
SOUTH AFRICA / JUDGMENT

SA Securitisation Programme and Others v JW Auto CC and Another (3903/2014) [2017] ZAECHGHC 50 (9 May 2017) [2017] ZAECHGHC 50

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Pickering

CASE / FILE NUMBER

3903/2014

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, GRAHAMSTOWN)

Case no: 3903/2014

Date heard: 18 August 2016,

27 February 2017, 3 March 2017,

22 March 2017 – 24 March 2017,

25 April 2017

Date delivered: 9 May 2017

In the matter between

SA SECURITISATION PROGRAMME

(RF) LTD

First Plaintiff

SASFIN BANK LIMITED

Second Plaintiff

SUNLYN (PTY) LTD

Third Plaintiff

vs

JW AUTO CC

First Defendant

PIETER JOUBERT

Second Defendant

JUDGMENT

PICKERING J:

1. First plaintiff is S.A. Securitisation Programme (RF) Ltd, a company with its main and principal place of business at Johannesburg. Second plaintiff is SASFIN Bank Limited, a company with its principal place of business at Johannesburg. Third plaintiff is Sunlyn (Pty) Ltd, a company also with its principal place of business at Johannesburg.
2. First defendant is JW Auto CC, a close corporation with its registered office and principal place of business at Cradock. Second defendant is Pieter Joubert, an adult male of Cradock.
3. On 26 September 2013 SAPOR Rentals (Pty) Ltd, (“SAPOR”) concluded a written rental agreement (“the Master Rental Agreement”) with first defendant (“JW Auto”) in terms whereof JW Auto rented a telephone PABX system and accessories (“the system”).
4. First plaintiff acquired the right, title and interest in and to the agreement and ownership in the system from SAPOR in terms of certain written agreements of cession, namely, from SAPOR to third plaintiff on 27 September 2013; from third plaintiff to second plaintiff, also on 27 September 2013, and from second plaintiff to first plaintiff on 17 October 2013.
5. In terms of the Master Rental Agreement JW Auto would hire the goods specified therein for an initial rental period of 60 months at an agreed monthly rental of R3 500,00, together with VAT in the sum of R490,00, the total monthly rental being therefore R3 990,00. The agreement further provided for an annual escalation of 15%.
6. The aforesaid rental amounts included an amount which was to be utilised for the settlement of JW Auto’s existing telephone system with Kasteel Rentals (Pty) Ltd trading as Winelands Finance.
7. JW Auto made certain rental payments up to and including November 2013 whereafter it made no further payments. First plaintiff accordingly instituted the present action against JW Auto as first defendant and against Mr. Pieter Joubert as second defendant, in his personal capacity as surety, for payment of the balance of the unpaid rentals in the sum of R316 818,80 in terms of clause 8 of the Master Rental Agreement which provided as follows:

“8. If User defaults in the punctual payment of any monies as it falls due in terms of the agreement or fails to comply with any of the terms and conditions of, or its obligations under this agreement ... then upon the occurrence of any of these events Hirer may without prejudice to any of its rights elect to:

8.1 ...

8.2 Claim immediate payment of all amounts which would have been payable in terms of this agreement until expiry of the rental period stated in the Equipment Schedule, whether such amounts are then due for payment or not...”

8. First plaintiff’s cause of action in relation to second defendant is founded in suretyship, second defendant having bound himself in writing as surety and co-principal debtor.
9. Whilst the defendants admitted that first defendant had signed the agreement and that second defendant had bound himself as surety and co-principal debtor they raised a number of defences to the plaintiffs claim. In particular defendants pleaded as follows in paragraph 5.2 of their plea:

“5.2 The defendants deny that all the terms and conditions as they appear in Annexure “A” are applicable to the agreement between the parties and the defendants plead that:

5.2.1 the documents were not fully completed when it was (sic) presented to the second defendant for signature by one Laudin Cloete;

5.2.2 that the second defendant, to the knowledge of Laudin Cloete, did not read the “fine print” before he signed the documents;

5.2.3 the terms and conditions presented to the second defendant due to the small-printed format was basically illegible;

5.2.4 that the said Laudin Cloete at no stage alerted/highlighted and/or drew to the second defendant’s attention any specific terms/conditions contained therein.

5.3 The defendants in any event plead that the agreement between the parties is void ab initio or voidable at the instance of the defendants for the following reasons:

5.3.1 the aforementioned Cloete who at all stages acted on behalf of the hirer represented to the defendants that:

5.3.1.1 he was employed by and/or associated with Telkom and that he would be able to supply and install a Telkom telephone system which would be serviceable by Cradock Telkom technicians;

5.3.1.2 the system to be installed would be equal to or of better quality than the existing system;

5.3.1.3 the system to be installed would substantially reduce the first defendant’s monthly telephone account and rental;

5.3.1.4 the hirer would settle the outstanding rental in respect of the old system before they would implement the new debit order.

5.3.2 The aforementioned representations which were material were false.

5.3.3 It was foreseeable that the representations could induce the defendants to whom they were made to enter into the contract and did in fact induce the defendants to enter into the contract.

5.3.4 The defendants had they known the true facts would not have entered into the contract and consequently as a result of the material misrepresentations the defendants entered into the contract to their detriment.

5.3.5 As a result of the aforementioned material misrepresentations the defendants cancelled the agreement between the parties as they were entitled to do.

5.3.6 On 29 January 2014 the defendants' legal representative informed the plaintiffs that the agreement had been cancelled by the defendants as they were entitled to do."

10. The defendants pleaded further that in the event of it being found that they were liable to plaintiffs for the amount claimed then "the provision of the rental agreement to the effect that the first defendant must pay rental over a period of 60 months, at an annual escalation of 15%, and at a rate 6% above prime, as set out in Annexure A, constitutes a penalty stipulation in terms of section 3 of the Conventional Penalties Act, 15 of 1972." They plead that such penalty stipulation is out of proportion to the prejudice suffered by the plaintiffs' as a result of their alleged default.
11. The defendants plead further that the plaintiffs' caused their own loss in that they refused to accept return of the goods tendered to them.
12. Mr. Laudin Cloete ("Cloete") testified that he was and presently still is employed by a close corporation, namely Advanced Telcoms CC, as a sales person.

Advanced Telcoms is a close corporation specialising, inter alia, in the provision of telephone PABX systems to businesses. Every second month he would embark on a sales trip during which he would approach businesses on a so-called cold call basis, this being an approach made without an appointment to businesses which were not existing customers of Advanced Telcoms CC.

13. On 15 August 2013 he approached the first defendant's business in Cradock and introduced himself to the receptionist, one Lydia Alexander ("Alexander") as being from Advanced Telcoms. During the course of the ensuing discussion she stated that first defendant was experiencing problems with its current supplier, IP Solutions, mainly relating to the fact that IP Solutions were unable to provide an efficient and speedy response by its technicians when problems arose with their system.

First defendant sometimes had to wait for a week or more for technicians to arrive in Cradock. Cloete informed her that Advanced Telcoms supplied systems and serviced and maintained them. Because it had customers throughout the area as well as close to Cradock its technicians were in the area virtually every week. Furthermore, Advanced Telcoms were able to remotely log into the system by way of so-called remote diagnostics, thus in certain cases obviating the need for a technician to physically visit the premises where the system was installed. Alexander then took him to the owner, Mr. Pieter Joubert, the second defendant. After a further discussion second defendant instructed Alexander to assist Cloete with whatever he needed in order to facilitate the replacement of the IP Solutions system with that of Advanced Telcoms.

