

SOUTH AFRICA / JUDGMENT

Centrafin (Pty) Ltd v Mazibuko (14202/2020; 24795/2018) [2022] ZAGPPHC 261 (22 April 2022) [2022] ZAGPPHC 261

COURT

North Gauteng High Court, Pretoria

BEFORE

N Davis

CASE / FILE NUMBER

14202/2020; 24795/2018

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HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 14202/2020 & 24795/2018

REPORTABLE: NO.

OF INTEREST TO OTHER JUDGES: NO

REVISED.

DATE: 22 APRIL 2022

In the matter between:

CENTRAFIN (PTY) LTD

Plaintiff

and

MAVELA AUBREY MAZIBUKO t/a Dr MA MAZIBUKO

Defendant

Summary: Commercial law – rental agreement – proof of claim for balance of rentals – return/ repossession of equipment – payment ordered.

Defamation – implied meaning of accusation of being a defaulting debtor – publication – absence of intent to defame or impair reputation – claim dismissed.

ORDER

1. The defendant in the matter initially launched in the Gauteng Local Division of this court under case no 10974/2018, Dr M.A Mazibuko, is ordered to pay Centrafin (Pty) Ltd the amount of R 114 406. 80 together with interest thereon at the rate of 10,5% p.a from 16 August 2019 to date of payment.
2. The claims by Dr M.A Mazibuko in the matter initially launched under case no 24795/2018 in this court against the defendants cited therein, are dismissed.
3. Dr M.A Mazibuko is ordered to pay the costs of the other parties in the above-mentioned matters including the consolidated matter, such costs in respect of the matter mentioned in paragraph 1 above, to be on the scale as between attorney and client.

J U D G M E N T

This matter has been heard in open court and otherwise disposed of in the terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1]

Introduction

Centrafin (Pty) Ltd (Centrafin) instituted action in this court's then Gauteng Local Division, Johannesburg in case no 10974/18, claiming the balance of rentals of a certain PABX telephone system and ancillary equipment rented out to the medical practice of a certain Dr Mazibuko, after an alleged breach of a Master Rental Agreement. Dr Mazibuko, in turn, instituted action in this Division under case number 24795/2018 against Centrafin and an employee thereof, claiming damages pursuant to alleged defamation which took place when an attempt was made to repossess the telephone system. Centrafin's case in the Johannesburg court was transferred to this Division under case no 14202/2020 and the two matters were consolidated under that case number upon the transfer by way of an order of Wright J, made by agreement on 28 January 2021.

[2] Consolidated hearing

The consolidated hearing commenced with Dr Mazibuko's case and was followed by that of Centrafin. Dr Mazibuko testified as well as an employee of his and an employee of Centrafin whereafter he closed his case. For Centrafin a Mr Wedu testified whereafter the second defendant in the defamation case, a Mr Khomola testified in respect of Centrafin's defence, his own defence and in respect of Centrafin's case. The trial concluded with oral argument on behalf of the parties followed by written heads

of argument delivered at an agreed later date, at the instance of counsel. The evidence in the consolidated trial shall be dealt with in the order it was presented.

[3] Dr Mazibuko's evidence

3.1 Dr Mazibuko explained that he had two medical practices, one in Germiston and one in Mbombela, which he referred to as Nelspruit. In order to run these practices effectively, he needed stable and fast telephone connectivity as well as internet connectivity. He also wanted to have cameras installed at the practices and needed sufficient available data. At both these practices he experienced problems in this regard, with the Nelspruit practice experiencing more internet problems. With the Germiston practice the problems were more telephone related.

3.2 At some point in 2017 someone from Advanced Telecon telephoned Dr Mazibuko and introduced the LTE concept to him as a solution to his problems. After some meetings and discussions, a rental agreement for a whole new telephone system and cameras was proposed. After some consideration, Dr Mazibuko opted to rather purchase the equipment and after installation thereof, he was presented with an invoice for R65 000, 00, which he paid.

3.3 Shortly hereafter, Dr Mazibuko was approached by a short gentleman with dreadlocks at his Germiston practice. Dr Mazibuko testified that he was, at that time, in discussions with one Lauden in connection with some hiccups with the installation at the Nelspruit practice and he assumed that the gentleman who came to visit him at his Germiston practice, was sent by this Lauden person. A presentation was made to him regarding a new telephone system for the Germiston practice whereafter 2 "guys" (one white, one black) did the installation. Dr Mazibuko was busy in his surgery at the time and did not pay them much attention. Afterwards, the gentleman with the dreadlocks came to the surgery and handed Dr Mazibuko a mobile or hand-held telephone. It was intended that a PABX system be installed in the practice's reception area and that hand-held units are to be used by Dr Mazibuko and his staff. According to him, the PABX system was never installed. He also asked about the cameras, to which the gentleman replied that the telephones were the first stage and that "they" will return at some later time to install the cameras. He required Dr Mazibuko to sign some documents and Dr Mazibuko testified that he had assumed that "the same will happen as in Nelspruit" and he "just signed".

3.4 Having regard to the actual documents discovered by the parties and the cross-examination in respect thereof, what Dr Mazibuko had actually signed, were the following:

- A Centrafin Master Rental Agreement.
- A declaration contained in the Master Rental Agreement reading: "for User who acknowledges that the terms and conditions of this Master Rental Agreement have been accepted and that the Hirer may send statements and invoices electronically to User. Furthermore User represents and warrants that the turnover or net asset value of the User exceeds the sum of R2 million (two million Rand) as defined and calculated in terms of the government gazette 34181 of 1 April 2011".

