

SOUTH AFRICA / JUDGMENT

Something Different Concepts and Shows CC and Another v South African Securitisation Programme (RF) Ltd and Others (A200/2023) [2024] ZAWCHC 103 (19 April 2024)

[2024] ZAWCHC 103

COURT

Western Cape High Court, Cape Town

BEFORE

Lekhuleni JD, Erasmus N, Mangcu-Lockwood N

CASE / FILE NUMBER

A200/2023

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

CASE

NO: A200/2023

In

the matter

between:

SOMETHING

DIFFERENT CONCEPTS AND SHOWS CC

First Appellant

KATHRYN

REBECCA HOLT

Second Appellant

And

SOUTH AFRICAN

SECURITISATION

PROGRAMME (RF)

LTD

First

Respondent

SASFIN BANK LTD
Second
Respondent
SUNLYN (PTY) LTD
Third Respondent
Heard: 26 January 2024
Delivered: 19 April 2024

JUDGMENT

LEKHULENI J

Introduction

- [1] This is an appeal against the whole judgment and order handed down by Van Zyl AJ, on 08 March 2023, in which the court a quo granted summary judgment against the second appellant in respect of three distinct claims that the respondents instituted against the appellants. The court a quo ordered the second appellant to pay the first respondent the sum of R56 370.96 in respect of claim A. In addition, the court ordered the second appellant to pay the second respondent R165 975.20 in respect of claim B and R56 856.66 in respect of Claim C. The second appellant was also ordered to pay interest on the three amounts and costs on an attorney and client scale.
- [2] Discontented with this order, on 30 March 2023, the second appellant applied for leave to appeal to the full bench of this court or to the Supreme Court of Appeal against the whole judgment and order of the court a quo. On 22 May 2023, the court a quo considered the application for leave to appeal and subsequently granted the second appellant leave to appeal to the full bench of this court. The second appellant seeks a reversal of the order granted by the court a quo and that she be granted leave to defend the action instituted against her by the respondents.

The Background Facts

- [3] The material facts in this matter are simple and can be summarised briefly as follows. The second appellant was the managing member of the first appellant, which operated its business at Unit J-K 9 Assegaa Road, Parow Industria, Cape Town. The first appellant's business was in the décor and design business, primarily managing projects for clients in the events industry. The second appellant averred that due to the devastating financial impact that the COVID-19 pandemic caused to this industry, she had no choice but to place the first appellant into liquidation. The first appellant was finally liquidated in terms of an order of this court on 13 August 2020.
- [4] The respondents' three claims against the first appellant are predicated on the conclusion of Master Rental Agreements between the first appellant and the third respondent, in which a photocopy machine and other related equipment were rented to the first appellant. The

third respondent ceded its rights regarding Claim A to the second respondent, who subsequently ceded them to the first respondent. The third respondent also ceded its rights regarding Claims B and C to the second respondent. The respondents aver that the first appellant failed to pay monthly instalments in terms of the agreements and was indebted to the respondents for the three amounts claimed in the summons.

- [5] The respondents averred that the second appellant bound herself in writing as a guarantor and co-principal debtor with the first appellant for the due fulfilment by the first appellant of its primary obligations for the proper and punctual payment by the first appellant to the third plaintiff or its cessionaries of all amounts due and owing out of or from the Master Agreement of Hire. The respondents pleaded that the second appellant renounced the benefit of division and excussion.
- [6] Accordingly, by virtue of the guarantees, the respondents averred that the second appellant is liable to the first respondent, alternatively to the second respondent, and alternatively to the third respondent in the amounts for which the first appellant is liable which amounts are due, owing, and payable. In her amended plea, the second appellant admitted to the conclusion of the Master Rental Agreements by the first appellant, the terms of those agreements, and that the first appellant was in breach of the said agreement. In addition, the second appellant pleaded that the first appellant was placed under final liquidation by the order of this court on 13 August 2020. As far as her personal indebtedness is concerned, the second appellant denied that she is indebted to the respondents as alleged or at all. To this end, the second appellant raised four defences, namely:
- [7] First, the second appellant denied the alleged cession of rights of the respective Master Rental Agreements to the first and second respondent, thus denying their locus standi to sue thereon. Secondly, the second appellant admitted that she represented the first appellant when the third respondent and the first appellant entered into the Master Agreements for Hire in respect of the three claims. However, when she signed the agreements, she was neither aware nor told that amongst the documents presented to her to sign was a deed of suretyship ("the guarantees"). The second

appellant pleaded that the Deed of Suretyship was surreptitiously hidden in the body of the main agreement to extend personal liability

to the signatory of the agreement.

- [8] When she signed the agreement, she was not aware that it contained a deed of suretyship and was not told as much. In fact, based on her interaction with the third respondent's representative, she assumed that no deed of suretyship was contained in the pack of documents. Had she known that the documents she was asked to sign included a deed of suretyship, she would not have signed the agreement.