14. Because first defendant had an existing contract with IP Solutions it was necessary for that contract to be settled. Cloete calculated that the settlement figure thereof would be approximately R106 000,00. He further calculated first defendant's monthly rental in respect of the new contract as being R3 500,00 without VAT. That amount equated to the monthly rental for the new system together with the settlement amount in respect of the IP Solutions system. The annual escalation of 15% was agreed upon.
15. Second defendant then signed a Rental Credit Application (92) on behalf of first defendant for submission to SAPOR for approval. Cloete stated that all the details relating to first defendant which appear thereon were obtained from Alexander and filled in by him. He then submitted the document to his office in order for the application to be processed with SAPOR.
16. Once SAPOR's approval had been obtained arrangements were made for the installation of the Advanced Telcoms system. Cloete stated that it was the practice that after the installation of a system the technicians who installed it would obtain the signature of the client confirming such installation. The Installation document (94) relating to first defendant and confirming the installation of the Advanced Telcoms system bears the date 29 August 2013 as well as the signature of Alexander.
17. According to Cloete he proceeded back to first defendant's offices on 18 September 2013 in order for the Master Rental Agreement between Sapor and first defendant to be signed. As appears from the Master Rental Agreement (97) it was signed on behalf of first defendant by second defendant. Cloete stated that when the Master Rental Agreement was presented to second defendant for signature it was already completed in full. He denied the allegation in the plea to the effect that it was not fully completed at that time. He stated that he went through the document with second defendant before the latter signed it, confirming the rental amount, the escalation and the term of 60 months.
18. He stated that second defendant signed the Master Rental Agreement in his presence. Of particular relevance is the "Acceptance Certificate" which reads as follows:

"User hereby irrevocably declares to Hirer that:

- a. The goods described in the schedule (“the goods”) have been delivered and installed in accordance with all the conditions of the agreement (“The Agreement”).
- b. The goods, where applicable, have been subjected to all field operating and/or similar tests which have been completed and the results are satisfactory.
- c. The goods have been inspected, are new and unused, are in good order and condition, free from defect and ready for use in every respect.
- d. No representations, undertakings or warranties not specifically contained herein are binding on the Hirer. User acknowledges that User was referred to the Hirer by the Supplier of the goods and that the Hirer has purchased the goods from the supplier at the User’s special instance and request. Accordingly, User hereby indemnifies Hirer against any claim that may be made against Hirer, or for any loss that Hirer may sustain arising out of or in relation to the purchase by the Hirer of the goods from

the Supplier to pass ownership of the goods to the Hirer.

- e. The serial number/s on the goods correspond with the serial number/s on the schedule and have been insured in accordance with clause 5.1”
19. Cloete stated that to the best of his recollection second defendant did not ask him any questions pertaining to the Master Rental Agreement nor did he indicate that he was unable to read the fine print thereof.
20. Second defendant also signed Sapor’s “Contract Installation Confirmation” (99) in which the following appears:

“You have signed a rental agreement for the rental of equipment, which has been supplied by Advanced Telcoms CC. As this rental agreement is non-performance related, the warranties and maintenance undertakings will be supplied by Advanced Telcoms CC. The indemnity below serves to bring to your attention the fact that the monthly rentals are only for the equipment and not for any warranty/ maintenance arrangements you may have with the supplier. SUPPLIER INDEMNITY: In terms of the Master Rental Agreement signed between Sapor Rentals (Pty) Ltd and JW Auto CC dated 18 September 2013 the equipment detailed said Master Rental Agreement, the User undertakes to Keep the Hirer indemnified and to hold it harmless against all loss or damage from any cause arising which the Hirer may sustain as a result of it having purchased or attempting to purchase, the goods in this instance, from Advanced Telcoms CC in order to rent the goods to the User in terms of the Agreement. Therefore JW Auto confirms that it will not stop paying for any reason that may indicate non-performance from Advanced Telcoms CC.”

21. With regard to the settlement of the previous system Cloete stated that only first defendant could obtain the settlement amount from Wineland Finance which had financed the rental of the IP Solutions system. Once first defendant had obtained the settlement figures they would be forwarded to Sapor who would pay the settlement amount directly to either the third party or the finance house.

22. He stated that he assisted first defendant in obtaining the settlement figures. Second defendant also signed a document on first defendant's letterhead (96) reading as follows:

"Re: Settlement for Equipment: Samsung OS 7070 PABX; Serial Number S2JC407885

I, Pieter Joubert id no: [5...], am MEMBER of JW Auto CC am aware that Sapor Rentals Pty Ltd will settle our lease agreement relating to the Equipment: Samsung OS 7070 PABX: Serial Number: S2JC407885 currently financed with Winelands Finance and give my full authority to Sapor Rentals Pty Ltd to settle this lease agreement.

The settlement amounts to 55% of the new lease agreement between JW Auto and Sapor Rentals Pty Ltd dated 18 September."

Cloete stated that he could not remember having asked for a JW Auto document in blank in order to type the letter but did not deny having done so. The letter in effect authorised Sapor to settle the first defendant's indebtedness to Winelands Finance and was required by Sapor.

23. It is common cause that a number of emails were thereafter sent by Alexander both to IP Solutions and to Winelands Finance on 26 August and thereafter, requesting full settlement figures. On 29 August Winelands Finance provided a settlement figure in the sum of R106 307,40. The settlement advice (125) provided that the quotation was valid to 31 August 2013. The immediate problem, however, was that the settlement advice contained no banking details, thereby rendering it impossible for Sapor to pay the said amount prior to 31 August 2013. The settlement quotation accordingly expired.
24. Alexander then sent further emails on 30 September both to IP Solutions and Winelands Finance stating "could you please resent (sic) full settlement urgent we want to settle before Monday month end." In response hereto one Linda Thomson of Winelands Finance responded stating that they were "unfortunately in the middle of our month end run and the figures will change tomorrow to take into consideration the debit order payment for October. As soon as we have the new figures I will expedite a settlement quotation for your attention." Nothing further was, however, received from either IP Solutions or Winelands Finance.
25. As set out above defendants pleaded that Cloete had represented to them that he was employed by Telkom.
26. A statement dated 18 October 2013 (9) made by Alexander was put to him. Alexander stated therein as follows:

"Laudin Cloete vanaf Advanced Telcoms het in Augustus 2013 by JW auto aan gekom, hy het homself voorgestel en Ons (personeel by JW auto) vertel hy is vanaf Telkom en is hier om te kyk na JW Auto se telefoon rekening waar ons kan bespaar. Ek het hom na Pieter Joubert eienaar van JW Auto geneem, omdat ons reeds problem met IP solutions gehad het.

Ek het hom voorgestel aan Pieter en Laudin het weereens vir Pieter gesê hy is van Telkom. Hy het vertel hy gaan kyk of hy ons uit kan kry by IP Solutions sodat ons terug kan gaan na Telkom. Pieter het hom vertel dat hy 'n vriend het wat by Telkom werk en as ons probleme het is hier onmiddelik mense om ons te help. Al rede hoekom ons oor geskuif het IP Solutions is omdat hy (Pieter) gewag het vir Telkom vir kwotasies, maar intussen het IP Solutions se verkoopsman gekom en met Mnr. Deandre Dreyer gepraat en hom oorrede om IP Solutions stelsel te installeer waarna Pieter ook ingestem het. Laudin het gesê

hy sal met sy mense (Telkom) praat en terugkom.

Hy het nooit reggestel dat hy nie deel is van Telkom maar wel verkoopsman van Advanced Telcoms. Die dag met installasie van

telefoon moes hy kamstig by Telkom een of ander part nog gaan kry wat kort was. Ons het eers 3 weke gelede uitgevind dat hy wel nie van Telkom is."

27. Cloete denied that he had made any such representations. He denied also having gone to Telkom to pick up a part. He stated that he had arrived at the premises of first defendant in his company car bearing the Advanced Telcoms logo on the side. He was also wearing his formal company shirt with an Advanced Telcoms badge and an NEC badge on it. It was put to him that he had informed both Alexander and second defendant that he was from Telkom. He denied this. He denied further that

he had told either Alexander or second defendant that the system which Advanced Telcoms would install would be serviced or be capable

of being serviced by Telkom Cradock technicians. He stated that Telkom was not allowed to service Advanced Telcoms systems which were not Telkom systems but NEC systems.