- A separate section in the agreement under the heading “debit order details” which reads “I/we request the Hirer or its Cessionary/ies to draw against my/our bank account, wherever it may be, the amounts due in terms of this agreement”. Next to Dr Mazibuko’s signature his bank account details were reflected.
- A separate section, with Dr Mazibuko’s details completed in manuscript under the heading “Guarantee” which reads: “We urge you to read all the terms of this Guarantee. You acknowledge that you have been given enough time to read the terms of this Guarantee. If you do not understand any term/s of this Guarantee we propose you get independent advice, before you sign as guarantor/s. If you sign this Guarantee, it will be deemed that you have read the terms and conditions and you will be bound by the terms thereof. You acknowledge having received a copy of the aforewritten agreement and the schedules hereto and confirm you are aware of the terms thereof”.
- A Centrafin Transaction Schedule to the Master Rental Agreement. It contains Dr Mazibuko’s signature above the inscription “User’s signature who confirms that the rental details were fully completed prior to signature and any handwritten identifying insertions are authorised”. The equipment were identified in this schedule as being 1 NEC 12 Key Digital Switchboard phone, 1 NEC 12 Key Digital Executive phone, 1 NEC QT Euro ChI cordless phone, 1 NEC Basic SLT desk phone, 1 power cord, 1 power surge plug, 1 KPID lightning protection. This was all done in manuscript. Printed was “1 NEC SL 1000 PABX” with the words “Main Unit” and the serial number “A 10233S6Z 01150” inserted in manuscript thereafter. The installation address had also been inserted, being that of Dr Mazibuko’s Germiston practice.
- The Transaction Schedule also contained a further separate signature block below the equipment description, also signed by Dr Mazibuko.
- A Centrafin insurance letter. The relevant portions thereof read as follows: “Please note that in terms of clause 5.1.1. of your rental agreement, you are obliged to comprehensively insure the goods subject to this agreement. Centrafin can insure the goods for replacement value ... should you elect to use this insurance, kindly sign below where indicated as acceptance. Please provide details of the bank account to be debited for monthly premium ...” Dr Mazibuko’s bank details had been included in manuscript whereafter he had signed the letter under the following words: “I/we confirm acceptance of the above Centrafin/PSG Wealth Financial Planning (Pty) Ltd quote and agree to a monthly debit order on the above account”.
- A Centrafin Release Note addressed to Dr Mazibuko containing the following: “Dear Sir, Centrafin (Pty) Ltd acts on your instruction to pay the supplier of your choice and commence the rental agreement. Therefore if you are satisfied with the installation of the goods you have chosen, please sign the Release Note below”. The equipment are then again listed, with the descriptions and delivery address according with those contained in the Transaction

Schedule. Dr Mazibuko then signed under the words: “User Warrants that all documents pertaining to the Rental Agreement were fully completed when signed and this document was only signed upon completion of installation and commissioning of the Goods”.

3.5 In total, Dr Mazibuko appended his signature nine times on the various documents. In all instances, save for the insurance letter, a witness also countersigned.

3.6 Dr Mazibuko testified that all these documents had been signed after the installation had taken place. In respect of the Release Note in particular, he testified that he was “under the impression” that “the same will happen as in Nelspruit”. He conceded however, both in examination in chief and in cross-examination, that he had in fact signed a rental agreement.

3.7 After this, the first debit order was debited against Dr Mazibuko’s designated bank account. This was in July 2017. The second debit order payment due in August 2017 was reversed by Dr Mazibuko. As a result, Dr Mazibuko received phone calls and emails demanding payment of the arrears and monthly installments, all of which had been halted by Dr Mazibuko.

3.8 He was also visited by two gentlemen who wanted to remove the equipment. Dr Mazibuko refused, stating he had purchased equipment and was waiting for further installation. He then received further correspondence from Centrafin, demanding payment and then decided to purchase the phones by making Centrafin an offer.

3.9 Dr Mazibuko testified that he had received a final demand from Centrafin dated 30 October 2017. It contained references to various clauses in the Master Rental Agreement. The letter concluded as follows: “As your account has not been paid, please accept this letter as our intention to transfer the account to our legal department to pursue the full settlement by way of summons unless we receive payment for the full outstanding by Friday the 17th of November 2017, we shall immediately thereafter commence with the following actions:

- The Guarantor, Mavela Aubrey Mazibuko will be blacklisted at the various credit bureaus.
- The equipment will be uplifted from your premises.
- The guarantor will also be pursued for the full settlement of the agreement by way of summons”.

3.10 Dr Mazibuko testified that he was “confused” by this letter as he had wanted to purchase the equipment and pay for the services.

3.11 Dr Mazibuko was again contacted by Centrafin, by one Lungelo Mchunu but Dr Mazibuko viewed him as being “very entry level” and nothing was resolved.

3.12 On 9 January 2018, after a visit which he could not clearly remember, Dr Mazibuko received an email from Doctor (first name, not a title) Khomola. This email reads as follows:

“Dear Dr Mazibuko

It was a great pleasure meeting you today and thank you for accommodating me in your busy schedule.

As discussed in our meeting, we agreed that all adverse listing on both ITC and XDS credit bureaus be removed with immediate effect. Furthermore, you requested that I furnish you with the settlement figure payable in order to absolve you of all contractual obligations against Centrafin.

I attached confirmation of de-listing from ITC effective immediately, please allow XDS at least 24hrs for updates to take effect. I will be in a position to send confirmation once done tomorrow morning.

Please note that as this is 60 months contract, with a monthly rental of R1 484.63 including vat and insurance, expiring in June 2022 and with a 15% annual escalation in July. The total settlement payable in order to cancel the agreement is R 114 147.00.

I escalated this matter to management and they have agreed to reduce the settlement payable on this agreement to a once off special settlement offer of R60 000.00 in order to discharge you of the contractual obligations. The settlement amount is valid for 7 working days thus request confirmation as to how you intend settling same. Please note that on expiry of the settlement, the amount will revert back to the original rental x period settlement as per clause 8.3 of the terms and conditions of the master rental agreement.

Kindly assist and arrange for an amount of R60 000.00 as full and final settlement, to be effected to our account indicated below.

Thank you once again for your co-operation and assistance in resolving this matter

Kind regards

Doctor Khomola”.

3.13 Dr Mazibuko testified that he was still confused by this email. The amount of R114 147.00 was seen by him as being exorbitant. He said he knew phones and prices and could not understand why he had to pay R60 000.00 and to return the phones as he wanted to purchase them. He alleges that he had asked Centrafin whether he could buy the phones and at what price but that he never received a response except a referral to the original supplier, ACI Data.

3.14 On 11 January 2018 Dr Mazibuko received a further email from Mr Khomola, again on the Centrafin letterhead. This letter reads as follows:

I refer to our telephone conversation yesterday and trust that you have had an opportunity to read through all my correspondence sent you to-date, as it contain essential information. I am disturbed by your own admission that you have not read through the correspondence yet as such, I suggest that you read through same together with the master rental agreement entered into with Centrafin for the rental of the 1 X Nec SI1000 Pabx Main Unit and accessories.

Please note that as you are merely renting the said equipment from us and ownership never passes to you, the costs of equipment is thus irrelevant to you. Should you wish to ascertain the costs or compare quotations, you are welcomed to make contact with the supplier being Aci Datacom (Pty) Ltd on (011) 2881600 or any supplier of your choice giving them the said equipment description.

At the moment, I require urgent payment of either the arrears of R7 832.41 or the full special settlement of R60 000.00 (valid for 7 working days) or advise how you intend settling same. Please note that failure to keep to your promise of settling the account, will result in us exercising our rights by repossessing our equipment and claiming the arrears and all future rentals totaling (R114 147.00) which would have been payable had the agreement ran its full period. Furthermore, we will ensure that the adverse listing is updated on credit bureaus.

Should you require any further clarity in this matter, please do not hesitate to contact me.

