

SOUTH AFRICA / JUDGMENT

Sasfin Bank Limited v Innes Rupert Steenekamp t/a Innes Steenekamp Attorneys (2496/2022) [2023] ZAGPJHC 1479 (28 December 2023) [2023] ZAGPJHC 1479

COURT

South Gauteng High Court, Johannesburg

BEFORE

Ternent AJ

CASE / FILE NUMBER

2496/2022

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IN THE HIGH COURT

OF SOUTH AFRICA

GAUTENG LOCAL

DIVISION, JOHANNESBURG

REPORTABLE: NO

OF

INTEREST TO OTHER JUDGES:NO

REVISED

CASE

NO:

2496/2022

DATE: 28

December 2023

In the matter between: SASFIN
BANK LIMITED
Plaintiff
and
INNES
RUPERT STEENEKAMP t/a INNES STEENEKAMP ATTORNEYS
Defendant

Coram: Ternent AJ
Heard
on: 24 May 2023

Delivered: 28 December 2023

Summary:

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 12h00 on 27 December 2023.

JUDGMENT

TERNENT, AJ:

- [1] The applicant, as cessionary, seeks summary judgment arising from two rental agreements concluded, under a Master Rental Agreement, between the cedent, Astfin North (Pty) Limited trading as Assetfin, and the defendant on 9 April 2018.[1] Initially Assetfin ceded its rights to Sunlyn (Pty) Limited who then on ceded these rights to the plaintiff. The plaintiff seeks return of certain CCTV cameras, a telephone PABX system and other ancillary equipment, and payment of outstanding rentals in the sums of R27 904,26[2] and R45 366,50[3], respectively. Interest is also sought at the prime interest rate plus 6% per annum from 9 December 2021 to date of payment and costs on a scale as between attorney and client.
- [2] The defendant brought an exception to the particulars of claim on the basis that it lacked averments to sustain a cause of action or was vague and embarrassing. The exception was not pursued by the defendant who abandoned it, on 26 October 2022, subsequent the plaintiff having delivered its heads of argument and, in the face of a compelling application to file his opposing heads of argument. The defendant proceeded to deliver his special plea and plea on 25 October 2022.

- [3] The defendant's counsel submitted to me that even though the exception had not been pursued, the defendant believed that the exception was good and that the decision taken not to pursue it was because the legal costs attendant on an opposed exception did not justify this claim. The point was raised again by way of the locus standi defence, dealt with below.
- [4] Although two special pleas and several purported defences were raised by the defendant, this Court was requested by both counsel to disregard these defences and focus materially on two defences which if proven at trial would require a dismissal of the summary judgment application.
- [5] The two defences are:
- [5.1] whether or not there had been a valid cession by Assetfin of its right, title and interest to the Master Rental Agreement and schedules to the plaintiff and, as a consequence, whether or not the plaintiff had locus standi to bring this claim; and
- [5.2] whether the rental agreements were validly cancelled by the defendant who pleaded that he is not in breach of the agreements because on 18 March 2021 he cancelled the agreements and tendered the return of the equipment in terms of the provisions of section 14 of the Consumer Protection Act 68 of 2008 ("the CPA") which pertains to the expiry and renewal of fixed term agreements.
- [6] The defendant contends that the plaintiff lacks the locus standi to claim because the particulars of claim does not establish a valid cession of the rental agreement. A iusta causa, it was argued, is required for a valid cession. This is because there is allegedly no detail or averments made by the plaintiff about the underlying rental agreements concluded between Assetfin and the defendant at the time of the purported cessions in the particulars of claim. Because the cession agreements were concluded some years prior to the conclusion of the rental agreements, the argument goes, the cession of contingent rights in and to rental agreements which may be concluded in the future meant that there is no iusta causa underpinning the cessions rendering them invalid. The plaintiff therefore lacks and has failed to establish locus standi to sue in its particulars of claim.
- [7] As set out in the particulars of claim, the defendant is not a party to the cession agreement. The defendant hence, as an outsider, seeks to dispute the validity of the cession agreements. The defendant concedes that he has no knowledge of the cession agreements.
- [8] In *ABSA Bank Bpk v CL Von Abo Farms BK and Others*[4] the Court found that what the defendant seeks: "is dat die Hof aan hulle as derdes 'n sterker reg tot kansellasië of nietigverklaring van die Ooreenkoms moet verleen as dit waaroor die partye daartoe self beskik - dit behoeft geen betoog dat geeneen van die partye op hierdie stadium en op die gronde soos deur die verweerders tans aangevoer die Ooreenkoms suksesvol sal kan laat nietig of ongeldig verklaar nie."