28. He stated that during October 2013, subsequent to the conclusion of the agreement, he was contacted by Alexander who expressed her dissatisfaction with the system chiefly because of the cost. In response to an email from her he replied on 22 October 2013:

"Omdat dit uit my hande is nou het ek dit aan my baas oorgelaat. Ek probeer nog my beste om julle gelukkig te hou en al wat ek weet wat die hele proses terug hou is die settlement van IP Solutions. Sodra dit afgehandel is kan ons dit oorbetal."

29. She replied to this by email on the same date:

"Die problem is Jy het gekom, JY het gesê dit kan nie live gaan voor als nie reg is en IP Solutions se settlement betaal is. Ons betaal nou 2 stelsels en Jul gee nie om Jul het MOS nou klaar jul geld. Jy het gesê ons gaan BESPAAR waar bespaar ons nou?" (sic)

30. On 23 October 2013 he responded:

"Sodra ons die settlement kry dan kan ons IP Solutions uitkoop. Ons het vir julle besparing gewys al."

31. Cloete stated that second defendant and Alexander were aware that the settlement figure could only be furnished to first defendant on its request and not to anyone else.
32. Ms. Tavares, the Litigation Manager for Sasfin Bank, testified that she was authorised to act for all three plaintiffs. She explained that once the bank had agreed to advance credit the Master Rental Agreement would be signed together with the confirmation of installation of delivery document and the current settlement quote. She stated that in most cases installation would take place before signature of the Master Rental Agreement because the Master Rental Agreement contained an acknowledgment by the client that it had the equipment which was fit for purpose, which it could not do if the equipment was not yet installed.
33. She stated further that a “last call” would be made to a client to establish that the client was satisfied with the equipment and was happy to go ahead with the finance and the rental agreement. In the present matter this was done by Bontle Mvayana from the operations department on 19 September 2013.
34. With regard to the commencement date of 27 September 2013 she stated that the agreement would commence on that date and the supplier would be paid. The first defendant would then be debited with the first rental amount. She stated that there was nothing in the Master Rental Agreement to the effect that the deal could not go live until such time as the settlement figures had been obtained and paid because of the fact that in practice this happens simultaneously. She stated that she had never experienced a situation where a client had requested that a settlement figure be included in the finance arrangements but then failed or refused to furnish the information pertaining to that settlement figure. She stated that third parties were precluded from approaching finance houses and requesting settlement figures. So too were suppliers. The request had to be done by the client and the information received by the client.
35. She confirmed that an amount of R115 000,00 was being held in retention for payment to first defendant but stated that first defendant had rejected the tender thereof.
36. Mr. Corrie Badenhorst, Sales Director at Sapor Rentals (Pty) Ltd, stated that Sapor is a brokerage company which accepts rental credit applications for assessment in order to secure rental finance. Advanced Telcoms CC is on its supplier list. Sapor and Advanced Telcoms entered into a Supply Agreement (128) in terms whereof the relationship between Advanced Telcoms and Sapor was regulated. Of particular relevance to the present matter is clause 8.12 of the Agreement which provides as follows:

“Nothing contained herein, or otherwise, shall be deemed or construed as constituting or authorizing the one party to act as or to hold itself out as the agent of the other party.”

37. Badenhorst testified that Advanced Telcoms accordingly had no authority to act on behalf of Sapor as its agent. He confirmed that Sapor received the Rental Credit Application (92) signed by second defendant and that the application was then approved.

38. With reference to the settlement letter of authority (96), signed by second defendant on 18 September 2013, he stated that the purpose thereof was for the client to acknowledge that there was a settlement built into the new transaction and that the settlement would be paid by Sapor to the previous finance house. He stated that this letter did not afford Sapor authority to approach the previous finance house to obtain their settlement figure. Such settlement figure would only be given to the client.
39. He referred in this regard to an email
- (171) sent by Ingrid Williams of Winelands Finance to Leannda Badenhorst of Sapor wherein Williams stated:

“Hi. Please forward me an email address I can send the settlement to at the client’s office. I tried jwauto@worldonline.co.za but the mail returned not delivered. I am not a loud (sic) to send termination settlements direct to you, the request must come from the client. I know you will be paying it but this is a formality I have to follow.”

40. With regard to the Winelands Finance settlement (125) Badenhorst stated that it was apparent therefrom that it was issued on Thursday 29 August and expired on Saturday 31 August. He stated that it was invalid not only because it had expired but also furthermore because there were a number of documents which Sapor had not yet received in order for payment to be made.
41. Badenhorst referred to a number of emails sent during September 2013 between employees of Sapor and Advanced Telcoms in which reference was made to the urgent need for an updated settlement. In particular, on 26 September, Leannda Badenhorst of Sapor wrote to Tara Kleinpenning, (156) an administrator of Advanced Telcoms, stating:

“These settlements do not have banking details on them, I tried calling Winelands Finance for the banking details and they informed me they will not give me these details over the phone, I must request it from Ingrid in writing via email and I should have her email if I got the settlement.

Please assist, not sure how you got the settlement, if from the client or from Winelands Finance directly, but I am getting no joy here in getting the banking details to pay these settlements and to also get the new settlement for JW Auto.”

42. On 30 September at 09h25 Leannda Badenhorst again wrote (157) to Tara Kleinpenning stating:

“Please see confirmation of payment for JW Auto. Please get us the settlement for this as soon as possible.”

43. Tara Kleinpenning replied at 09h41, copying the email (157) to Cloete:

“Thanks, Leannda, Laudin please advise on the settlement.”

44. At 11h16 Leannda Badenhorst wrote (159) to Tara Kleinpenning:

“Hi Tara, we must get this settlement today, it is the last day of September, and we paid you for this deal on Friday, so we must have the settlement today as the deal is going live and the settlement must be paid today.”

45. On 15 October Leannnda Badenhorst wrote

(160) to Linda Thomson of Winelands as follows:

“Do you have any news on the settlement going to the client for this deal please? We need to settle this account now.”

46. On the same day she wrote (160) to Tara Kleinpenning:

“Please can you see if the client has a settlement yet. I am waiting to hear from Linda at Winelands Finance.”

47. On 16 October Leannnda Badenhorst wrote to Tara Kleinpenning (164):

“Hi Tara, this client called me now telling me she wants to cancel this deal. The deal has already been paid out and gone live, all we were waiting for was to pay the settlement. This is the same finance house we are settling for the other client who was giving us trouble when the client informed us that the rep said they were from Telkom. This client is now telling me the same thing. Lydia from JW Auto informed me that they want to cancel because they were under the impression that the system was from Telkom and not from Advanced Telcoms, however, the client signed the release note and did final call, so why are they now saying this? Did they not read the document before signing?”

48. Badenhorst stated that when this matter was brought to his attention he telephoned Alexander as well as Winelands Finance, asking for their assistance to obtain the settlement. Eventually, on 15 January 2014, he addressed an email to Alexander (17):

“Hi Lydia, as discussed please can you send me your attorney’s details so we can try and resolve this issue... To say that Mr. P. Joubert just signed the paperwork that was put in front of him and that you want to cancel the deal is not a valid excuse. Mr. P. Joubert had many opportunities to cancel the deal before the deal was discounted... As I mentioned a last call to confirm installation and what Mr. Joubert signed for was done before the deal was discounted. We are waiting for the updated settlement so that we can settle Winelands Finance.”

49. Badenhorst stated that Cloete did not act on Sapor’s behalf. He was not Sapor’s agent. He was acting on Advanced Telcoms’ behalf. The Master Rental Agreement between Sapor and first defendant was only signed after first defendant had agreed with Advanced Telcoms on the terms, the finance had been approved and installation had taken place. He stated that Advanced Telcoms would quote the client on the equipment, model, brand, accessories and would present the quote to

the client. If the client was satisfied it would sign the quote and complete the credit application for submission to Sapor.

