be provided demonstrating that the Defendant has indeed selected that address as their *domicilium citandi*. In this matter the election of the Defendants' addresses as per the Master Rental Agreement's Terms of Business and the Guarantee remains undisputed and apparent. Service was effected at the said addresses.
- [33] Where an individual has designated a *domicilium citandi* address, service may be accomplished by delivering or leaving a copy of the relevant process or document at the chosen *domicilium*.²⁰
- [34] Service at the *domicilium* will be good even if it is apparent that the process could not have come to the Defendant's notice. The reason is that the *domicilium* so chosen is regarded as the place of residence within the meaning of the rule.²¹
- [35] In the matter of *Bowley Steels (Pty) Ltd v 10 Sterling Road (Pty) Ltd* the court, RS Willis AJ found that:
- "[13] ... Such service is then good, even if the process may not actually be received, because the purpose of requiring the choice of a domicilium is to relieve the party causing service of the process, from the burden of proving actual receipt, hence the decisions in which service at a *domicilium* has been held to be good, ..."
- [Emphasis added]
- [36] The party giving notice or serving a document need only prove compliance with the requirements of the chosen *domicilium* address.
- [37] On appeal, the Gauteng Division, Johannesburg in the matter of *Shepard v Emmerich (A5066/2013) [2014] ZAGPJHC 120* considered the validity of the service of a summons at a contractually chosen *domicilium citandi et executandi*.

²⁰ *Cohen v Lench* 2007 JOL 19995 (SCA); 2007 6 SA 132 (SCA) par 35:

²¹ *Muller v Mulbarton Gardens (Pty) Ltd* 1972 1 All SA 190 (W); 1972 1 SA 328 (W) 332; *Loryan (Pty) Ltd v Solarsh Tea and Coffee (Pty) Ltd* 1984 3 All SA 625 (W); 1984 3 SA 834 (W) 847; *Amcoal Collieries Ltd v Truter* 1990 1 All SA 248 (A)

- [37.1] The court held that the fact that the Respondent had moved from the *domicilium* address and the fact that Mr Janks had resigned were of no moment. Therefore, if service had been effected in accordance with the agreement, being marked for the attention of Mr Janks and served at the 2nd floor, proper service would have been effected even though the summons would not have come to the attention of the Respondent.
- [38] Where an agreement contains a chosen *domicilium* address, service at that address must accordingly be in accordance with the *domicilium* clause as stated in the agreement for proper service to be effected. If such clause is strictly complied with, proper service will have been effected even if the Defendant no longer resides at the *domicilium* address.
- [39] In *Amcoal Collieries Ltd v Truter* 1990 1 SA 1 (A) at 5I to 6C it was held:
- "...It is a well-established practice (which is recognised by Rule 4(1)(a) (iv) of the Uniform Rules of Court) that, if a defendant has chosen a *domicilium citandi*, service of process at such place will be good, even though it be a vacant piece of ground, or the defendant is known to be resident abroad, or has abandoned the property, or cannot be found." (Emphasis added)
- [40] In the matter before me service was effected on the chosen *domicilium* addresses as per the Master Rental Agreement and the Guarantee in terms of Rule 4(1)(a)(iv) the Uniform Rules of Court which stipulates:
- if the person to be served has chosen a *domicilium citandi*, by delivering a copy thereof to a person apparently not less than sixteen years of age at the*
- domicilium so chosen: Provided that if no person is present at the*
- domicilium,*
- the sheriff may leave a copy at the aforesaid *domicilium*;*

- [41] The Sheriff had served the summons in terms of the Uniform Rules of Court on a person *apparently not less than sixteen years of age at the domicile* in respect of the First Defendant and by affixing in terms of the Second Defendant when the latter was absent. In respect of the return in respect of the Second Defendant the Sheriff indicated that he affixed the documentation to the principal door as the premises were locked. There is no mention made that service was effected at the front gate or at security. The return is furthermore deemed *prima facie* proof of the service.
- [42] The Sheriff's service on the Defendants was proper, cannot be said to be defective and simply cannot lead to the conclusion the order was erroneously sought or erroneously granted.
- [43] Paragraphs at 578G to 579E in *Hardroad (Pty)Ltd v Oribi Motors (Pty) Ltd* 1977 (2) SA 576 (W) is highly relevant:-