- [9] As explained in the judgment: “Daar bestaan mynsinsiens geen beginsel, regtens of andersins, waarkragtens derdes 'n sterkere reg tot die kansellasië van 'n ooreenkoms kan verwerf as dit waaroor die kontrakterende partye self beskik nie.”
- [10] This principle was followed in *Letseng Diamonds Ltd v JCI Ltd and Others*[5] and referred to in *Corporate Finance (Pty) Ltd v Schwartz North*[6] in which the defendant's denial of the plaintiff's locus standi as cessionary was also raised and determined as follows:
- [20] It is trite law that a cession is a bilateral juristic act whereby a right, a contractual right is transferred by agreement between the cedent and the cessionary. This can be compared to the sale of the goodwill in the business. In *Botha & another v Carapax Shadeports (Pty) Ltd* 1992 (1) SA 2020 (A) pg 214, Botha JA stated ‘When he sells the goodwill of the business, the merx embraces that contractual right.’
- [21] The cession therefore embraces the contractual right to sue. It is common cause that a cession, to be effective, does not require the prior consent, knowledge, concurrence or cooperation of the debtor.

The debtor has no right of refusal/veto or to intervene in the cession agreement unless there is prejudice. It is effective irrespective of the debtor's attitude as the debtor is not actively engaged in the process.

- [23] In *Letseng Diamonds Ltd v JCI Ltd & Others; Trinity Asset Management (Pty) Ltd & Others v Investec Bank Ltd & Others* 2007 (5) SA 564 (W) in applying the correct principle in relation to whether a third party has locus standi in relation to a declaration of rights it was held that: (1) applicant must have a direct interest

in the subject-matter of the litigation; and not an indirect financial interest in validity of agreements and therefore lacks locus standi to bring applications. In an unreported case in 2013 *Corporate Finance Solutions (Pty) Ltd v Dwergieland Kleuterskool & Others*, a decision of the full bench it was held:

‘The respondent's contention, since the procedure had not been followed, that there can be no valid and binding cession cannot be entertained. Respondents' not having been parties to the cession agreement cannot raise this as a defence, especially when the parties to the agreement do not, and in fact, insist that a valid and binding cession was concluded.’”

- [11] Accordingly, the defendant cannot dispute the cession and transfer of the cedent's rights in the agreements to the plaintiff.
- [12] Furthermore, it suffices for the plaintiff to plead, as it did, that it had complied in full with its obligations to the cedent to establish a cause of action. More particularly, in circumstances where the defendant has no knowledge of the cession agreements.
- [13] Insofar, as it is also a contention that there is no iusta causa underlying the cession agreement this too is wrong.

[14] As submitted to me and as is evident in FNB v Lynn:[7]

“The position, in my view, then is that it has been accepted in commerce and by the Courts of our country for more than a century that future rights can be ceded and transferred in anticipando. The decisions of our Courts have thus been regarded for a very long period of time as being correct. Clearly these decisions have been acted upon and served as the basis for the general and well-known practice of taking security in the form of the cession of book debts (including future debts), cession of existing and future rights in securitatem debiti and factoring of existing and future rights. In these circumstances I am not inclined to hold that these decisions are wrong ... Although there may be considerations of public policy militating against upholding the cedability of future rights (as to which see Lubbe (op cit at 131-40)), they have not been canvassed in the present case. If it is considered that the present position needs review, that is a task that should be undertaken by the legislature.”

[15] Accordingly, I am of the view that the locus standi defence is without merit and is not a triable defence.

[16] The second defence was argued more strenuously and relates to whether or not the defendant cancelled the agreement in the context of the provisions of the CPA.

[17] Section 14 of the CPA provides as follows:

“14(1) This section does not apply to transactions between juristic persons regardless of their annual turnover or asset value.

(2) If a consumer agreement is for a fixed term –

(a) that term must not exceed the maximum period, if any, prescribed in terms of subsection (4) with respect to that category of consumer agreement;

(b) despite any provision of the consumer agreement to the contrary –

(i) the consumer may cancel that agreement –

(aa) upon the expiry of its fixed term, without penalty or charge, but subject to subsection (3)(a);
or

(bb) at any other time, by giving the supplier 20 business days’ notice in writing or other recorded manner and form, subject to subsection (3)(a) and (b); ...”

[18] The defendant contends that he cancelled the two rental agreements, in writing, on 18 March 2021, as permitted in the CPA. Having done so, he determined and made payment of a penalty in a reasonable amount in instalments over a period of nine months from April 2021 to November 2021 which payments were accepted by the plaintiff. Although he requested that the equipment be collected on 1 June 2021, Jacques Visser (“Visser”) collected certain equipment but not the equipment forming the subject matter of this action.