50. He agreed that there was nothing preventing Sapor from holding back on the commencement of the deal until such time as the settlement figures had been obtained. He stated, however, that second defendant had signed all the necessary documents in order to secure the release of the payment and to “make the deal go live” and had never instructed Sapor to hold back. He denied that the commencement of the deal was conditional on the settlement having been obtained.
51. On behalf of the defendants Mr. Pieter Joubert, the second defendant, testified that he was the only member of the first defendant close corporation. At that time JW Auto had branches in Grahamstown, Middelburg, Somerset East and Colesberg and required a PABX telephone system. He stated that at the time of Cloete’s visit to his Cradock offices the business was experiencing very serious problems with the telephone system which had recently been installed by IP Solutions. Apart from the deficiencies in that system it also took IP Solutions up to a week to attend to any problems because they had no technicians in the area.

Joubert stated that he had wanted to install a Telkom system more especially as a good friend of his from Cradock, one Naas, worked for Telkom as a technician and would be able to attend to any problems immediately they arose. Telkom, however, had not responded

timeously to his request for a quotation and, given the urgency of the situation at the time, he had decided to use the IP Solutions

system.

52. He confirmed that during August 2013 Alexander had brought Cloete to his office. She said that Cloete was from Telkom and could help with the telephone system. According to him Cloete said to him “hy is van Telkom. Hulle is plaaslik. Hulle kan onmiddelik regmaak. Hy kon vir my ‘n baie goedkoper diens lewer.” Joubert agreed under cross-examination that at the time of Cloete’s cold call he would have had no idea that first defendant was experiencing problems with its telephone system and would not have been aware that Joubert desperately wanted a Telkom system. Despite this, according to Joubert, Cloete introduced himself as being from Telkom. Under further questioning, however, Joubert backtracked considerably from his categorical assertion that Cloete had said that he was from Telkom. He now conceded that Cloete had in fact introduced himself as being from Advanced Telcoms and conceded that he, Joubert, had assumed that this was one of Telkom’s many divisions. This assumption was based, inter alia, on the fact that Cloete was driving a van with “a big blue Telkom sticker on it, that same blue colour that Telkom had at that stage en toe hy instap toe sê ek vir hom maar Naas is my pel. Ek gaan nooit weer in my lewe probleme hê en hy sê dis reg.”
53. Joubert’s evidence in this regard then became extremely confused. Having stated that he thought that Cloete worked for Telkom he then stated that he thought that Advanced Telcoms was “affiliated” to Telkom or that it “had iets met Telkom te doen of hy werk saam met Telkom of daar is ‘n assosiasie tussen Advanced Telcoms en Telkom.”

54. He stated that he had told Cloete that he had only recently installed the IP Solutions system. Cloete explained that this was not a problem because the IP Solutions rental would be settled. Joubert accordingly signed the letter authorising Sapor to settle the Winelands Finance lease agreement. He also signed the Rental Credit Application (8). He stated that he also assumed that Cloete was representing Sapor. Under cross-examination, however, he stated, for the first time, that he

thought that Cloete was in fact representing both Sapor and Advanced Telcoms, although he conceded that he knew Cloete was not from Sapor but from Advanced Telcoms. He then said that he also thought that Cloete was representing or affiliated to Telkom. He stated further that he assumed Cloete was working for Sapor because the Master Rental Agreement was entered into with Sapor. He then stated that he assumed that Sapor and Advanced Telcoms were in fact one company.

55. He confirmed that the Advanced Telcoms system was installed on 29 August. He said that as far as he was concerned the system to be installed was to be a Telkom system which would be serviced locally. He conceded, however, that no documentation, including the Master Rental Agreement, made any mention of Telkom maintaining the system and that, on the contrary, all the documentation provided expressly that Advanced Telcoms would do so. In this regard he stated that he had not read the relevant documents and had merely taken Cloete's word for it that Telkom would do so. He described the Advanced Telcoms system as "brilliant" stating that he wished that he still had it.
56. With regard to the Master Rental Agreement he stated, in accordance with what appears in the plea, that it had not been fully completed at the time that he signed it. Under cross-examination, however, he conceded that this statement was not correct. He stated that "ek neem aan dit was ingevul gewees, maar al hierdie ander handtekeninge en of presies die serial nommers en goed is in, dit kan ek nie onthou nie." He then said that it was only the signatures and the dates thereof which were not filled in and that "die res was alles in gewees."
57. He was specifically asked whether the commencement date of 27 September 2013 was filled in to which he replied "dis reg." Later in his evidence, however, he stated that he could not remember if the commencement date had been filled in at the date of signature. He conceded that this latter evidence was in contradiction of his earlier admission that the date had been filled in. He conceded too that in defendant's plea the admission had been made that "the rental agreement would commence on the date as defined in the agreement." He stated, however, that Cloete had assured him that the agreement would not "go live" before the settlement had been paid.
58. As set out above it was pleaded by the defendants that the system to be installed would substantially reduce first defendant's monthly telephone account and rental. It is not necessary to deal with Joubert's evidence in detail in respect of the alleged increase in costs occasioned to first defendant after installation of the Advanced Telcoms system. After

considerable debate under cross-examination he conceded that the system was “brilliant”; that he wished he still had it; that it was entirely effective and that the costs problem in all probability lay with the fact that during installation certain lines had been cut and not reconnected. The following exchange is relevant in this regard:

“Q As jy die skikkings bedrag uithaal is jou huur goedkoper?”

A Dit sou ‘n paar rand goedkoper gewees het.

Q En u was bereid om die addisionele bedrag te betaal wat die skikkingsbedrag insluit omdat u die kostes sou spaar op die lyne.

A Oor ek die kostes aan die ander kant sou spaar wat nooit gebeur het nie.

Q So dis nie dat meneer Cloete u mislei het nie. Dis net die goed wat hy gesê het moet gebeur het nie gebeur nie. Is dit korrek?

A Dis reg.”

59. Furthermore, although he had stated in his affidavit in opposition to the plaintiffs’ summary judgment application that “I know that Cloete excluded from the savings calculator a number of material factors” he now conceded that Cloete had not in fact done so and that the problem lay rather with the execution of the contract.
60. He stated that he had not read the Master Rental Agreement and the terms and conditions on the back thereof. Cloete had assured him that the terms and conditions were the normal clauses to be found in any such agreement. Although it was alleged in defendants’ plea that certain provisions which he would have expected to have been explained to him were not so explained he conceded that in fact there were none and that the only reason for having made those allegations in the plea was because he had not read the contract. He conceded further that he would have been able to read the terms and conditions, albeit with some difficulty, had he tried to do so. Because he had not so tried he never told Cloete that the print was too small for him to read.

I interpose to state that it is common cause that the terms and conditions, although in small print, are perfectly legible.

61. With regard to the authority letter he initially stated that his understanding thereof was that he had given authority to Cloete or Sapor to obtain the settlement figures. He eventually conceded, however, that Winelands Finance could only give the figures to first defendant. He conceded that even if authority had been given by first defendant to Cloete or Sapor the request for the figures could only come from first defendant and the reply thereto could only be given to first defendant. In the result therefore he conceded that the authority letter did not give Sapor the authority or the right to request the information or to receive it from Winelands Finance and that “settle” in the context of the letter simply meant “to pay” once first defendant had received the figures.

62. He stated that he only became aware that there was a problem with the settlement when the double payments were first deducted. Nobody had told him about the problem with obtaining the settlement figures and, had he known, “sou ek seker binne ‘n bestek van drie ure, sou ek die aflos kry dat Laudin het gesê nou is dit in hulle hande, sy baas se hande, ons hoef oor niks verder te worry nie.”
63. He agreed that it appeared from the correspondence that Sapor and Advanced Telcoms were assisting as far as they could to obtain new settlement figures from Winelands Finance on behalf of first defendant. His evidence in this regard is relevant:

“Q Stem u saam dat die feit dat daardie syfers nie terug kom nie is nie as gevolg van die feit dat Advanced Telcoms of Sapor enige iets gedoen of nie gedoen het nie?”

A Dis reg.

Q So die enigste party wat in ‘n posisie was om Winelands te dwing om die syfers beskikbaar te stel was JW Auto?