3.15 Dr Mazibuko testified that, prior to Doctor Khomola's visit during which the alleged defamatory publication took place, he and Mr Khomola had communicated by way of telephone calls and "WhatsApp" messages. Dr Mazibuko was confronted with a printout of these messages and did not deny the contents thereof. The messages span two printed pages and, as the contents thereof are not in dispute, it is not necessary to quote them. What they do incontrovertibly indicate, is that during the period from 11 January 2018 to 26 January 2018, Mr Khomola had done his utmost to amicably settle the matter, to no avail. Many of his messages were simply ignored while others were treated by way of seeking to avoid or delay dealing with the contents thereof. The following examples will suffice to indicate what has transpired ("Doctork" is a reference to Mr Khomola):

"11/01/2018, 12:52 – Doctork: Hi Dr, I trust that you received my email and that you have considered the contents thereof. Pls note that it is essential that we resolve this matter amicably hence our efforts to meet with you in order to try and negotiate. Pls let me have your feedback by close of business today regarding my proposal. I kept to my promises based on our recent meeting and not its your turn to keep to yours regarding payment. Thanks Doctor.

12/01/2018, 10:36 – Doctork: Hi Dr. Mazibuko, pls let me have your urgent feedback regarding payment. I tried making contact earlier this morning. Thanks Doctor.

12/01/2018, 11:40 – Doctork: Dr pls ke kopa answer.

12/01/2018, 11:41 – Doctork: At least for now pay the arrears while you still getting quotations for the equipment

12/01/2018, 13:55 – Doctork: Dr

12/01/2018, 13:56 – Doctork: Pls respond to my email at least

12/01/2018, 22:35 – Dr Mazibuko: Just saw ur text I check in email is in accordance to our verbal agreement

12/01/2018, 22:36 – Dr Mazibuko: I will look at email on Wednesday”.

3.16 Pursuant to the non-payment of the proposed settlement, Dr Mazibuko was re-listed as a defaulting payer with the credit bureaus and the settlement offer lapsed. Mr Khomola kept Dr Mazibuko abreast of these developments by way of messages, often more than one per day.

3.17 In respect of the “defamation incident”, Dr Mazibuko testified as follows: on the day in question he was in his surgery when he was told by his receptionist that “a man”, identified as Khomola from Centrafin, was there. Dr Mazibuko’s staff, which he identified as Khoza, Fikile, Zandile and Musi were all in the reception area, which also accommodated 15 chairs for patients of which he estimated almost half were occupied. Mr Khomola was shown into the surgery and greeted him and “everything started well”. Dr Mazibuko said that Khomola’s voice and attitude then changed and he said if the doctor wouldn’t pay he would have to take the phones, being all the phones that had been installed. Mr Khomola then stormed out of the surgery into the reception area to take the phones saying things like “how can a doctor not pay his phone?”, “not meeting his obligations” and “a doctor should know better”. He was talking loudly while disconnecting cables and telephones.

During this, some patients left. Dr Mazibuko telephoned “security” who then stopped Mr Khomola from “causing chaos” and apprehended him. Members of the South African Police Service also arrived on the scene and asked Mr Khomola what he was doing at the Doctor’s practice. He explained that he had come to collect the telephones whereafter everybody went to the local police station where both Dr Mazibuko and Mr Khomola made statements. After Mr Khomola’s visit, only one mobile phone was left behind.

3.18 Dr Mazibuko’s statement to the police is very short and it reads as follows: “On 29/01/2018 Mr Doctor disconnected the phones forcefully, even though he was told not to do so. His behavior was disruptive and as a result patients left the surgery. He was very bullying and intimidating”.

3.19 In cross-examination Dr Mazibuko conceded that he had “accepted the services of Centrafin but later “changed my mind”. To my mind this agreement does not exist”. He also conceded that prior to the documents having been drawn up, he had furnished Centrafin with all the requested documentation such as proof of his identity, proof of address, three months bank statements and details of the bank account from which the installments were to be deducted. He still alleged that he had cancelled the agreement with one “Lauden” and that the agreement was void. He also maintained that the PABX system had never been delivered or installed.

[4] Ms Masina

The second witness to testify was Ms Fikile Masina. Her evidence can be summed up as follows:

4.1 She was still in the employ of Dr Mazibuko, having started as his receptionist on 28 July 2017.

4.2 She remembered the day in question in relation to Dr Mazibuko's defamation claim when Mr Khomola came to the doctor's practice for the second time. On both occasions he told Dr Mazibuko that he was there to remove the telephones. On the second occasion, he greeted "us", referring to the four staff members of Dr Mazibuko, and told them that he was there to remove telephones.

4.3 Mr Khomola asked to see the doctor but was told to wait as the doctor was attending to a patient in his surgery. After the patient had left, he entered the surgery and a few minutes later came out, saying "What kind of a doctor does not pay his bills?"

4.4 Mr Khomola then told the staff to "move" while talking loudly. Ms Masina asked him to talk quiet and be professional as the waiting room was almost filled with patients. Meanwhile the doctor was instructing Mr Khomola not to remove the phones.

4.5 When asked in chief examination what Ms Masina thought Mr Khomola had meant by his words, she said she was not sure and later said she did not know.

4.6 Ms Masina testified that Mr Khomola sounded angry. He then proceeded to remove the telephones and cabling. Meanwhile Dr Mazibuko shouted "call security, call the police".

4.7 Ms Masina testified that, by the time security had arrived and taken Mr Khomola outside the doctor's rooms "into the mall" he had removed various devices and "wires" and telephones. She did not know what a PABX system was and could not say whether it had been installed or removed. Some of the patients also left during the course of this incident.

[5] Ms Annemarie Booysen

It is not clear for what purpose Dr Mazibuko called Ms Booysen as a witness. She was the legal manager of Centrafin and oversaw all legal issues regarding Centrafin collection department. She testified about the following:

5.1 According to what she had been informed, the purpose of Mr Khomola's visit on 29 January 2018, was to collect equipment which was a normal procedure after a client had remained in default.

5.2 Centrafin was described by Ms Booysen as a finance house. Suppliers of electronic (and other) equipment would refer their clients to Centrafin for rental finance. Centrafin would then buy the equipment by paying the supplier and rent the equipment to the client. This is what had happened in this case. It is much the same as renting a car from, say, a Toyota dealership and where Wesbank would finance the deal. Wesbank would buy the car by paying the dealer and then lease the car to the client. (The names used here were those actually used by Ms Booysen to illustrate her example and Centrafin's business).

5.3 Ms Booysen was asked how many rental finance clients Centrafin had. She was not aware of the exact figure, but estimated thousands. At the time however, there were only 226 defaulting clients under her control for recovery.

5.4 A long discourse then followed relating to the various recovery steps taken by Centrafin in the recovery of unpaid rentals, from emails, telephone calls letters of demand, cancellation and legal proceedings.