[19] There is no dispute that the agreements enured for a fixed term of sixty months, and that the defendant is a person. As also appears below, the CPA applies to the rental agreements.

[20] In an e-mail, to which a letter was attached, addressed by the defendant to Assetfin and sent to j[...]@oep.co.za and j[...]@cdc-centurion.co.za, on 18 March 2021, the defendant cancelled the rental agreements and referenced as RSA18030340/E. This reference is reflected on the Master Rental agreement schedule for the CCTV camera equipment.[8]

[21] The defendant, an attorney, in the letter, quoted from the Master Rental Agreement which provides in clause 1 that:

“1. Duration of the Agreement

This agreement commences on the Commencement Date set out in the Schedule and shall continue indefinitely unless 3 (three) calendar months’ (90 days) prior written notice of termination (“Notice”) is given by either party, provided that this Agreement shall not, with prejudice to the Hirer’s rights in terms hereof or in law, be terminated by the User before expiry of the initial rental period as set out in the Schedule. Should the Hirer not receive notice before the expiry of the initial period, the Agreement, will automatically renew for a subsequent 12 (twelve) months. Thereafter the User shall only be entitled to terminate this Agreement on an anniversary of the Commencement Date, by giving prior written notice to the Hirer.

19. Early settlement

The User shall not be entitled to terminate this Agreement or any part thereof, prior to the expiry of the Initial Period stipulated in the relevant Schedule without the Hirer’s prior written approval, which if given may be made subject to such settlement amounts which the Hirer may require.”

[22] The defendant then goes on to quote the provisions of the CPA, mentioned above, and also makes reference to Regulation 5 to the CPA which provides that:

“The reasonable credit or charge as contemplated in section 14(4)(c) may not exceed a reasonable amount, taking into account:

- (a) the amount which the consumer is still liable for to the supplier up to the date of cancellation;
- (b) the value of the transaction up to cancellation;
- (c) the value of the goods which will remain in the possession of the consumer after calculation;
- (d) the value of the goods that are returned to the supplier;
- (e) the duration of the consumer agreement as initially agreed;
- (f) losses suffered or benefits accrued by consumer (sic) as a result of the consumer entering into the consumer agreement;
- (g) the nature of the goods or services that were reserved or booked;

- (h) the length of notice of cancellation provided by the consumer;
- (i) the reasonable potential for the service provider, acting diligently, to find an alternative consumer between the time of receiving the cancellation notice and the time of the cancelled reservation; and
- (j) the general practice of the relevant industry.”

[23] The defendant also quotes Regulation 5(1) of the CPA which provides that the maximum period for a fixed term consumer agreement is 24 months from the date of signature by the consumer unless:

[23.1] such longer period is expressly agreed with the consumer and the supplier can show a demonstrable financial benefit to the consumer;

[23.2] differently provided for by Regulation in respect of a specific type of agreement, type of consumer, sector or industry; and

[23.3] provided for in an industry code contemplated in section 82 of the Act in respect of specific type of agreement, type of consumer, sector or industry.

[24] The contention then is that the cancellation settlement amount has been calculated on the full outstanding term of the agreement which would continue until April 2023. Because the agreement falls within the provisions of the CPA, section 14 allows for the imposition of a penalty in a reasonable amount taking into account the factors mentioned above.

[25] The defendant proceeds to tender what he contends is a reasonable penalty taking into account that two years remain on the agreement and which he determines is a period of nine months. He requests Assetfin to provide a reasonable penalty settlement amount in the face of the cancellation, and notifies Assetfin that as his law firm is relocating on 30 March 2021, the equipment will have to be removed prior to that date. The defendant annexed an e-mail exchange to his plea[9] and a more comprehensive e-mail exchange to his opposing affidavit in the summary judgment proceedings in support of his contentions.[10]

[26] Subsequent the cancellation letter, e-mails are exchanged between Visser and the defendant on 24 March 2021 and 25 March 2021 respectively as the defendant seeks feedback on the cancellation and penalty. Visser states that his Legal Division has to revert.

[27] On 26 March 2021 at 3:06 pm, Brandon Chetty who is described in the email as the Assetfin Aftercare Manager, copies in Visser to his email and says that he will revert. This is after a further e-mail is sent by the defendant on 26 March 2021 at 14:59 to Visser confirming that his offices are moving the following Tuesday and the equipment is remaining behind.