A Dis reg.”

64. It was put to him further that Cloete was unable to resolve the problem on his own to which he agreed. He stated that he personally never attempted to contact Winelands Finance or IP Solutions to sort out the problem but had left it to his administrative staff. He did not contact them himself because, as far as he was concerned, he had given them the authority to settle the account by virtue of the authority letter. When the problem was not resolved he cancelled the contract by way of stopping his debit order. He stated that the equipment should thereupon have been returned by Sapor to Advanced Telcoms which, so he said, could use it again.
65. With regard to the reappearance of IP Solutions on the scene he stated that someone, whose name he could not remember, had arrived from IP Solutions at his premises and had told him that he had spoken to Alexander and understood that there was a problem with the settlement figure. He then instructed IP Solutions to remove the Advanced Telcoms system and to reinstall their system.
66. Lydia Alexander testified that she was employed by first defendant as a stock controller. She confirmed that during August 2013 Cloete had made a cold call to first defendant. She stated that he had introduced himself as “Laudin van Telkom”. She then stated that he had said “hy is van Advanced Telcoms, hy is ‘n verteenwoordiger van Telkom.” She said that she could not recollect what clothing he was wearing but accepted that he was from Telkom because he said so. Questioned about this she stated that:

“Hy kon seker Advanced Telcoms gesê het, maar dit was dat hy afhanklik is van Telkom” and “ek het nie daai tyd nou so fyn gehoor dat hy nou Advanced Telcoms is, dat dit nie nou Telkom is nie, maar seker Advanced Telcoms.”

Q: So hy het gesê hy is Laudin Cloete van Telcoms?

A: Ja, seker.”

67. Cloete told her that he could look at their telephone system because he could save them money. She then took him to Joubert. He introduced himself to Joubert as Laudin Cloete from Advanced Telcoms. She was referred under cross-examination to a statement made by her on 18 October 2013 at the instigation of one Rosco George of IP Solutions wherein she stated (9):

“Laudin Cloete vanaf Advanced Telcoms het in Augustus 2013 by JW Auto aan gekom, hy het homself voorgestel en ons (personeel by JW Auto) vertel hy is vanaf Telkom en is hier om te kyk na JW Auto se telefoon rekening waar ons kan bespaar. Ek het hom na Pieter Joubert eienaar van JW Auto geneem, omdat ons reeds probleme met IP Solutions gehad het.

Ek het hom voorgestel aan Pieter en Laudin het weer eens vir Pieter gesê hy is van Telkom. Hy het vertel hy gaan kyk of hy ons uit kan kry by IP Solutions sodat ons terug kan gaan na Telkom. Pieter het hom vertel dat hy ‘n vriend het wat by Telkom werk en as ons probleme het is hier onmiddelik mense om ons te help... Laudin het gesê hy sal met sy mense (Telkom) praat en terugkom.

Hy het nooit reggestel dat hy nie deel is van Telkom maar wel verkoopsman van Advanced Telcoms. Die dag met installasie van

telefoon, moes hy kamstig by Telkom een of ander part nog gaan kry wat kort was. Ons het eers 3 weke gelede uitgevind dat hy wel nie van Telkom is... ons sal niks bespaar soos aan ons belowe was deur Laudin Cloete vanaf Telkom.”

68. She now stated that Cloete said that he was “van Advanced Telcoms wat vir Telkom verteenwoordig.” Asked why she had never said this before she stated that “ek moes dit miskien gesê het.” She then reiterated that Cloete had introduced himself to Joubert as being from Telkom. Her evidence then proceeded as follows:

“Q: So hy sê toe nou hy is van Advanced Telcoms maar toe u nou met hom by die kantoor ingaan toe sê hy nee hy is van Telkom is dit wat u sê?

A: Nee, hy het vir ons daar, ons het aangeneem hy is van Telkom want hy is ‘n Telkom ou.

Q: U het aangeneem?

A: Ja hy is verteenwoordiger. [tussenbeide]

Q: So hy het nooit vir u gesê hy is van Telkom nie?

A: Hy het nie so direk gesê hy is van Telkom nie, hy verteenwoordig Telkom, hy kan vir ons ‘n Telkom sisteem, want alles is Telkom in Cradock.

Q: Het hy vir u gesê hy is van Telkom of het hy vir u gesê hy is van Advanced Telcoms?

A: Advanced Telcoms.”

69. She stated that she and Joubert had informed Cloete of the problems they were experiencing with the IP Solutions system. She furnished Cloete, inter alia, with their telephone accounts and, after some discussion, he said he could save them money without, however, giving them any details of how he would do so. He then stated that he would see what he could do to get them out of the current IP Solutions contract “om terug te gaan Telkom toe.”

Questioned on this she stated that they had informed Cloete that they wanted to go back to Telkom whereupon Cloete had said that he would talk to his people and see what he could do. She confirmed that the contract was then entered into. She stated that Cloete had also promised that the contract would not “go live” before “al die papierwerk en alles nie uitgesorteer is nie.” Cloete asked for first defendant’s blank letterhead and then typed the letter of authority which he gave to defendant to sign so that the settlement figures could be obtained. She agreed, however, that Cloete had asked her to obtain the settlement. She accordingly sent an email to Kirsty at Winelands Finance and to Cecilia at IP Solutions (16) on 26 August stating “could you please sent (sic) Full Settlement URGENT PLEASE.”

70. She was asked how she had eventually found out that Cloete was not from Telkom. She stated that she had been telephoned by the above mentioned Rosco George. She had told him that Cloete had said he was from Telkom whereupon Rosco George told her that he was not. She was asked why she had told Rosco George that Cloete had said he was from Telkom, when in fact he had not said so, to which she replied that “hy laat ons glo hy is van Telkom, want soos hy vir ons gesê het ons het vir hom gesê ons wil terug gaan na Telkom toe. Hy het nooit vir ons gesê maar ek is nie van Telkom, ek is van Advanced Telcoms so julle gaan nooit kan terug gaan Telkom toe nie. So ons het aangeneem hy is van Telkom, niteenstaande die feit dat hy gesê het hy is van Advanced Telcoms.”

71. Although she said she did not know why Rosco George had telephoned her she conceded that it might have been in consequence of the request to IP Solutions for the settlement figures. In this regard she confirmed having received an email

(103) from Rosco George on 14 October in which he expressed “concern” at the implications of first defendant’s new contract and proceeded to state as follows:

“The next steps we must take is to have the NEC system removed. Lydia I would advise you to contact Sapor and inform them of what has happened – that you cannot afford this, also that you were misled that it was Telkom you were dealing with. Advanced Telecoms ARE NOT AND WILL NEVER BE A PART OF TELKOM. So it is of utmost importance to put an end to this contract – if you create enough of a hassle for Advanced Telecoms – and I would bet this would not be the first client this has happened to: Sapor Rentals may have them buy back the deal and cancel the deal.

If you can successfully have this system removed I will at no cost re-install the Samsung PABX.”

Rosco George also proposed a new more advantageous deal.

72. She stated further that Rosco George had telephoned her and told her that Cloete was busy talking to their clients and trying to influence them to switch over to Advanced Telcoms. He was trying to “rokkel” their clients from IP Solutions. According to George, Cloete told their clients that he was from Telkom and would be able to save them money whereas it later transpired that there were in fact no savings. She stated that she never told Cloete about this call but instead phoned him and asked him for the so-called “calculator”
- (106) which would indicate the savings which the Advanced Telcoms system would give them. After receipt of the calculator she told Cloete that she had looked at it and that it was misleading. She conceded that none of this had been put to Cloete during his cross-examination.
73. Although Mr. Joubert had not mentioned a word in his evidence concerning Alexander’s alleged conversation with Cloete she insisted that she had told him and stated that “toe ek klaar met Cloete gepraat het het ek direk na Pieter gegaan en vir hom gesê die outjie het vir ons gejoj oor die besparing.”
74. In support of her averment that Cloete was attempting to mislead the defendants and “to catch them out” she referred to the fact that the IP Solutions Samsung PABX rental figure was not reflected in the top column of the calculator but only appeared in the bottom section of the document under “total savings”. She was asked in the circumstances what her problem was to which she replied that:

“Ek gaan mos as ek eers ‘n ding kyk gaan ek nie eers onder kyk nie. Ek gaan eers hier bo kyk, dit is wat ons gaan bespaar.