5.5 After traversing the nature of the documents to be signed when an agreement is entered into at some length, Ms Booysen was asked what a client could do if it wanted to cancel a rental agreement before the expiry thereof. She testified that the client would have to negotiate the cancellation, return the equipment and settle the calculated settlement figure. She explained that, in order to make a return on Centrafin's investment of having paid the full purchase price of the equipment up front, the rentals are calculated over a period of 60 months. To cancel prior to the expiry without paying the balance would not be feasible for Centrafin.

5.6 Ms Booysen was asked what happens to returned equipment at the expiry of a rental period to which she responded that the items are "scrapped" and sold to waste companies and other traders in such goods. In the case of Dr Mazibuko, this has not happened as the equipment formed the subject of litigation. All the items recovered by Mr Khomola was still in a box under her control, marked with his name.

5.7 Ms Booysen was directly asked what Centrafin did to mitigate its damages. She testified that high value items like photocopiers and the PABX system in question could be re-sold or rented out again (as opposed to second-hand telephones) but in this case the PABX system hasn't even been returned. She continued to state that in the case of Dr Mazibuko, Centrafin had suffered a direct income stream loss. It has paid the purchase price of some R60 000.00 in 2017 and has not recovered the money spent or received any return on its investment.

[6] Absolution

After the above evidence had been led, Dr Mazibuko amended his particulars of claim which had initially been formulated in a narrative-like and almost affidavit-like fashion with inclusion of *facta probantia*. The amendment was done in order to have the particulars accord with his evidence in particular in relation to the inclusion of Ms Masina therein. Thereafter he closed his case. An application for absolution from the instance of the defamation case was refused and the matter proceeded with Centrafin calling two witnesses. I shall deal with their evidence hereunder.

[7] Mr Mzukona Wedu

Mr Wedu was a telecommunications advisor and a sales representative of ACI Datacom in 2017. He testified as follows:

7.1 He met Dr Mazibuko in June or July 2017 as part of a "sourcing" of clients. As a sales representative he obtained a list of business and medical practitioners in a specific area. Thereafter the representatives go virtually door-to-door.

7.2 Mr Wedu explained the procedure he followed, both in general and in respect of Dr Mazibuko. It involved a discussion with the client regarding his needs, then a proposal of telecommunications solutions. Thereafter the method of payment is discussed. The requirements of the National Credit Act are also adhered to in obtaining information from the client to determine his eligibility for credit and his ability to pay. In most cases the client cannot pay a lump sum purchase price up front and a 60 month rental is then proposed as the alternative solution.

7.3 However, the equipment still needs to be purchased as ACI Datacom itself does not rent out, but sells its equipment. The client is then referred to or presented with a financial service provider who would then purchase the equipment. Various banks and financial institutions are utilized by ACI Datacom and Mr Wedu and in the case of Dr Mazibuko, it turned out to be Centrafin.

7.4 Mr Wedu was one of the persons who was present at Dr Mazibuko's practice when the equipment were installed. He was the one who checked the PABX system's serial number. The PABX system is always installed at a place indicated by the client. The documentation is only presented to a client after the installation has been completed.

7.5 In the case of Dr Mazibuko, Mr Wedu explained the various documentation to him. This included explaining the terms of the Master Rental Agreement and the confirmation of the installation of the equipment before the release note is signed. It also included the obtaining of the selection by Dr Mazibuko as to whether insurance is to be provided by Centrafin or whether Dr Mazibuko would obtain his own insurance.

7.6 Mr Wedu signed as a witness on the Master Rental Agreement and the Transaction Schedule after he had presented the documents to Dr Mazibuko and after he had witnessed him signing the documents referred to in paragraph 3.4 above, except for the Release Note which he explained may have been a day or so later.

7.7 Mr Wedu had been the line of business he was in at the time for five years. He knew the area Dr Mazibuko was in well and had given Dr Mazibuko his own and ACI's office numbers and told him to "phone at any time" if he was unhappy about anything. The agreement with Dr Mazibuko was not a once-off thing, first there was the introductory visit, then the determination of the equipment required and the discussions about financing, then followed the installation and only thereafter did Mr Wedu present the documents to Dr Mazibuko and went through the documents whereafter they were signed and witnessed and the insurance option was elected.

7.8 Mr Wedu did not do the actual installation himself. This was done by three technicians which he had identified as Ian, Hendrik and "another one".

7.9 The installation was complete and operational before any signature was obtained from Dr Mazibuko and the installation included all the items listed in the Transaction Schedule. At no stage did Dr Mazibuko express any dissatisfaction with either the installation or the documentation.

[8] Doctor Khomola

Doctor Khomola has been employed by Centrafin since 2016. He was a legal control officer, tasked with collections, the submission of claims to business rescue practitioners, the recovery of outstanding accounts, liaison with Centrafin attorneys and a host of related duties. He testified as follows:

8.1 Dr Mazibuko's account was handed to him during November or December 2017 from Centrafin's risks department. Since then he was in email, telephonic and WhatsApp communication with Dr Mazibuko and visited him on 9 January 2017 as well as on the day in question relating to the claim by Dr Mazibuko.

8.2 Mr Khomola referred to various emails addressed by him to Dr Mazibuko, but the most pertinent one, dealing with the issue of Advance Telecoms who Dr Mazibuko had been dealing with in respect of his Nelspruit practice, is one dated 18 December

2017. As it deals with the position of both parties in respect of the claim by Centrafin, it was read out in court and is quoted here in full:

We refer to various correspondence between yourself and our Credit Control Dept regarding the master rental agreement entered into with you, for the Nec SI1000 Pabx System which is currently in arrears with an amount of R6 272.78 as at today.

Please be advised that the account has since been handed over to our Legal Dept in order to commence with the recovery of the equipment, arrears and future rentals, however, I need to bring the following to your attention:

- According to our agreement, the equipment was supplied by ACI Datacom (Pty) Ltd;
- The said equipment was installed at Entrance 1, shop 13 Golden Walk, Germiston;
- We have on record, the release note and acceptance certificate confirming the installation addresses;
- Furthermore, we have no records whatsoever of any dispute lodged with our office pertaining to any wrong doing by ACI Datacom (Pty) Ltd.

The correspondence dated the 14th November 2017, seems to implicate Advance Telcoms of which they are not associated with this transaction and therefore suggest that you forward me any documentation or information supporting your claims to enable me to investigate same. It seems Dr. based on the issues raised, there seems to be some misunderstanding between yourself and Advance Telcoms on a separate agreement entered into between the two parties which requires further interrogation.

We are of the opinion that, at this stage, it is premature to escalate this matter to your attorney and incur unnecessary litigation costs when the matter could possibly be resolved by facilitating a meeting with the concerned parties. As Centrafin, we are prepared to assist you resolve this matter amicably thus request that you pay the full arrears of R6 272.78 and resume with the monthly rentals while the investigation are ongoing.

