

SOUTH AFRICA / JUDGMENT

## Absa Technology Finance Solutions Limited v Rocbit Drilling Equipment (Pty) Ltd and Others (13062/16) [2017] ZAGPJHC 269 (19 September 2017) [2017] ZAGPJHC 269

COURT

South Gauteng High Court, Johannesburg

BEFORE

Fisher

CASE / FILE NUMBER

13062/16

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### Source record

REPUBLIC OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA,

GAUTENG LOCAL DIVISION,

JOHANNESBURG

CASE

NO: 13062/16

Not

reportable

Not

of interest to other judges

Revised.

19/9/2017

ABSA TECHNOLOGY FINANCE SOLUTIONS

LIMITED Plaintiff

and

ROCBIT DRILLING

EQUIPMENT (PTY) LTD First

Defendant

BEATRICE

JEANETTE DU

TOIT Second

Defendant

JEAN CLAUDE  
BERNARD  
CABANAC Third  
Defendant  
In

the matter between:

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## JUDGMENT

FISHER J

[1] The plaintiff, which I shall call ABSA, sues the first defendant, which I shall call Rockbit on a contract being a rental agreement

concluded on 16 February 2016 in respect of a photocopy machine. The second and third defendants, Ms Du Toit and Mr Cabanac, are sued on the basis that they are sureties for the principal indebtedness of Rockbit under the rental agreement. The suretyships appear as part of the rental agreement.

[2] The rental agreement relied on, was concluded between Rockbit and Itec Finance (pty) Ltd. ABSA relies on a cession of the rights under the rental agreement from Itec Finance to ABSA in terms of a written master cession agreement.

The pleadings

[3] ABSA alleges that Rockbit is in breach of the agreement in that it has failed to make payment of due rentals and that, in terms of the rental agreement, it (ABSA) was entitled to claim immediate payment of all amounts due in terms of the agreement which it contends amount to R160 128.43 plus interest and costs. It initially claimed return of the copy machine but this claim was withdrawn during the hearing.

[4] The defendants put the plaintiff to the proof of the cession and plead further that Rockbit did not receive delivery of the machine

under the rental agreement; that this amounts to a repudiation which has been accepted; and that Rockbit has terminated the rental

agreement in consequence of this non -delivery.

[5] The defendants admit that the rental agreement was concluded for the machine. Ms Du toit and Mr Cabanac plead, however, that, by appending their signatures to the rental agreement, they did not intend to become bound as sureties and that they were misled as to the suretyship provisions which they plead were hidden within the document and not brought to their attention.

The evidence

[6] ABSA called two witnesses: Ms Sonja Dunne, the head of legal services at the Itec Group and Ms Veronica McNaughton a business development

officer at ABSA.

[7] Ms Dunne identified the signature of the master cession agreement on behalf of Itec Finance by Mr Duyver. She said she knew his signature well as she had worked with documents signed by him for some years. Ms Dunne testified that she could confirm that payment had been made in respect of the transaction in issue by ABSA to Itec Finance. She made reference in this regard to an invoice raised in respect of the transaction by Itec Finance to ABSA. Such invoice is dated 29 February 2012 and makes specific reference to the machine by means of its serial number which number correlates with the rental agreement. It seeks payment of R160 558.19. She then made reference to a document which is, on the face of it, an audit trail bank transfer document. She confirmed that this showed the electronic payment of the amount of R157 578.23 by ABSA in respect of the transaction. She was not cross examined on these aspects and her evidence stands.

[8] She further testified that the supplier of the machine was Itec South (pty) Ltd and this too was not challenged.

[9] Ms McNaughton testified that she had worked as a business development manager of ABSA since May 1998. She recognized and was well able to testify to the signature on the master rental agreement on behalf of ABSA as being that of the managing director of ABSA at the time, Corali Rademan. She confirmed that indeed payment had taken place in respect of the transaction between Itec Finance and ABSA in relation to the cession of the rights in the rental agreement to ABSA. She explained the discrepancy in the document evidencing proof of payment (ie the audit trail document testified to by Mr Dunne) and the invoice by stating that the first rental was deducted from the payments a rule. She handed up the original rental agreement which she said had been duly delivered into the possession of ABSA in the course of the transaction. She testified that she is responsible for following up on the payment on the transactions between ABSA and Itec Finance and was categorical that ABSA would only have made the payment if it was satisfied that the delivery of the machine under the ceded transaction had taken place. She also confirmed that Itec South was the supplier in the transaction.