Q: Maar mevrou Alexander as u kyk na die kolom aan die onderkant daar sê dit ‘total savings’.

A: Ja.

Q: En daar is die bedrag in?

A: Nou reeds dit is hoekom ek sê hoekom hy dit nie in die eerste plek in die eerste kolom gesit het nie.

Q: So u probleem is oor die format? Dit is nie dat hy dit glad nie ingesit het nie. Dit is in, dit is net in die verkeerde plek. Is dit u problem?

A: Hy moes dit in die eerste plek vir my daar bo ook gesit het.

Q: Hoekom mevrou?

A: Hy werk dan nou vir my ‘n cost uit daarbo.”

75. After further cross-examination she stated that:

“Hy wou gehad het ons moet nou dink aan die begin ‘wow’ dit is ‘n besparing wat ons gaan hê.

Q: Maar dit is daar, dit is nie dat dit glad nie daar is nie? Dit is net op 'n ander plek as wat u sou verwag het. Dit moes wees, is dit korrek?

A: Ek wou gehad het dit moet daar bo ingeweess het.

Q: Mevrouw ek gaan nie verder met u debateer nie. Al wat ek vir u sê, u getuienis is misleidend, net soos wat u sê meneer Laudin se dokument is misleidend. As u sê dit is nie daar nie, u is nie korrek nie. Dit is daar, dit is net nie op die plek waar u verwag het dit moes wees nie, is dit korrek?

A: Dit moes daar gewees het.

Q: Maar dit is steeds in die dokument.

A: Dit is in die dokument maar dit is in 'n ander kolom.

Hof: Soos u na die dokument, in sy geheel kyk, dan het u besef dat daar wel 'n besparing is.

A: Besparing is ja."

76. Her evidence then continues as follows:

"Q: Mevrouw so die boonste kolom het nie bedoel om besparing aan te toon nie, stem u saam met my.

A: Ok, ek stem met u saam, maar hy het in die eerste plek het hy dit nie ingesit nie. So hy wou ons probeer uitvang het deur dit."

77. The settlement advice (125) was duly sent by Winelands Finance. She gave the settlement advice to Cloete. According to her it was incumbent on Advanced Telcoms to obtain Winelands Finance's banking details.

78. She stated that during late September Cloete asked her to obtain a fresh settlement figure. She again emailed IP Solutions on 26 September stating "COULD YOU PLEASE RESENT (SIC) FULL SETTLEMENT URGENT WE WANT TO SETTLE BEFORE MONDAY MONTH END." On 30 September 2013 she sent another email to IP Solutions in the same terms. On 30 September 2013 she received an email from Linda Thomson of Winelands Finance stating:

"Hi Lydia we are unfortunately in the middle of our month end run and the figures will change tomorrow to take into consideration the debit order payment for October. As soon as we have the new figures I will expedite a settlement quotation for your attention."

79. She stated that she never knew that the deal would "go live" on 27 September. Asked why she then needed the figures so urgently "before month end" she conceded that there was no real urgency except that they wanted to have the deal wrapped up and the paperwork finished. She stated that she never saw the contract and the commencement date. She was referred to the email (171) sent from Ingrid Williams of Winelands Finance to Leanda Badenhorst of Sapor stating "please forward me an email address I can send the settlement to at the client's office. I tried jwauto@worldonline.co.za but the mail returned not delivered. I am not allowed to send termination settlement direct to you, the request must come from the client,

I know you will be paying it but this is a formality I have to follow.”

80. She now agreed that only first defendant could have obtained the settlement figures but stated that in that case Cloete could have told her and she would have tried harder. She never told Joubert of the problem because she did know that there was one.

81. She was referred to the email (115) sent by Cloete to her on 22 October stating:

“Omdat dit uit my hande is nou het ek dit aan my baas oorgelaat. Ek probeer net my beste om julle gelukkig te hou en al wat ek weet wat die hele proses terug hou is die settlement van IP Solutions. Sodra dit afgehandel is kan ons dit oorbetaal.”

82. She replied to this email on the same day stating:

“Die problem is jy het gekom JY het gesê dit kan nie live gaan voor als nie reg is en IP Solutions se settlement betaal is. Ons betaal nou 2 stelsels en jul gee nie om jul het MOS nou klaar jul geld. Jy het gesê ons gaan BESPAAR waar bespaar ons nou?

Cloete replied hereto on 23 October stating:

“Hi Lydia, sodra ons die settlement kry kan ons IP Solutions uitkoop. Ons het vir julle besparing gewys.”

83. As appears from the evidence set out above the respective versions of plaintiffs and the defendants are mutually destructive. In these circumstances the well known dictum of Eksteen J (as he then was) in *National Employers’ General Insurance Co Ltd v Jagers* 1984

- (4) SA 437 (E) at 440 D – G is applicable:

“It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.”

84. Cloete was, in my view, a good witness whose evidence that he did not represent to Joubert or Alexander that he was from Telkom not only remained unshaken but, furthermore, was, in my view, in accordance with the probabilities of the matter.

85. Both Tavares and Badenhorst were good witnesses. The evidence of Tavares established beyond any doubt that it was only the first defendant which could request and obtain the settlement figures. As appears from the evidence set out above the second defendant and Alexander were, in the light of this evidence perforce obliged to concede that this was indeed so.
86. Joubert impressed me as a basically honest witness in most respects although I gained the impression that he was not entirely open with the Court as to the role played by IP Solutions which led up to the purported cancellation by first defendant of the contract. His evidence concerning Cloete's introduction as being from Telkom was most unsatisfactory and it became apparent, in my view, that this evidence was based almost entirely on assumptions made by him. In my view it is clear that he jumped to the conclusion that Cloete was indeed from Telkom because of the similarity in the names and of his frustration with his present telephone system. He in effect heard what he wanted to hear.
87. I was not impressed by Alexander. She was, in my view, very far from being the unbiased, ostensibly independent witness described by Mr. Schoeman S.C., who appeared for the defendants. She was instead, in my view, an evasive and obdurate witness. Her evidence was contradictory, unclear and, at times, clearly false.
88. As will have been seen from the evidence set out above and, in particular, from the concessions perforce made by second defendant, the grounds upon which the defendants relied in paragraphs 5.2.2, 5.2.3 and 5.2.4 of their plea have been shown to be without merit.
89. As to the averment in paragraph 5.2.1 of the plea, to the effect that the documents were not fully completed when presented to second defendant for signature, this resolved itself into a dispute as to whether the commencement date of 27 September was already filled in on the Master Rental Agreement when it was signed by second defendant.
90. In my view no reliance can be placed on second defendant's evidence in this regard. He at first stated that he assumed that the date was filled in. He then stated categorically that it was filled in. He then stated that he did not remember if it was filled in. He in any event didn't read through the agreement. Furthermore, as pointed out to him by Mr. Aucamp, who appeared for the plaintiffs, the defendants in their plea had in any event admitted therein that the agreement would

commence on 27 September 2013. In the circumstances I accept Cloete's evidence that the Master Rental Agreement was fully completed at the time that second defendant signed it.

91. I turn then to consider the allegedly false representations made by Cloete to the defendants as set out in paragraph 5.3 of their plea.

92. In this regard Mr. Schoeman submitted that the defendants were not bound by the agreement with Sapor because of the misrepresentations which induced first defendant to enter into it and that therefore the agreement between Sapor and first defendant was void ab initio or voidable at the instance of the defendants. Foundational to this admission is that Cloete, through the eyes of outsiders, was clothed with the authority to act on behalf of Sapor because he negotiated the terms of the agreement, had access to Sapor's

documents and agreements and had presented these to the defendants for signature.