We are calling you to co-operate with us, as we endeavour to resolve this matter without incurring unnecessary costs.

Should you require any further details, please do not hesitate to contact me.

8.3 Mr Khomola further confirmed all the correspondences referred to above during the discussion of Dr Mazibuko's evidence. He furthermore confirmed that, during all these discussions, it was made clear to Dr Mazibuko, that the equipment and, most importantly the most valuable item thereof, the PABX System, remained the property of Centrafin.

8.4 Mr Khomola testified that he has been doing debt collections for more than 20 years and, apart from his vast experience, he always remained committed to acting professionally and preferred the "one-on-one" method of communication with client in an attempt to resolve matters, hence the tone of his emails and WhatsApp messages.

8.5 On the day in question, he went to Dr Mazibuko's practice, where he found four staff members at reception as well as some patients sitting in the waiting room. He introduced himself and was told that the doctor was busy seeing a patient in his surgery. He took a seat and went in after the patient had left. His meeting with the doctor started out cordial, so cordial in fact, that after he had presented copies of the correspondence and told the doctor that he still had the option to pay otherwise he would have to surrender the equipment, the doctor stood up, went to a cabinet, took out a cordless phone and handed it to Mr Khomola.

8.6 Mr Khomola took this gesture as an election of a voluntary surrender of goods. He then proceeded to the reception area to remove the remainder of the equipment. He told the ladies that he was there to remove the equipment and they allowed him to remove the 12 keypad desktop phone. When he started to disconnect the cabling under the counter from the PABX System, the doctor came out of his room and started calling the mall security. They arrived promptly and escorted Mr Khomola to their security officer where he explained what he had been doing and showed them a copy of the Master Rental Agreement. When the police arrived, he did the same whereafter everyone went to the police station. He had telephoned Centrafin and told them of this. He did not know the contents of Dr Mazibuko's statement but the police refused to open a case or arrest or charge anyone. After he had made a statement, he was allowed to leave. His statement made to the police was recorded in writing and read as follows: "I am the representative of Centrafin (Pty) Ltd. On the 29th January 2018 I came to repossess the 1 x NEC SL 100 PABX System and accessories, due to Dr Mazibuko account no. being in arrears with R9 500.00. The said doctor signed the Master Rental Agreement and agreed to rent and pay to Centrafin an amount of R1 100.00

excluding VAT. We have attempted on several occasions to resolve the matter amicably and negotiated with the doctor but he failed to honour the arrangements. The equipment remains the property of Centrafin as such. The ownership never passes. The doctor refuses to release the main PABX Unit and only permitted 2 x phones and cordless phone to be released. The only disruptions was the removal of the phones, his restricting communication”.

8.7 Mr Khomola denied having uttered words to the effect that a doctor should pay his bills or should know better than to not pay his bills. Mr Khomola said that to do so would be unprofessional. He was never angry but was firm when the receptionists appeared to be reluctant to allow him to remove the equipment. He treated the doctor with utmost respect and still as a client.

8.8 When pushed in examination in chief about having used the words or any similar words at all, he stated that even if he had used the words alleged, which he still denied, he never meant to imply anything negative. He would never have said anything to the effect that the doctor could not afford to pay as he remembered that the doctor had told him at some stage that he owned twenty curved television sets. He firmly denied having intended to defame Dr Mazibusko.

8.9 In cross-examination there was some suggestion that the doctor had not received his emails but Mr Khomola said that they had been discussed telephonically and his latest email had even been forwarded via WhatsApp on 26 January 2018, that is three days before his visit.

8.10 Extensive cross-examination could not reveal any discrepancy in Mr Khomola’s evidence nor did it detract from his denial of defamation. In addition to what he had testified in chief, the contents of his correspondence and the R60 000.00 reduced settlement figure was debated with him. He echoed Ms Booysen’s evidence that the recovered telephones were still in a box at Centrafin marked with the doctor’s name and that the doctor still had retained possession of the PABX system.

[9] The credibility of the witnesses and evaluation of their version

9.1 In respect of the defamation issue, the two parties have provided two irreconcilable versions as to the actual act itself. Dr Mazibuko says Mr Khomola did use certain words (or words to a certain effect) while Mr Khomola testified that he never used the complained-of words. There is also a secondary issue regarding intent and publication, but I shall deal with that later.

9.2 In respect of the Master Rental Agreement issue, the versions are somewhat easier to adjudicate as Centrafin’s version has a substantial amount of corroborating documentary evidence thereto but technically, there are still two irreconcilable versions to adjudicate on.

9.3 The technique used to resolve irreconcilable versions have been described in *SFW Group Ltd & Another v Martell et Cie & Others* 2003 (1) SA 11 (SCA) as follows at [5]:

“On the central issue as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarized as follows. To come to a conclusion on the disputed issues a court must make findings on

(a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established facts or with his own extracurial statements or actions, (v) the probability or improbability of particular aspect of his version, (vi) the caliber and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), his necessitates and analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it".

I shall now apply these principles or techniques to the various witnesses.

9.4 Dr Mazibuko: his demeanour in the witness box was not to his credit. He became over-excited and emotional. He insisted on his version where, for example in respect of the Master Rental Agreement, the incontrovertible facts based on the documents that he signed, did not support him. For example, there never was a sale agreement. His version that he thought that there was or that he merely signed a simple contract (once) can never be true. His refusal to accept facts or make concessions when one would have expected a reasonable person to do so displays bias in favour of his pre-conceived idea of what the truth should be and his evidence displayed internal and external contradictions. His evidence of what occurred in his reception area when Mr Khomola attempted to recover the equipment appears to be a hyperbole of the events, not fully corroborated by his "supporting" witness, Ms Masina. When viewed as a whole, the calibre and cogency of his performance as a witness compared to that of the other witnesses testifying about the same incident or events did his case no favours. The excessiveness of his hurt or insult which he displayed in court about Mr Khomola's conduct also, significantly, did not find its way to the almost contemporaneous statement made to the police shortly after the event. I find that very little weight could be accorded to his version of the events when they are in conflict with those of other witnesses.

9.5 Ms Masina came across as a demure, soft-spoken person who simply came to court to convey what she remembered about the day in question regarding the defamation claim. She also did not embellish her version of the events and, when presented with an opportunity to bolster her employer's version when asked what she thought her version of Mr Khomola's words meant she declined to take the bait. Generally, she came across as a credible witness.

9.6 Ms Booysen, who was only peripherally involved, gave her evidence as to be expected from a senior employee in her position. It was given forthright, in an unbiased and professional manner and also gave the impression of an honest version of whatever answer she was asked to provide.