[10] No challenge was made to the evidence led in relation to the conclusion of the master cession agreement and I am satisfied that it has been proved.

[11] In terms of the master cession agreement:

11.1. Itec Finance is entitled to offer written rental agreements for equipment to ABSA for cession from time to time;

11.2. ABSA would deal directly with Itec Finance and not with suppliers or any other person in concluding the transaction;

11.3. Itec Finance would deliver the rental agreement to ABSA when making the offer to cede as well as documents evidencing ownership and suretyships and other securities;

11.4. Acceptance of an offer to cede would take place on payment by ABSA to Itec Finance;

11.5. ABSA would conclude checks in respect of the equipment and the user thereof.

[12] All indications are to the effect that the cession transaction in issue between ABSA and Itec Finance was duly and properly concluded.

[13] ABSA relied on the clause in the rental agreement which allowed for proof of indebtedness by way of a certificate of manager of the hirer as to the indebtedness of Rocbit under the agreement and in respect of any other fact which would be proof of such indebtedness or other fact on the face of it. The certificate was prepared by a manager of ABSA and was duly handed in.

[14] The Defendants closed their respective cases without leading any evidence.

The Defendants cases

[15] In defence the defendants contented themselves with raising the following points:

15.1. That ABSA had not established delivery under the rental agreement;

15.2. That ABSA had not established its quantum as to the principle debt by means of the certificate in that the certificate clause provided for the certificate to be made by a manager of Itec Finance and not ABSA;

15.3. That ABSA had not proved its quantum as against the sureties, in that the certificate clause did not provide for the use of the certificate to prove the indebtedness of the sureties.

[16] In light of these contentions the defendants seek absolution from the instance. I shall deal with each of these points in turn.

Delivery

[17] It is not in dispute that the copy machine forming the subject of the rental agreement was delivered to Rocbit. The point of departure made by the defendants is that the machine was delivered under a different agreement and by a different party, being Itec South. It has not been challenged that Itec South is the supplier of the machine.

[18] The rental agreement confirms, under the hand of Mrs Du Toit that the machine was received in good order on 16 February 2012.

[19] There is however a delivery note under which delivery of the machine in issue appears to have taken place on 23 February 2012 by the supplier.

- [20] ABSA's witnesses were questioned in relation to a delivery note in respect of the machine which was discovered by the defendants. This note is admitted only on the usual basis - i.e. that it is what it purports to be. The delivery note bears the name of Itec South. Indeed it would not be an unusual course of events for a supplier to deliver the goods directly to the hirer.
- [21] The defendants however seek to gain some traction in their cases by reference to this delivery note. The delivery note is at odds with the certification on behalf of Rocbit in the agreement to the effect that the machine was delivered on 16 February 2012. The defendants seek that the court take this anomalous delivery note into account notwithstanding that no evidence has been led or adduced to establish the truth of its contents. Defendant seeks that the court go still further in relation to this note and that it have reference to terms and conditions on the back of the note – which suggest that the delivery of the machine is accepted by Rocbit on terms prescribed by the supplier including a reservation of ownership to the supplier.
- [22] Whilst the introduction of the delivery note may create a small ripple on the surface of the probabilities as to why and by whom the machine was delivered, it does not serve to displace them in light of the status of the evidence as to delivery. It is established on the case of ABSA that:

22.1. The machine being the subject matter of the rental agreement was delivered to Rocbit after the signature of the rental agreement;

22.2. It was delivered by a company which has been established to be the supplier of the machine under the rental agreement;

22.3. It was confirmed on the face of the signed rental agreement that delivery of the machine had occurred under the rental agreement, albeit on 16 February 2012.

- [23] In all the circumstances, ABSA has established that delivery took place of the machine by the supplier under the agreement. The anomaly of the date and time of the delivery and the terms that appear on the reverse side of the delivery note do not serve to displace the evidence of delivery or the probabilities being to the effect that delivery took place pursuant to the rental agreement.