"This Rule [Rule 42(1)(a)] does not specifically require "good cause" or "sufficient cause" (as in certain earlier Rules) to be shown, before a judgment can be rescinded or varied. Paragraph (a) requires, however, that the judgment must have been "erroneously sought" or "erroneously granted". Examples of that sort of error that will or will not avail an applicant are to be found in Ex parte Jooste 1968 (4) SA 437 (O); Custom Credit Corporation (Pty) Ltd v Bruwer 1969 (4) SA 564 (D); Shield Insurance Co Ltd v Van Wyk 1975 (4) SA 781 (NC). The only possible error that could be suggested in the present case is that the service of the provisional sentence summons upon the applicant was defective... ...Counsel for the applicant ultimately virtually conceded that there had been proper service of the summons in terms of the Rules. The order was therefore neither erroneously sought nor erroneously granted. He suggested no other grounds upon which the judgment had been erroneously sought or erroneously granted. The application therefore could. not be made in terms of Rule 42(1)(a)." (my emphasis)

- [44] The service provided in this instance is beyond reproach. Consequently, this aspect of the Defendants' argument for rescission is not sustainable and must be dismissed.

JURISDICTION DEFENCE

- [45] The second basis for a rescission is the court's alleged lack of jurisdiction.
- [46] The Defendants asserts that the agreements were concluded in *Gqeberha* (previously *Port Elizabeth*) and that the court lacked jurisdiction to entertain the Default Judgment application and to grant an order.
- [47] The Plaintiff disagreed and contended that the Master Rental Agreement amounted to an offer by the First Defendant, which was accepted in Randburg where *Kago* operated from. On that basis, the court had jurisdiction.
- [48] The foundation for the Plaintiff's contention is based upon the trite principal that the place where a contract is concluded is where the offer is received and acceptance dispatched.²² Acceptance takes place when the offeree (the person receiving the offer) communicates their unconditional assent to the terms of the offer, usually in writing and signs.
- [49] It is clear from the Master Rental Agreement that the First Defendant was the offeror as the agreement is framed as an offer.
- [49.1] It stipulates and is apparent that the First Defendant ask "us" - *Kago Finance (Pty) Ltd*, of 3 Highview Boulevard, Ferndale Ext 26, Randburg to hire to it the equipment listed in the schedule thereto and at the Installation address as per the Terms of Business at 1[...]*J*[...] Road, B[...]*B*[...], Port Elizabeth.²³

²² African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and others [2015] 3 All SA 10 (SCA)

²³ Case Lines 02-49

[50] The offer was signed by the Second Defendant, duly authorised by the First Defendant, at Port Elizabeth on *23 January 2019*. A certain Ms. Sonja van der Merwe, the new business manager of the Plaintiff had subsequently signed on *25 January 2019* in a block on the agreement marked "*FOR OFFICE USE ONLY*".²⁴

[51] It is common cause that:

[51.1] the delivery and installation of the equipment, the Toshiba printer, was effected in Port Elizabeth prior to, or concomitant with the Second Defendant's signature on *23 January 2019*;

[51.2] the equipment was tested prior to the Second Defendant signing the offer on *23 January 2019*.

[52] The Defendants' Founding Affidavit clarifies that the supplier of the relevant equipment, *Toshiba* (hereafter "the supplier"), not a party to the Master Rental Agreement, provided the agreement to the Second Defendant. Upon installation of the equipment, the supplier required the Second Defendant to sign the Schedule to the agreement, thereby confirming satisfactory installation and consenting that the cedent may proceed with payment for the goods "*[a]nd that we may pay for the purchase of the goods*".²⁵

[53] Prior to releasing any payment to Toshiba (the supplier) the First Defendant therefore had to confirm that:

"you state that you have received all of the goods as scheduled above and that it is exactly what you ordered and you have tested it and found it to be in good working order and that we may pay for and purchase the goods".²⁶