9.7 Mr Wedu testified as garrulously as one could expect from a salesman but on all the crucial aspects, his version was supported by the uncontroverted documentary evidence. Despite his occasional verbosity, he displayed no internal or external contradictions and his evidence also generally appeared cogent and acceptable.

9.8 Mr Khomola testified in a calm and dignified manner. His version that he had acted professionally and attempted to assist Dr Mazibuko as a client is corroborated by the tone and contents of the various emails written by him as well as the numerous WhatsApp messages which predated the defamation incident. Of course, it could be that, after all that, a person may lose his temper when a client not only refuses to pay, refuses all attempts at settlement and obstructs the recovering of a finance company's own property but even when testifying about these events, Mr Khomola came across as a patient individual. What enhanced his credibility, was the fact that he was prepared to concede the possibility of having used words to the effect of indicating a certain measure of disbelief that a well-to-do medical practitioner does not even want to pay paltry monthly rental payments for equipment actually

necessary for him to effectively run his practice. But even in making this concession, Mr Khomola calmly stated that he never meant to publicise this displeasure or disbelief and definitely he never intended to insult the client or reduce or harm his reputation.

[10] Evaluation

10.1 In respect of Centrafin's claim, it must be accepted that the Master Rental Agreement documentation were properly completed and signed. There were just too many documents with completed detail, both in typescript and in manuscript completed on the documents as well as the numerous instances where Dr Mazbuko had signed, for this court to find on a balance of probabilities that those documents did not reflect the agreement which had actually been entered into between the parties. Dr Mazibuko's initial version, being also the one pleaded by him, namely that he was under the impression that the agreement as a purchase agreement (similar to

the one he had entered into in Nelspruit/Mbombela) just wasn't sustained by the evidence. There was, firstly no comparable agreement of sale from Nelspruit produced but more importantly, in respect of the equipment installation in Germiston, there was no evidence as to price per item or even of the installation or evidence of the conclusion of any agreement of sale. If the sale had taken place, there was also no explanation for the debit orders instruction or the insurance selection. No details of such a sale, which would apparently have been a cash sale, no particularity of date, time, place or representative of the seller (or even the identity of the actual seller) were furnished by Dr Mazibuko. His vague evidence of such a sale cannot stand against the bulk of other evidence in support of the Master Rental Agreement. Mr Wedu's evidence referred to in paragraphs 7.2 – 7.7 above were also not materially placed in dispute. The most telling point is Dr Mazibuko's concession made during cross-examination that he had accepted the services of Centrafin but later "changed his mind". To sum up: Dr Mazibuko's evidence does not support his plea and while all the other evidence supports Centrafin's claim. On a balance of

probabilities, I find in favour of Centrafin on this aspect. The amount claimed accords with a Certificate of Balance, as provided for in the Master Rental Agreement.

10.2 In respect of the defamation claim it is useful to revisit Dr Mazibuko's claim as formulated in his latest version of his amended particulars of claim. It is this:

"6.2 The following events transpired on 29 January 2018:

6.2.1 The Second Defendant [Mr Khomola] entered the Plaintiff's premises and requested to speak with the Plaintiff. The Second Defendant made a verbal demand to the Plaintiff to hand over to him telephonic equipment leased from the First Defendant [Centrafin] as a result of the installments in terms of the of the agreement being in arrears;

6.2.2 The Plaintiff refused to hand over the equipment as there is a dispute between the Plaintiff and the First Defendant whether the installments are due and payable and informed the Second Defendant that the Defendants should follow legal process to collect the equipment;

6.2.3 The Second Defendant became aggressive and shouted at the Plaintiff "that one would expect more form a doctor than not paying his accounts";

6.2.4 The second Defendant then aggressively learned over the reception counter and forcefully ripped two phones from their cables;

6.2.5 The Plaintiff requested the Second Defendant to leave his premises however the Second Defendant refused and only left when the building security came to escort him from the premises. He took the two phones with him.

6.3 The Second Defendant expressly, alternatively though his actions a referred to in paragraph 6.2 above intentionally defamed the Plaintiff in front of 9 patients in the Plaintiff's waiting room, the Plaintiff's employees, one of which such employee was Ms Fikile Masina, and members of the public passing".

10.3 On these allegations, only those pleaded in quoted paragraphs 6.2.1 and 6.2.5 appear to be factually correct. There was at that time no "dispute" in the sense as pleaded in paragraph 6.2.2, Dr Mazibuko was simply in breach of the Master Rental Agreement and had refused any settlement offer. His counter-offer of purchasing the equipment after cancellation of the agreement had been rejected and he simply did not pursue it further. He had retained Centrafin's equipment without paying any rental

or settlement amount. The allegation in quoted paragraph 6.2.4 is not supported by Ms Masina who was the person closest to the place of removal of the telephones. There was also no evidence supporting the alleged "ripping" of cables.

10.4 The most crucial aspect of Dr Mazibuko's case, is that pleaded in quoted paragraph 6.2.3, that is the actual alleged defamatory words ascribed to Mr Khomola. Those pleaded are not the same as those testified about by Dr Mazibuko. All the versions of the comments ascribed to Mr Khomola have the same tenor, however, namely the questioning of a doctor defaulting on his obligations to pay his accounts.

10.5 The second crucial part of the defamation case, is the element of publication. It is clear that the allegation pleaded that publication had been made to passing members of the public cannot be sustained. The allegation that publication took place to 9 patients is also too doubtful to be upheld. The only publication about which there is no doubt, is that made to the staff member Ms Masina.

10.6 Insofar as there is doubt about the veracity or credibility of Dr Mazibuko's recall of the events and in particular the actual wording of the statement, then a finding can and should only be made on the evidence on which a court can rely as being trustworthy, being that of Ms Masina. On her version Mr Khomola had said, either to her or loud enough that she could hear, "what kind of a doctor does not pay his bills?". This is very close to the words in quoted paragraph 6.2.3 and I find that Mr Khomola had uttered those words. I am bolstered in this finding by Mr Khomola's own partial concession that it may be found that he had used words to those effect when questioning Dr Mazibuko's persistent default when he had exited the examination room. See in this regard *International Tobacco Co of South Africa Ltd v Wollhem and Others* 1953 (2) SA 603 at 612D – 614C regarding the issue of whether words "to the effect" of a certain statement can be accepted, as I have done here.

10.7 It must thereafter be considered whether the words are per se defamatory. Dr Mazibuko pleaded that Mr Khomola "created the impression" that Dr Mazibuko could not comply with his payment obligations and created the impression that he was "dishonest, sly and involved in misdemeanors".

10.8 The impressions pleaded by Dr Mazibuko was not shared by Ms Masina. Regarding the defamatory nature of the statement, it is a question of law whether the words complained of are reasonably capable of conveying to a reasonable hearer thereof a meaning defamatory of the Plaintiff. See *Mohamed v Jassiem* [1995] ZASCA 115; 1996 (1) SA 673 (A) at 703-704.