93. It will be convenient to deal firstly with the issue of the alleged misrepresentations as a finding to the effect that no such misrepresentations were made by Cloete would render the submissions concerning Cloete's authority to act for Sapor otiose.
94. It is trite that a party wishing to avoid a contract due to misrepresentation must allege and prove that a knowingly false representation was made by the particular party or its agent, that the representation was material and that it would have and did induce a reasonable person to enter into the contract.
95. In *Gilbey Distillers and Winters (Pty) Ltd v Morris N.O.* 1990 (2) SA 217 (SE), a decision emanating from this Division, Kannemeyer JP stated as follow:

"Finally the applicant's allegation that the first respondent is guilty of fraudulently concealing the true facts from the second respondent must be considered. The onus of proving fraud is on the applicants. Although the onus is the ordinary civil one i.e. one that must be discharged on a balance of probabilities, one must bear in mind that fraud will not lightly be inferred. Gates v Gates 1939 (AD) 150 at 155."

96. In *Gates v Gates* supra, at 155, the following was stated:

"It is true that in certain cases more especially in those in which charges of criminal or immoral conduct are made, it has repeatedly

been said that such charges must be proved by the 'clearest' evidence or 'clear and satisfactory' evidence or 'clear and convincing' evidence, or some similar phrase. There is not, however, in truth any variation in the standard of proof required in such cases. The requirement is still proof sufficient to carry a conviction to a reasonable mind, but the reasonable mind is not so easily convinced in such cases because in the civilised community there are moral and legal sanctions against immoral and criminal conduct and consequently the probabilities against such conduct are stronger than they are against conduct which is not immoral or criminal."

97. In paragraph 5.3.1.1 of the plea it is pleaded that Cloete represented to the defendants that he was "employed by/and/or associated with Telkom and that he would be able to supply and install a Telkom telephone system which would be serviceable by Cradock Telkom technicians." In submitting that defendants had discharged the onus upon them of proving the alleged misrepresentation in this regard Mr. Schoeman relied heavily on the evidence of Alexander. As I have said above, I have grave problems with the calibre of her evidence. Her

evidence commenced at the outset with an allegation that Cloete introduced himself as being from Telkom. This evidence was subsequently shown to be untrue, as too was the averment to similar effect in her statement of 18 October 2013. Although she was forced during the course of her evidence to concede that Cloete had never said that he was from Telkom she persisted in attempting to link him somehow to Telkom in the face of all the evidence to the contrary.

98. It is, in my view, utterly improbable that Cloete, on a cold call, with no inkling whatsoever as to first defendant's problems and needs, would have introduced himself as being from Telkom. Furthermore, not only were his motor vehicle and his clothes branded with the logo of Advanced Telcoms but so too were all the telephones subsequently installed as well as the switchboard. It is quite improbable in these circumstances that anyone could have been brought under the impression that Cloete was from Telkom. It is also quite improbable that Cloete would have represented that the system would be serviced by Telkom. There was no need for him to have made such a representation. On his evidence Advanced Telcoms could very adequately service the system

themselves by logging on remotely to the system in order to resolve any problem that might arise. I accept Cloete's evidence that he informed Joubert and Alexander of this. Advanced Telcoms also had technicians available in the area.

Furthermore, if Cloete had made such a representation he could not but have been aware that his subterfuge would have been speedily

exposed when the very first problem arose with the system. It is hardly probable in these circumstances that he would have made such a representation.

99. In my view Joubert's evidence does not take defendant's case any further. It is clear that his averment that Cloete was in some way associated with Telkom was based entirely on assumptions on his part. I therefore accept Cloete's evidence in this regard and reject the evidence on behalf of defendants to the contrary.
100. In paragraph 5.3.1.2 of the plea it is pleaded that Cloete represented that the Advanced Telcoms system would be equal to or of better quality than the existing system. The evidence of Joubert discloses that, far from being a misrepresentation, the statement by Cloete to this effect was entirely truthful. Joubert described the Advanced Telcoms system as "brilliant" and stated that he wished he still had it instead of the IP Solutions system which was problematic and inferior it is a matter of some surprise, in the light of this evidence, that such an averment could have been pleaded.
101. In paragraph 5.3.1.3 it is pleaded that the system to be installed would substantially reduce first defendant's monthly telephone account and rental.
102. As was submitted by Mr. Aucamp with regard to the rental, Joubert must or should reasonably have been aware that the monthly rental in respect of the system would be more than the rental paid in respect of the IP Solutions system including as it did the settlement

figures. The Rental Credit Application was made in respect of the sum of R3500,00 excluding VAT whereas the rental per month in respect of the IP Solutions system was R2000,00. Joubert signed the Credit Application as well as the Master Rental Agreement in both of which the monthly instalment figure was recorded.

103. I agree further with the submission by Mr. Aucamp that the allegation that the system resulted in an increase in first defendant's monthly telephone costs is unsubstantiated. There was, quite simply, no reliable evidence adduced by defendants establishing what the costs were prior to and subsequent to the installation of the Advanced Telcoms system. Joubert stated in the course of his evidence that the alleged increase in the costs was in consequence of the faulty installation of the equipment, an allegation which was never put to Cloete and was only mentioned by Joubert for the first time during the course of his cross-examination. Be that as it may, he conceded, as set out above, that Cloete had not misled him in this regard.
104. On the issue of the reduced costs Alexander's evidence concerning Cloete's "calculator" was unacceptable. In support of her averment that Cloete was attempting to mislead defendants about the savings and to "catch them out" she referred to the fact that the figure of R3 500,00 relating to the Samsung PABX rental was not reflected in the top section of the calculator but only appeared in the bottom section thereof under the heading "Total savings". I have set out her evidence in this regard above, from which evidence it is, in my view, quite apparent that Alexander had a fixed determination, despite the objective facts to the contrary, that Cloete had been dishonest. I am satisfied that the defendants have failed to discharge the onus upon them in this regard.
105. In paragraph 5.3.1.4 of the plea it is pleaded that the hirer, Sapor, would settle the outstanding rental in respect of the IP Solutions system before implementing the new debit order. In his evidence Cloete denied ever having told Alexander that the system would not "go live" until the settlement was paid whereas the evidence adduced on behalf of the defendants was to the contrary. In determining this issue it is necessary to view it in the context of the evidence as a whole. The evidence of Tavares was that there was nothing in the Master Rental Agreement to the effect that the deal could not go live until such time as the settlement figures had been obtained and paid because of the fact that in practice this almost invariably happened simultaneously. As stated by her she had never experienced a situation where a client had failed or refused to furnish the information pertaining to those figures.
106. In the present matter the system was installed on 29 August and commenced working. It was thus in operation for nearly a month before the commencement date of 27 September, which in the normal course of events would have been more than sufficient time for the settlement figures to have been obtained by first defendant. Indeed, second defendant stated that he could have obtained them "binne die bestek van drie ure" had he been aware of the problem.

107. In these circumstances Mr. Aucamp submitted, correctly in my view, that it could be accepted at best for defendants that it was the understanding at the time that the system was installed and the agreement thereafter signed, that first defendant would timeously obtain those figures and that the settlement would be paid before the commencement date. It could not, however, have been contemplated at the time that first defendant would thereafter take no steps to obtain those figures resulting in first defendant having to pay double rentals.
108. Whatever the understanding may have been it is clear from the Master Rental Agreement that the commencement of the agreement on 27 September was not made conditional on the settlement having been paid by that date. Such a condition was not a term of the agreement nor did Cloete have the authority verbally to amend the agreement. In any event, any such purported amendment of the agreement was precluded by clause 14.1 thereof which provided that “this agreement constitutes the sole and exclusive record of the agreement between the parties ... and no variation ... shall be of any force or effect ... unless the same shall be reduced to writing and signed by the parties hereto.”
109. In the circumstances the defence set out in paragraph 5.3.1.4 of the plea can also not be sustained.
110. Even were I to be wrong in coming to the conclusion which I have regarding the alleged misrepresentations I am of the view that defendants have in any event not established on a balance of probabilities that Cloete was authorised to act on behalf of Sapor and/or that he had any authority to make any representations on behalf of Sapor. In order for defendants to succeed they were required to establish such authority, either actual or ostensible. As regards actual authority it was incumbent on them to allege and prove the existence and scope of Cloete’s authority as a matter of actual fact. In my view, with regard

to Badenhorst’s evidence and in particular the provisions of clause 8.12 of the Supply Agreement (128) set out above they have failed to do so.