²⁴ Case Lines 02-49

²⁵ Case Lines 02-50

²⁶ Case Lines 02-50

- [54] The Second Defendant confirmed that the equipment was delivered, installed and tested prior to her signing the agreement framed as an offer on *23 January 2019*.²⁷
- [55] It is of crucial importance to note that Toshiba was not a party or a signatory to the said agreement.
- [56] The only party to the Master Rental Agreement who signed on *23 January 2019* was accordingly the Second Defendant on behalf of the First Defendant.
- [57] The Defendants drew my attention to clause 17 of the Terms of Business which states as follows:
- “17. You acknowledge and agree:
- 17.1 That you 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;
- 17.2 that all warranties implied by the Common Law are excluded and that no representations of any nature have been made by or on behalf of us; and
- 17.3 that once the Schedule to the Agreement is signed by you, all the risk in the goods pass to you.”
- [58] The Defendants argued that even the risks in the goods passed to the First Defendant upon the Second Defendant signing the Schedule to the Master Agreement of Hire.

²⁷ Paragraph 16 at 12.2-12

- [58.1] The passing of risk in respect of the copier in this agreement, is in terms of clause 17.3 of the Terms of Business, linked to the signing of the Schedule to the agreement and not to the conclusion of the agreement.
- [58.2] Clause 17.3 in the Terms of Business to the agreement between the parties specifically deals with the passing of the risk in respect of the copier. Parties can therefore stipulate when the passing of risk in respect of goods can occur as in the case before me.
- [58.3] Additionally, the commencement date of the agreement was agreed upon as the date of last signature of the agreement, namely that of the Plaintiff on *25 January 2019*. The date of the passing of the risk in respect of the copier was accordingly not the same date as when the Second Defendant signed the Schedule to the Agreement.
- [59] Accordingly, it was argued that the delivery, installation, testing and signature by the Second Defendant all took place in Port Elizabeth and that even the risk passed to the First Defendant upon signature of the Schedule by the Second Defendant. The Defendants accordingly argued that:
- [59.1] the entire agreement was concluded on *23 January 2019*;
- [59.2] by *25 January 2019* the agreement was already concluded and the Plaintiff had nothing to accept;
- [59.3] the annotation on the signature of the Plaintiff is in block titled "*OFFICE USE ONLY*" and therefore of no significance and
- [59.4] the agreement does not make provision for acceptance.
- [60] The aforesaid argument does not hold muster and cannot be accepted considering the following:
- [60.1] the agreement is framed as an offer calling for acceptance.

- [60.2] the Plaintiff was not present at the Installation address in *Port Elizabeth* on *23 January 2025* only Toshiba – the supplier – which was not a contracting party;
- [60.3] even if the Schedule was signed and the risk of the equipment passed to the First Defendant, the signature merely represented an offer. The First Defendant's offer is a firm, clear promise to contract on specific terms which had to be accepted by the Plaintiff. In the absence of acceptance there was no valid and binding agreement between the parties;
- [60.4] the agreement made provision for a commencement date – the date of last signature thereof;²⁸ This date was the Plaintiff's signature on *25 January 2019*.
- [60.5] The first rental was due on the *commencement date* (date of last signature of the agreement);
- [60.6] the Plaintiff's signature was required to establish the commencement date of the agreement, which was only appended on *25 January 2019*.
- [60.7] the Plaintiff, who was absent at Port Elizabeth on *23 January 2019*, did not communicate acceptance on *23 January 2019*.
- [60.8] the Defendants did not plead how, where and by whom the Plaintiff accepted the offer on *23 January 2019*. Acceptance is an unconditional, communicated agreement to the terms of the offer. An offer and the acceptance thereof constitute the core mechanism for forming a legally binding contract, establishing mutual assent (*consensus ad idem*) between parties.

²⁸ Case Lines 02-50 under initial rental period;

- [60.9] the Plaintiff's signature and the date of signature at Randburg on *25 January 2019* cannot be of no consequence and insignificant as each page of the Master Rental Agreement, Schedule, Terms of Business and Guarantee was also initialled by Ms Sonja van der Merwe on the Plaintiff's behalf as Business manager. The only plausible reason for her signature and initials on each page must simply be that the offer had to be accepted for a valid and binding agreement to come into play.
- [60.10] the Plaintiff's written signing and initialling of each page of the agreement is clearly indicative of a written acceptance of the offer to establish a valid and binding agreement.
- [60.11] the initial rental period was stated in the Schedule as 60 days from the first common due date after the date of last signature hereto ("*the Commencement Date*"). This is contrary to the Defendants' contention that the signature was merely for office purposes and that the signature was insignificant. The first rental payment was also due on the commencement date of the agreement which is the date of last signature.²⁹
- [60.12] the Master Rental Agreement was of no force and effect unless in writing and signed by both the Plaintiff and First Defendant in terms of clause 15 of the Terms of Business. The commencement date was triggered by both parties' signatures.
- [61] I am of the firm opinion that the signature on behalf of the cedent (*Kago Finance (Pty) Ltd*) at Randburg on *25 January 2019* can only been seen as acceptance of the offer. The Defendants furthermore remain silent (does