10.9 If the words complained of are capable of having a defamatory meaning in their ordinary sense, a cause of action is disclosed. See *Harms, Amler's Precedents of pleadings*, Seventh Edition at 163. The fact that Dr Mazibuko may have pleaded something in excess of a meaning conveyed by the words used does not detract from this. See *New Age Press Ltd v O'Keefe* 1947 (1) SA 311 (W) and *Rogaly v General Imports (Pty) Ltd* 1948 (1) SA 1216 (C).

10.10 In this case, the words used are not per se defamatory and the secondary or implied meanings pleaded by Dr Mazibuko, namely that the words convey the meaning that he is "sly" or committing "misdemeanors" is, in my view, not sustainable. The words ascribed to Mr Khomola, understood by a reasonable person simply implied that Dr Mazibuko, being a medical practitioner, is in default of his contractual obligations and that one would have expected of such

a medical practitioner to discharge his payment obligations. This is an implied meaning which can reasonable be ascribed to the words and no additional innuendo (which has in any event not been pleaded) should be read into it. See the distinction between an implied meaning and an innuendo in *Argus Printing and Publishing Company Ltd v Esselen's Estate* 1994 (2) SA 1 (A) at 21. The implied meaning is however, still sufficient to sustain a cause of action. Accusing a doctor of being a defaulting may damage his reputation.

10.11 In order to succeed with a claim for defamation however, a plaintiff must not only allege and prove a wrongful publication of a statement which is defamatory of the plaintiff (as established above) but that it has been made with animus iniuriandi. The plaintiff is assisted herein by a factual presumption that, once publication of a defamatory statement is proven, the elements of wrongfulness and animus iniuriandi are presumed. The onus to disprove this prima facie position, is then on the publisher. Despite this rebuttal onus, the overall onus still remains with the plaintiff. See *SABC v O'Malley* 1977 (3) SA 394 (A), *Borgin v De Villiers* 1989 (3) SA 556 (A) and more recently *Delta Motor Corporation (Pty) Ltd v Van der Merwe* 2004 (6) SA 185 (SCA) at [7].

10.12 Proceeding then from the finding of publication of a statement questioning the reason why a medical doctor would not pay his bills and the implied meaning thereof of him being a defaulting debtor, one must examine the defence of Centrafin and Mr Khomola.

10.13 Having regard to the circumstances during which the alleged defamation had taken place, the publication appears to fall within the definition of fair comment. Mr Khomola was flummoxed as to why a well to do practitioner who can afford to pay his bills, did not do so. The alleged contractual defence of an actual sale and not a rental agreement which was attempted by Dr Mazibuko in this court was certainly not apparent to either Centrafin and Mr Khomola at the time. It only existed in Dr Mazibuko's mind. It therefore appears that Mr Khomola's statement was a comment or expression of an opinion, which was a fair question to ask

in the circumstances, based on facts accurately stated and that the comment was about a matter of interest to the doctor's staff. As such the statement amounts to fair comment in the context of a defamation defence. See *Delta Motor Corporation supra* at [12] and [13] and the reference to *Marais v Richard and Another* 1981 (1) SA 1157 (A) at 1167F made therein.

10.14 The defence of fair comment has however, not been pleaded. What has been pleaded however, was a denial of animus iniuriandi. This has expressly and vehemently been testified about by Mr Khomola.

10.15 On the basis as indicated in paragraph 9.8 above, I accept the evidence of Mr Khomola that he was merely attempting to recover his employer's equipment and, insofar as this court may find that he had used words complained of by Dr Mazibuko, he never had any intention to defame the doctor or to damage his reputation. I therefore find that the presumption of the presence of animus iniuriandi has been dispelled. This accords with the type of analysis of conduct undertaken in *Borgin v De Villiers supra* in the concurring judgment of Corbett CJ and in *Moaki v Reckitt & Colman supra* at 105H – 106C. The same goes for the alleged defamation occasioned by the attempts at repossession itself.

10.16 I therefore find that the claims of defamation (and damages as a result thereof) cannot succeed.

[11] The Consumer Protection Act 68 of 2008 (CPA)

11.1 After a hard-fought trial, not only on the issue of defamation, but also on the issue of the existence and validity of the Master Rental Agreement, it came as somewhat of a surprise that in the written Heads of Argument delivered on behalf of Dr Mazibuko some ten days after the conclusion of evidence, it was argued in respect of Centrafin's case that "the only defence in the plea relates to the defences based on the Consumer Protection Act 68 of 2008".

11.2 Whilst the plea did contain some references to the CPA, they were raised only in the alternative and then only in a limited sense.

11.3 In paragraph 3 of the plea it was pleaded in the alternative that "should the court find that there was no mistake on the part of the Defendant and that the agreement is valid and binding, the Defendant, in the alternative pleads that he did not request the Plaintiff's services and accordingly same amounts to direct marketing ...". Failure to advise of a cooling off period is then further alleged. This plea was neither canvassed nor supported by evidence and was rightly not proceeded with.

11.4 In paragraph 4 of the plea, the following is pleaded: "Should the above Honourable Court find that the agreement is valid and binding and that the Plaintiff's actions did not amount to direct marketing, the Defendant pleads that he is not liable to pay the Plaintiff for future rentals as the Plaintiff unlawfully removed the equipment from his practice on 29 January 2018".

11.5 The above plea is firstly not factually correct: Dr Mazibuko is still in possession of the largest part of the equipment, the PABX system.

11.6 This plea also does not disclose a defence as it is in conflict with various clauses in the agreement. The parties have agreed to the following:

"8. If the user defaults in punctual payment of monies ... or breaches any warranty given in terms of this agreement ... then the hirer may without prejudice to any of its rights elect to:

8.1 remotely access the goods and limit the use thereof, and

8.2 claim immediate payment of all amounts which would have been payable in terms of this agreement ... or

8.3 immediately terminate this agreement, take possession of the goods, retain all amounts already paid by user and claim all outstanding rentals, all legal costs including legal expenses on the attorney and own client scale and, as agreed pre-estimated liquidated damages, the aggregate of the rentals which would have been payable had the agreement continued until expiry by effluxion of time".

11.7 Insofar as the above may constitute a penalty as contemplated in the Conventional Penalties Act 15 of 1962, being yet another alternative plea, this did not feature in the Heads of Argument. It has, in view of the evidence of Ms Booysen and in the absence of any other evidence, rightly not been proceeded with as Dr Mazibuko has clearly not discharged the onus resting on him for such a defence. See also the confirmation that a pre-estimation of damages for breach of contract is enforceable in *Fidelity Bank Ltd v Three Woman (Pty) Ltd*

[1996] 4 All SA 368 (W) and the issue of onus as determined in *National Sorghum Breweries (Pty) t/a Vivo African Breweries v International Liquor Distributors (Pty) Ltd*

[2000] ZASCA 159; 2001 (2) SA 232 (SCA).