- [28] In an e-mail, dated 29 March 2021, at 12:32, to Visser the defendant records that he is moving offices the next day, and despite the agreements having been cancelled by him, there is no feedback in relation to his penalty tender. He confirms that he has no further use for the equipment because the telephone system is incompatible with the fibre lines at his new premises and the camera system is not needed. He records that he will not be liable for any damages in the event that the equipment is not collected and should it be stolen.
- [29] Again, on 29 March 2021, Visser sends a follow - up e-mail to Chetty enclosing the e-mails from the defendant and requesting feedback from the Legal Department.
- [30] On 8 April 2021, Visser, in an e-mail in which he is described as a Branch Director Centurion, enquires as to whether or not the defendant has relocated and asks for the new address in order to upload it on the system so that certain toners, no doubt for photostating machines or printers, will be sent to the correct address. The respondent's counsel submitted that it was not only the equipment in this action but other equipment that was leased too. Visser's name in the signature section of the letter appears above an entity known as Daisy Business Solutions. At the foot of the e-mail are logos referring to Assetfin, Smart Office Connection and Canon and also two different telephone numbers relating to Assetfin accounts and Sox accounts.
- [31] Visser sends another e-mail to the defendant, on 9 April 2021 at 10:54, in which he inter alia states that the defendant must deal directly with Chetty at Assetfin because he can't take the matter further, particularly as Assetfin can be difficult about cancellation of the agreements and also in light of the defendant having cancelled in terms of the CPA.
- [32] The defendant does not explain these e-mails in his opposing affidavit but they certainly demonstrate that he had notified Assetfin of his cancellation of the rental agreements. Notably, the defendant was not aware of the cessions and so it is probable that in cancelling the agreement he would not notify the plaintiff but rather Assetfin, as he did.
- [33] Assetfin is one of the parties in the transaction having sold the equipment to the defendant and then ceded its rights to Sunlyn who then on ceded the rights to the plaintiff. This indicates a commercial relationship between the parties which commenced with the purchase and rental of the equipment, at the behest of the defendant, as provided for in the Master Rental Agreement and schedules which are common cause. It would appear therefore that the plaintiff must know the parties involved in this transaction and to the extent that it was submitted to me that the collection letter of 1 June 2021 reflected an unknown entity, Daisy Business Solutions, both in the heading and body of the letter, represented by Visser, and was misleading I cannot accept, especially in summary judgment proceedings, that that is the end of the matter. The letter does reflect that "Daisy equipment" was collected from the defendant but the letter also lists the equipment leased in terms of the Master Rental Agreement as part of the collection list. This equipment, it is common cause, was not collected. It is unsurprising then that this equipment has been crossed out with a double line and initialled by Visser, a clear indication that it was not

collected. He also appends his signature to the base of the letter, no doubt in affirmation of the equipment which was collected from the defendant.

- [34] Furthermore, and as is apparent from the annexures to the plea, Chetty, albeit without prejudice, writes two letters, dated 17 and 29 March 2021 respectively, on behalf of Assetfin, to the defendant cancelling the agreements on the basis of what he terms the early termination, and seeking payment of R40 322,35 and R33 343,66 respectively and for which payment is required within a period of 14 days.
- [35] It appears that this proposal was not acceptable to the defendant who affirms both in the affidavit opposing summary judgment and the plea that having tendered a penalty payment for a period of 9 months these payments were accepted in that the debit order was terminated in November 2021.
- [36] The only remaining issue from the defendant's perspective is the return of the equipment which to date has not been collected albeit that it has been tendered again by the defendant.
- [37] I am guided in this matter by two decisions handed down in this division this year namely South African Securitisation Programme (RF) Ltd v Prelene Jaglal-Govindpershad[11] and South African Securitisation Programme (RF) Ltd v Dr Lucic Mirjane.[12] In both of these matters, the plaintiff's counsel was Mr Botha who also appeared before me in this matter.
- [38] In all three matters Mr Botha submitted that because the plaintiff is a financier, the CPA is not applicable to it and therefore exempt from its application. In both decisions, the Court found that the plaintiff was in fact a supplier and more particularly that the definition of "supplier" in section 1 of the CPA is defined as "a person who markets any goods or services" which is broad in its ambit and includes parties other than those who manufacture and sell goods. In this regard the definition of "services" in the CPA permits for "any banking services or related or similar financial services". As a consequence the CPA is applicable to the Master Rental Agreement. This matter is on all fours with these two matters.
- [39] In the Mirjane decision, Mr Botha also argued, as he did here that the termination/cancellation notice did not come to the attention of the plaintiff but rather was addressed to the supplier, Assetfin, and therefore the agreements were not validly cancelled.
- [40] In Mirjane the defendant's counsel argued "That the issue of the relationship between Sasfin and Telelink and/or Sunlyn and whether her notification conveyed to these third parties constitutes communication of the cancellation on the supplier is an issue for trial, especially in light of Telelink's responding to her complaints to Sasfin with the settlement quote and the second Master Rental Agreement bearing Sunlyn's name".
- [41] This submission is apposite here too.