²⁹ Clause 14 at 02-50

not plead) as to where, when and by whom acceptance took place on *23 January 2019*.

- [62] A contract is made at the place at which the signature to the last party is affixed.³⁰ The signature on the cedent's behalf on *25 January 2019* turned the offer into a binding contract.³¹
- [63] An offer made without acceptance does not create a binding contract,³² as legal obligation requires both parties to agree (consensus). An offer remains just a proposal until accepted unconditionally. Without acceptance, the offer may lapse due to rejection, counter-offer, or expiration of time.
- [64] The Defendants did not plead where, how and by whom acceptance took place on *23 January 2019*.
- [65] I accordingly find that the signature of the Plaintiff was required in terms of the agreement to come into full force and effect³³ and that same took place as per the written agreement on *25 January 2019* at *Randburg*. The court accordingly had jurisdiction to deal with the matter and the jurisdiction defence can therefore not succeed.

MISREPRESENTATION - DEFENCE

- [66] I now address the final defence relating to misrepresentation.
- [67] The Second Defendant asserts that she was induced to sign the written guarantee -pursuant to which she is held jointly and severally liable with the First Defendant -on the basis of a misrepresentation. Specifically, she claims that she was not informed that she was executing a personal guarantee (hereafter "*the misrepresentation defence*").

³⁰ Kergeulen Sealing & Whaling Co Ltd v Commissioner for Inland Revenue 1939 AD 487 at 503 to 504

³¹ Driftwood Properties (Pty) Ltd v McLean 1971 (3) SA 591 (A) at 598A.

³² African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and others [2015] 3 All SA 10 (SCA)

³³ Clause 15 of both the terms of business and guarantee at 02-50 and 02-49

- [68] According to the Second Defendant she signed the guarantee undertaking, without reading it, and claims that the supplier did not inform her that she was required to agree to be personally liable.³⁴
- [69] The Second Defendant asserts that the only place her handwriting appears on the Master Agreement of Hire and/or the Guarantee, is where she had signed.
- [70] She states that all of the handwriting on the Master Agreement of Hire, is either that of :
- [70.1] Ms. Nadia du Plessis, who was the Account Manager of the First Defendant at the time; and/or
 - [70.2] the Representative of Toshiba, who was present ; and/or
 - [70.3] Ms. Sonja Van Der Merwe, whose signature appears in the block under the heading "*FOR OFFICE USE*".
- [71] Similarly, the handwriting on the Guarantee and the Schedule to the Master Agreement of Sale is not her handwriting. It is only her signature, but nothing further appears on the documentation.
- [72] Toshiba's representative had handed the Second Defendant, she asserts, a fully completed agreement. Ms Nadia du Plessis had inserted the handwriting relating to the Defendants. All she knew was that she was renting a copier.
- [73] The Second Defendant confirms her signature on the guarantee. She stated that she was misled into signing the document on the basis that my signature was perfunctory on an Agreement with *KAGO Finance (Pty) Ltd* (of whom she had no knowledge) for the rental of the equipment.

³⁴ Paragraphs 43 and 44 at 12.2-20

[74] The word “**GUARANTEE**” appears in bold and in larger font at the top of the page. The page contains a number of clauses, in a relatively small font, although by no means illegible.