11.8 Insofar as Dr Mazibuko retains the PABX system, Centrafin was actually entitled to extend its claim for rentals beyond the R114 406.80 claimed until expiry of the initial contract term, as the parties have agreed that: “11.1 ... should the user in breach of its obligations fail to return the goods on termination of this agreement then, in addition to any other claims that the hirer may have against the user pursuant hereto, the user shall be liable to continue to pay rentals to the hirer as if the agreement had not been so terminated ...”.

11.9 In the Heads of Argument various other terms of the Master Rental Agreement are then attacked on the bald averment that they are “unfair unreasonable and unjust” and that this court should, in terms of Section 52 of the CPA declare them as such or declare the agreement void.

11.10 The court’s first difficulty with these submissions are that they have not been canvassed at all during the course of the trial, except perhaps obliquely by Dr Mazibuko stating that a rental agreement is less cost effective than a purchase agreement and his refusal to pay even a settlement figure if he cannot thereby obtain ownership of the equipment. Even the entitlement to future rentals has not been debated with Ms Booysen with reference to the specific clauses that are now sought to be attacked. In fact, she has explained that the effect of non-recovery would be unfair to Centrafin who has expended money which it has not

recovered and, should it not be able to pre-calculate rental income, it would not make a profit. This is not simply a matter of taking the total rental income and deducting the purchase price, issues such as the period of time, interest and the loss of real value of money also play a role prior to one even being able to calculate profit, gross or otherwise. One must also remember that the evidence of Ms Booysen formed part of Dr Mazikuko’s case.

11.11 The fact that specific terms of the Master Rental Agreement not expressly referred to in the pleadings or canvassed in evidence, are attacked under the general blanket provisions of the CPA in Heads of Argument, meant that Centrafin had not dealt with them in its Heads of Argument. Centrafin notionally could have delivered rebuttal or replying Heads of Argument, but be that as it may, the court was left without the benefit of argument on issues not expressly previously raised.

11.12 Of course, it is open to a party to argue any point of law available to it in a case but this must be subject to two conditions, namely that it has been canvassed in evidence and secondly, that fair warning has been given to the other side. This is similar to raising a new point of law on appeal. See: *Shraga v Chalk* 1994 (3) SA 145 (N) at 150G – 151E and *Navidas (Pty) Ltd v Essop; Meta v Essop*

[1994] ZASCA 84; 1994 (4) SA 141 (A) at 148G – 149C.

11.13 In the present case, Dr Mazibuko in general terms complained about the “unfairness” of Centrafin refusing to sell the equipment to him and the general “unfairness” of his having to return the goods while still being liable for the contractually agreed rental. These aspects were, however not canvassed on the basis that the specific terms now referred to in the Heads of Argument were to be declared invalid in terms of the CPA or that fundamental changes to the essential elements of a contract of this nature, i.e. a rental contract of movables, should be declared invalid. The agreement was a “pure” rental agreement with an obligation to return the equipment. It was never a “lease” as contemplated in the National Credit Act 34 of 2005.

11.14 The argument advanced on behalf of Dr Mazibuko is also that what may have been a standard practice in an industry, might not necessary be “fair”. This may be an arguable point, but then it has to have been canvassed sufficiently in evidence. Failure to do so, would either have the result that the point cannot be entertained or that it would be dismissed.

11.15 The issue of “fairness” or “unreasonableness” contemplated in the CPA cannot, in relation to the terms sought to be impugned in this case, be adjudicated “in the air”. The evidence of Ms Booysen indicates that there are elements of “fairness” relating to Centrafin, which also has to be considered, such as its rights to recover a return on its investment. The “unfairness” or unreasonableness” concept in the CPA codified, to an extent, “... the established principle that courts will refuse to enforce contractual provisions that are so unfair, unreasonable or unjust that it would be contrary to public policy to give effect to them. Public policy is, of course, by its very nature informed by constitutional values and precepts”. See *Magic Vending (Pty) Ltd v Tambare and Others* 2021 (2) SA 512 (WCC) at [8].

11.16 Insofar as the issue of payment of the outstanding rental have been protested against by Dr Mazibuko in evidence, I find, in similar fashion as Binns-Ward J did in *Magic Vending* at [9] that “... there is nothing unconscionable about a term directed at incentivizing punctilious compliance by a consumer with his or her contractual obligations”. Dr Mazibuko did not seek to invoke unfairness of these terms nor did he take steps to give prior notice of an intention to cancel, he simply stopped paying based on his own unilateral and unfounded view that the contract was void or that he had “changed his mind”.

11.17 Reliance has not been placed by Dr Mazibuko on the remarks made in *Botha and Another v Rich* NO 2014 (4) SA 124 (CC) regarding the assessment of proportionality in the enforcement of contractual rights of cancellation, which have more recently been characterized as obiter dicta in *Beadica* 231 CC and *Another v Trustees for the time being of the Oregon Trust and Others* 2020 (5) SA 247 (CC), but even if one were to have regard to those cases, the facts necessary to established

such a proportionality enquiry or, conversely, to consider whether a disproportionality finding would support a finding of unfairness, have not been established.

11.18 In conclusion then, I find that the contentions argued in favour of invalidity declarations in terms of section 52 of the CPA, cannot be upheld.

[12] Costs

I find no cogent reason to deviate from the customary principle that costs should follow the event. This includes costs previously reserved. On the contractual claim, the scale of costs have been contractually agreed to be that of attorney and client. I further find that this is not a matter where I should limit the scale of costs to that of a Magistrate's court.

[13]

Orders

1. The defendant in the matter initially launched in the then Gauteng Local Division of this court under case no 10974/2018, Dr M.A Mazibuko, is ordered to pay Centrafin (Pty) Ltd the amount of R 114 406. 80 together with interest thereon at the rate of 10,5% p.a from 16 August 2019 to date of payment.
2. The claims by Dr M.A Mazibuko in the matter initially launched under case no 24795/2018 in this court against the defendants cited therein are dismissed.
3. Dr M.A Mazibuko is ordered to pay the costs of the other parties in the above-mentioned matters, including the consolidated matter, such costs in respect of the matter mentioned in paragraph 1 above, to be on the scale as between attorney and client.

N DAVIS

Judge of the High Court

Gauteng Division, Pretoria

Date of Hearing: 8 - 10 November 2022

Judgment

delivered: 22 April 2022

APPEARANCES:

For the Plaintiff: (Centrafin (Pty) Ltd) Adv J J Durandt

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