This is especially so in that the defendants adduced no evidence.

- [24] In the circumstances I find that the plaintiff, ABSA has established delivery under the rental agreement.

Proof of quantum by means of the certificate – principle debt.

- [25] The certificate produced by ABSA to prove the amount owing under the rental agreement is, on the face of it, drawn by a manager of ABSA. The defendants make the point that the rental agreement - being between Rocbit and Itec Finance - prescribes that the certificate must be under the hand of Itec Finance. The contention is that the rental agreement

prescribes which entity may provide the certification and that this does not change with the cession – i.e. the certification must still be effected by Itec Finance and that a certificate of ABSA does not suffice for the purposes of proof.

- [26] ABSA counters by raising clause 9 of the rental agreement which affords Itec Finance the right freely to cede the rights under the agreement and which states the following in relation to what will occur on cession:

*“Any reference in this agreement to Hirer shall, unless the context indicates otherwise, be construed as referring to the cessionary. User hereby undertakes to accept the cession and to acknowledge the rights of the cessionary in terms of this clause and to hold the goods on behalf of the cessionary, subject to the conditions of this agreement”.*

- [27] On the face of it this term is clear: ABSA on cession will step into the shoes of Itec Finance unless the context suggests otherwise.
- [28] The certificate clause in no way fits into a context which suggests otherwise. The rental agreement allows the cessionary to sue in its own name as cessionary of the rights. It would be counter- intuitive to interpret this clause as limiting the rights under the rental agreement which facilitate pursuit of the rights by the cessionary. In any event, the clear language of the rental agreement is such that it leaves no room for any ambiguity in this regard.
- [29] I thus find that proof of the principle indebtedness by means of the certificate under the hand of ABSA was in accordance with the rental agreement.

Proof of quantum by way of the certificate - sureties

- [30] The sureties raise a different point in relation to the use of the certificate to prove their accessory indebtedness. They contend that they, as sureties, did not agree to be subject to this method of proof and that proof of the principle indebtedness does not serve as proof of the liability of the sureties. The defendants counsel relied on the case of Thrupp Investment Holdings (Pty) Ltd v Goldrick [2007] ZAGPHC 23; 2008 (2) SA 253 (W) Where it was held that the certificate clause which appeared in the main lease agreement did not allow for the proof of the suretyship

liability by way of the certificate as the sureties had not consented in the deed of surety ship to such a method of proof against them.

- [31] The ABSA's counsel however contends that the facts in this matter are distinguishable from those in Thrupp in that here the sureties specifically bound themselves to any cessionary of the rights under the rental agreement and made it clear in clause 16 thereof that clause 12 - which is the clause allowing proof by certificate - would apply to the guarantee/surety ship as well. I agree with counsel for ABSA: this clause on a clear reading shows that the certificate facility was specifically and expressly agreed to by the sureties – which was not the case in Thrupp.

## Conclusion

[32] The plaintiff has thus established the conclusion of the rental agreement; that it took cession of the rights under the rental

agreement; that performance was made in terms thereof; that there was a failure to pay amounts due in terms thereof by Rochbit; and the fact that the plaintiff is entitled to payment as claimed. The defendants have not established their case as pleaded and have not succeeded on the points raised against the plaintiff's case.

[33] As to costs, despite the quantum, this was a case which had technicalities which made it appropriate for this court to deal

with it. Neither party sought costs on the Magistrates Court scale.

I thus grant the following order:

The First and Second and Third defendants, are jointly and severally the one paying the other to be absolved for;

1. Payment of the amount of R160, 128.43.
2. Interest on the aforesaid amount at the rate of prime plus 6% per annum, from date of service of summons to date of final payment (prime is currently at 9.75%).
3. Costs of suit.

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D FISHER

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of Hearing: 25 August 2017

## Judgment

Delivered: 19 September 2017

APPEARANCES:

For the Applicant: Adv Cohen Instructed by Jay Mothobi Incorporated.

For the Respondent: Adv Durandt Instructed by Jan Bezuidenhout Attorneys.

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