[75] Below the word **GUARANTEE** in a separate block is the following recommendation printed and easy to read:

“It is recommended that the Guarantor/s obtain independent legal advice to ensure that they understand their commitment in terms hereof and the potential consequence of their decision to bind themselves as Guarantor/s and co-principal debtor/s.” (my emphasis)

[76] Clause 1 of the guarantee then reads as follows:

“1. I/ We the Guarantor/s listed below, do hereby bind myself/ourselves jointly and severally as co-principal debtor and for the primary continuing obligation and punctual payment by User, as defined overleaf, to Hirer, as defined overleaf or its cessionary/ies of all amounts due and owing arising out of or from the Master Agreement of Hire and the schedule/s thereto and all and any other indebtedness t Hirer, whether actual or contingent, present or future and howsoever arising (the “Guaranteed Obligations”);”

[77] It is important to note that the Second Defendant signed in a block below the various clauses, which is distinctly headed: “*Signature of Guarantor*”.

[78] The Second Defendant argued that she had no intention to be bound and that no guarantee was accordingly entered into. However, contractual liability can arise even without genuine agreement or consensus, through the doctrine of *quasi mutual* assent. This means that, even if both parties did not truly agree, contractual liability may still occur. The error which occurred was unilateral. As held in *National and Overseas Distributors*

Corporation (Pty) Ltd v Potato Board 1958(2) SA 473 (A) at 479G-H, this type of mistake is one-sided.

“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.”

- [79] The validity of the guarantee remains unaffected by any misrepresentation made by a third party (the supplier) who is not a party to the contract, even if the supplier's silence is deemed to constitute a misrepresentation.³⁵ In such cases, the remedy lies against the third party directly.
- [80] Where a fraud which allegedly induces a contract does not proceed from one of the parties, but from an independent third person (such as the representative), it will have no effect on the contract.
- [81] Further, a contracting party is generally not bound to inform the other party of the terms of the proposed agreement.³⁶ He must do so, however, where there are terms that could not reasonably have been expected in the contract.³⁷
- [82] The guarantee in the current matter was not hidden. It was separate page under a bold and capitalised heading "**GUARANTEE**". Moreover, it required the Second Defendant's signature immediately next to her residential address and identity number. A cursory glance would have alerted the Second Defendant about the nature of the document she was agreeing to.

³⁵ Slip Knot Investments 777 (Pty) Ltd v Du Toit 2011(4) SA 72 (SCA)

³⁶ Constantia Insurance Co Ltd v Compusource (Pty) Ltd 2005 (4) SA 345 (SCA) para 19.

³⁷ Afrox Healthcare Bpk v Strydom 2002 (6) SA 21 (SCA) ([2002] 4 All SA 125) para 36; and cf Fourie v Hansen and Another [2001] 1 All SA 510 (W) at 516.

[83] The Second Defendant's mistake was accordingly unilateral one. On her version (the supplier's representative presented the agreement and the guarantee for signature without saying anything, and the Second Defendant's staff member Ms. Nadia Du Plessis had already filled in sections of the agreement when the Second Defendant had signed ("the circumstances") she does not establish that her mistake constituted an *iustus error*.

[84] The decisive question is whether a reasonable person would have been misled (considering the form and format of the guarantee, and the alleged circumstances leading to it being signed).

*"(Did) 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 misrepresentation; and thirdly, was the other party misled thereby? ..."*³⁸

[85] Considering the form and format of the guarantee, and the circumstances, a reasonable person would not have been misled. The Second Defendant is furthermore a business lady and should have realized the importance of the heading in bold **GUARANTEE**.

[86] The *misrepresentation*-defence consequently also fails to establish a *bona fide* defence to the Plaintiff's claim which *prima facie* has some prospect of success.

CONCLUSION:

³⁸ Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) - Pappadogianis 1992 (3) SA 234 (A) at 2391-240B.

- [87] Having considered all the Defendant's defences – the service, the jurisdiction and misrepresentation defences - it is clear that there is no merit in these.
- [88] There is neither a defence on the merits that has reasonable prospects of success, nor has the existence of an error as contemplated in Uniform Rule 42(1) been established. A rescission can accordingly not be granted in terms of rule 42(1)(a) or based upon the common law.
- [89] In respect of costs, costs will follow the cause and be granted on an attorney and own client scale as per clause 16 of the Terms of Business³⁹ and clause 10 of the Guarantee.⁴⁰
- [90] I accordingly make the following order:

Order

- [1] The Rescission application is dismissed;
- [2] The Defendants are directed to pay the costs of the application, jointly and severally the one paying the other to be absolved, on an attorney and own client scale.

S VAN ASWEGEN
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

³⁹ Case Lines 02-50

⁴⁰ Case Lines 02-49

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