[42] It is clear that the cancellation notice which was addressed to Assetfin under the CPA reflects that the defendant clearly and unequivocally notified Assetfin of his intention to cancel the

agreement.

[43] Furthermore, and as also permitted in the Mirjane judgment, the cancellation must be communicated to the supplier to be effective. This is expressly provided for in section 14(2)(b)(i)(bb) of the CPA. As also stated in the judgment, the plaintiff must know having been involved in the commercial

transaction what the third parties' roles were in the transaction and whether or not they are agents of the plaintiff. Although no particularity was provided by the defendant, it would be inappropriate in summary judgment proceedings to criticise the defendant therefore as he is not required to give such detail in these proceedings.

[44] It is clear that Assetfin provided a settlement quote to the defendant albeit rejected by him and the Master Rental Agreement reflects Assetfin's name too. As such, the defendant will be given an opportunity at trial to determine whether the plaintiff received notice of the cancellation, it having been given to Assetfin, or not.

[45] As also stated in the Jaglal- Govindpershad matter

[13] the CPA protects consumer rights and prevents "trumping provisions" in contracts which exclude these rights. Furthermore, should the cancellation be valid as against the applicant, the equipment still

to be collected will reduce the alleged indebtedness and there is also a possible credit due to the defendant for the debit orders paid as a penalty, should it be determined by the trial court to be a fair penalty, and also any future rentals charged by the plaintiff. This means that the certificates of balance tendered in evidence are incorrect too.

[46] I am of the view that this is a triable defence and that the defendant has established a prima facie defence to the summary judgment and leave to defend ought to be granted.

[47] As submitted to me and as explained in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*:^[14]

"[31] So too in South Africa, the summary judgment procedure was not intended to 'shut (a defendant) out from defending', unless it was very clear indeed that he had no case in the action. It was intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights.

[32] The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our courts, both of first

instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out. In the Maharaj case at 425G-426E, Corbett JA, was keen to ensure first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded. The

second consideration is that the defence so disclosed must be both bona fide and good in law. A court which is satisfied that this

threshold has been crossed is then bound to refuse summary judgment. Corbett JA also warned against requiring of a defendant the precision apposite to pleadings. However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor.”

[48] Having disclosed a triable issue, there is a real possibility that the defence may succeed at trial.

[49] In respect of the issue of costs, I was asked to make an order of costs if I dismissed the application because the plea and affidavit disclose these defences. However, it appears to me that a number of the defences which were raised, albeit not argued before me, are groundless, having already dismissed the locus standi defence. As a consequence, I am of the view that the ordinary Rule should apply and that costs should be costs in the cause.

[50] I make the following order:

1. The application for summary judgment is dismissed with costs to be in the cause of the main action.

P V TERNENT

Acting Judge of the High Court of South Africa

Gauteng Division, Johannesburg

HEARD ON: 24 May 2023 DATE OF JUDGMENT: 28 December 2023 FOR PLAINTIFF: Adv J G Botha E-mail: jgbotha@theproteagroup.co.za Cell: 083 703 4418 INSTRUCTED BY: ODBB Attorneys E-mail: lelanie@odbb.co.za / adriaan@odbb.co.za Tel:

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[1] Annexure “SAS1A” read with “SAS1B” and “SAS1C”, CaseLines 001-32 to 35, “SAS3A”, CaseLines, 001-40 and “SAS3B”, CaseLines 001-41

[2] Which amount is certified by way of a certificate of balance, Annexure “SAS7”

[3] Which is also certified by way of a certificate of balance, Annexure “SAS8”

[4] 1999 (3) SA 2620 at 274E-F

- [5] 2009 (4) SA 58 (SCA) at 63H-I
- [6] Case No. 32806/2012 [2017] ZAGPJHC 369 (10 March 2017)
- [7]
- [1995] ZASCA 158; 1996 (2) SA 339 (A) at 360A-B
- [8] SAS(1)(b) Caselines 001-34
- [9] Annexure “IRS1” to the plea, CaseLines 012-29 to 012-45
- [10] Annexure “IRSOA1”, CaseLines 019-36 to 019-65
- [11] 2023 JDR 2260 (GJ)
- [12] (2022/6034) [2023] ZAGPJHC 768 (6 July 2023)
- [13] Para [13]
- [14] 2009 (5) SA 1 (SCA)
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Prepared on 13 October 2026 · Esheria