111. Mr. Schoeman submitted, however, with reference to *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) that defendants had established that Cloete had ostensible or apparent authority to bind Sapor, “apparent authority” in this case being Cloete’s authority as it appeared to the defendants. In *Makate supra* Jafta J, writing for the majority, criticised the reasoning in the leading Supreme Court of Appeal decisions which were relied on by Mr. Aucamp, namely *South African Broadcasting Corporation v Coop and Others* 2006 (2) SA 217 (SCA) and *NBS Bank Ltd vs Cape Produce Co (Pty) Ltd and Others* 2002 (1) SA 396 (SCA).

112. At paragraphs 45 and 46 the learned Judge stated as follows:

“[45] Actual authority and ostensible or apparent authority are the opposite sides of the same coin. If an agent wishes to perform a juristic act on behalf of a principal, the agent requires authority to do so, for the act to bind the principal. If the principal had conferred the necessary authority either expressly or impliedly, the agent is taken to have actual authority. But if the principal were to deny that she had conferred the authority, the third party who concluded the juristic act with the agent may plead estoppel in replication. In this context, estoppel is not a form of authority but a rule to the effect that if

the principal had conducted herself in a manner that misled the third party into believing that the agent has authority, the principal is precluded from denying that the agent had authority.

[46] The same misrepresentation may also lead to an appearance that the agent has the power to act on behalf of the principal. This is known as ostensible or apparent authority in our law.

While this kind of authority may not

have been conferred by the principal, it is still taken to be the authority of the agent as it appears to others. It is distinguishable

from estoppel which is not authority at all. Moreover, estoppel and apparent authority have different elements, barring one that is common to both. The common element is the representation which may take the form of words or conduct.”

113. At para 65 the learned Judge stated further with regard to the question as to whether the agent in Makate’s case had ostensible authority to bind Vodacom as follows:

“This question must be considered with the view to doing justice to all concerned. The concept of apparent authority as it appears from the statement by Lord Denning, was introduced into law for purposes of achieving justice in circumstances where a principal had created an impression that its agent had authority to act on its behalf. If this appears to be the position to others, and an agreement that accords with that appearance is concluded with the agent, then justice demands that the principal must be held liable in terms of the agreement.”

114. The immediate problem facing defendants is that there is no evidence whatsoever that Sapor, by its words or conduct, created any representation that Cloete had authority to act on its behalf. Joubert’s evidence does not assist defendants, based entirely as it was on his mistaken assumption that Cloete was representing Sapor and that somehow Sapor and Advanced Telcoms were “associated” with each other. This assumption was, in my view, not reasonable in the light of what was known to Joubert at the time he signed the contract. He is an astute businessman with 35 years experience in the motor industry.

He dealt, he said, with thousands of financial agreements relating to the sale by his business of motor vehicles. He could therefore not but have been aware of the distinction between the supplier of the goods and the company financing the deal. He knew that Cloete was employed by Advanced Telcoms if not Telkom, and that Advanced Telcoms which was the supplier of the system was an entirely different entity to Sapor which was financing the deal. Cloete never represented to him that he represented Sapor nor did Sapor, by any words or conduct represent that Cloete was its agent. The Rental Credit Application was made to Sapor and the final authority to approve such application to Joubert’s knowledge rested with Sapor and not Cloete. In addition the Contract Installation Confirmation signed on behalf of first defendant expressly provided that “JW Auto CC confirms that it will not stop paying for any reason that may indicate non-performance from Advanced Telcoms CC.”

115. Furthermore, the fact that Cloete may have thought that he was Sapor's agent cannot, of itself, impose liability on Sapor in circumstances where Sapor did not, by its words or conduct, create an appearance that Cloete had the power to act on its behalf.
116. In my view therefore the defendants have failed to discharge the onus upon them of proving ostensible authority on the part of Cloete.
117. Mr. Schoeman relied finally on the provisions of the Conventional Penalties Act 15 of 1962 and submitted that the sum claimed by plaintiffs was a penalty stipulation and that, as such, it was out of proportion to the prejudice suffered by the plaintiffs and fell to be reduced to a just and equitable amount.
118. In *Steinberg v Lazard* 2006 (5) SA 42 (SCA) the following was stated at para [7]:
- "The Legislature provided protection to a debtor against an excessive penalty. In terms of the section, as construed by this Court, the debtor bears the onus of proving that the penalty is disproportionate to the prejudice suffered and to what extent (See Smit v Bester 1977 (4) SA 937 (A) at 942 D – G)."*
119. As stated in *Steinberg* supra at para 8 there is no need for the creditor to allege prejudice in claiming a penalty. The onus was on the defendants not only to allege but also to prove an absence of prejudice on the part of plaintiffs. They have not done so. In any event, in my view, prejudice to plaintiffs is manifest in the circumstances of this case where the plaintiffs have paid Advanced Telcoms.
120. It is also worth mentioning that the problems faced by the defendants were entirely of their own making. They took no steps whatsoever to obtain the settlement figures after 30 September in circumstances where a simple telephone call or email from Joubert to Winelands Finance or IP Solutions would have brought forth the figures. It is, in my view, not unfair to draw the inference that after the unwarranted and pernicious interference by IP Solutions, as evidenced by its letter of 14 October, the defendants deliberately chose not to obtain those figures.
121. It was correctly accepted on behalf of second defendant that should first defendant be found to be liable then second defendant, as surety and co-principal debtor, would be jointly and severally liable with first defendant for the sum claimed by plaintiffs.
122. As set out above the first plaintiff holds an amount in respect of the settlement of the Winelands Finance agreement. There was some debate between counsel as to whether or not the sum held by first plaintiff should be set off against the amount claimed by them but, in my view, it would be more appropriate to order first plaintiff to pay the said sum to the first defendant.
123. The quantum of plaintiffs' claim falls well within the jurisdiction of the Regional Court. Although the trial was lengthy the issues were not particularly complex. There was, and is, in my view, no reason why the action should not have been instituted in the Regional Court.

I have a discretion, to be judicially exercised in this regard. I am of the view in all the circumstances that those costs should be awarded only on the Regional Court scale. Those costs, in accordance with the Master Rental Agreement, will have to be paid by defendants on the attorney and own client scale.

124. On 28 November 2016 the matter was postponed without any evidence being led because of a prolonged electricity outage affecting this Court. Costs were reserved. In my view it would be fair in the circumstances to order that each party pay their own costs in respect of that day.
125. Accordingly the following order will issue:
1. Judgment is granted in favour of first plaintiff against first and second defendants, jointly and severally, the one paying the other to be absolved as follows:
 - a. Payment in the sum of R316 818,80.
 - b. Interest on the aforesaid sum at the rate of 15.25% (prime plus 6%) per annum from 22 August 2014 to the date of payment.
 - c. Costs of suit on the Regional Court scale and on the attorney and own client scale, save that in respect of the wasted costs occasioned by the postponement of the matter on 28 November 2016 each party shall pay their own costs.
 2. First plaintiff is ordered to pay to first defendant the settlement amount held by it in respect of the Winelands Finance rental agreement.

J.D. PICKERING

JUDGE OF THE HIGH COURT

Appearing on behalf of Plaintiffs: Adv. Aucamp

Instructed by: Netteltons Attorneys, Mr. Nettelton

Appearing on behalf of Defendants: Adv. Schoeman S.C.

Instructed by: Nolte Smit Attorneys,

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Prepared on 26 October 2026 · Esheria