- [9] Thirdly, the second appellant averred that the first and second respondents failed to take reasonable steps to mitigate their damages after the first appellant was liquidated. According to the second appellant, the equipment that the respondents uplifted was refinanced and or sold after the first appellant was placed into final liquidation. In particular, the second appellant asserted that pursuant to the liquidation proceedings, the respondents have not adduced any evidence of whether they have received any dividend payment from the insolvent estate pursuant to proving their claims at a meeting of creditors.
- [10] Fourthly, the second appellant asserted that the respondents sought to rely upon a provision in the agreement entitling them to claim amounts which would have been payable in terms of the agreement until the expiry of the initial rental period, irrespective of whether such amounts were due for payment or not. According to the second appellant, this is patently unjust and inequitable and enables the respondents to mulct a customer with charges for services that it does not provide. To this end, the second appellant asserted that this clause is invalid and unenforceable as it is contra bonos mores and inconsistent with public policy. In the alternative, the second appellant pleaded that the amount claimed by the respondents ought to be reduced to the extent that this court considers equitable in the circumstances in terms of section 1 of the Conventional Penalties Act 15 of 1962 ("the CPA").
- [11] The respondents sought summary judgment against the second appellant based on the guarantees or the suretyship agreement. The respondents contended at the court a quo that the defences raised by the second appellant are not bona fide defences. Amongst others, the respondents asserted that the penalty provisions in this matter are not contrary to public policy and could be lawfully enforced. However, their enforcement is subject to the court's discretion to reduce the penalty in terms of section 3 of the CPA. In addition, the respondents averred that the second appellant, as a party seeking a reduction of the penalty provision, has the onus of alleging the reasons for the reduction and the amount of the reduction. In this regard, it was contended that the second appellant did neither in this case.
- [12] The court a quo found that the four defences the second appellant raised were not bona fide defences and was not inclined to grant the second appellant leave to defend. Consequently, the court a quo granted summary judgment in favour of the respondents and costs thereon on an attorney and client scale. It is this order that the second appellant seeks to assail in this court.

Principles relating to summary judgment applications.

- [13] The summary judgment procedure is intended to protect a plaintiff who is entitled to money from being delayed where there is no arguable defence. The rule is not intended to shut out a defendant who can show that there is a triable issue applicable to the claim from laying his or her defences before the court (see, *Eclipse System and Another v He & She Investments (Pty) Ltd* and a related matter 2020 (6) SA 497 (WCC) at para 11). However, it is a procedure intended to prevent sham defences from defeating the rights of the parties by delay and, at the same time, causing great loss to the plaintiff who is endeavouring to enforce his or her

rights (*Majola v Nitro Securitisation 1 (Pty) Ltd* 2012 (1) SA 226 (SCA) at 11C-G).

- [14] The remedy should be resorted to where the plaintiff can establish his or her claim clearly and the defendant fails to set up a bona fide defence or to raise a triable issue. (*SA Bank of Athens Ltd v Van Zyl* 2005 (5) SA 93 (SCA) at 102E). For many years, the remedy of summary judgment has been regarded as an extraordinary and stringent one in that it closes the doors of the court to the defendant and permits a judgment to be given without a trial. (*Absa Bank Ltd v Le Roux* 2014 (1) SA 475 (WCC) para 4). However, in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*, 2009 (5) SA 1 (SCA) at para 32, Navsa JA, reasoned that the time has perhaps come to discard labels such as 'extraordinary' and 'drastic' and that the procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. The learned justice concluded that having regard to its purpose and its proper application, summary judgment proceedings only hold terrors and are drastic for a defendant who has no defence.
- [15] In addition to the above, I am of the view that this remedy should be viewed through a constitutional law prism, especially because it has the hallmark of a final judgment. The court should not close its doors on a defendant to ventilate his defence unless the plaintiff's case is unanswerable, as to do so would violate the right of access to courts envisaged in section 34 of the Constitution. Furthermore, as will be demonstrated hereunder, courts must be careful to guard against grave injustice to a defendant who is called upon without the benefits of discovery to satisfy it that he or she has a bona fide defence in instances where some of the documents or information supporting the defendant's defence are in the possession or exclusive knowledge of the plaintiff. In my view, granting summary judgment in such cases would violate the right of access to justice.
- [16] It is partly for that reason that the inquiry in summary judgment applications is simply whether the requirements for the grant of summary judgment are present on the papers. A defendant who chooses not to give security for the plaintiff's claim but instead to file an affidavit (or, with the leave of court, to tender oral evidence) in opposition to an application for summary judgment must fully disclose the nature and grounds of his defence and the material facts on which it is founded. The court will then determine whether, based on the information disclosed, the defendant appears to have a defence that

is both bona fide and good in law. If the court is so satisfied, the application for summary judgment must be refused. (*Absa Bank Ltd v Noniki Trading CC & Others*; *Absa Bank Ltd v Ikroza Enterprise Solutions CC & Others*; *Absa Bank Ltd v Hqubela Trading CC and Others* [2011] JOL 27204 (ECG) at para11).

- [17] In determining whether there has been sufficient disclosure by the defendant, the court does not require of the latter the precision apposite to pleadings, but at least sufficient particularity and completeness to enable the court to decide whether a bona fide defence has been disclosed, is required (see, *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A) at 425G – 426; *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture* 2009

(5) SA 1 (SCA), para 32). If it has the slightest doubt the court will not grant summary judgment (see, *First National Bank of SA Ltd v Myburgh and Another* 2002 (4) SA 176 (CPD) at para 9).

Analysis

and Discussion

[18] Against this backdrop, I turn to consider whether the court below was correct in granting summary judgment against the appellants. Expressed differently, whether the court a quo was correct in finding that the defences raised by the second appellant were not bona fide and good in law.

Preliminary Point – The deponent to the plaintiff's affidavit

[19] The second appellant impugned the respondents' affidavit in support of summary judgment. The second appellant contended that the affidavit does not meet the requirements of Rule 32(2)(a) of the Uniform Rules. The second appellant contended that Mr Govender, the deponent to the summary judgment application, does not have the requisite knowledge to depose to the affidavit or to verify the facts as set out in the particulars of claim or the cause of action.

[20] Mr Hoffman, the second appellant's Counsel, submitted at the hearing of this appeal that the application for summary judgment must be brought in a competent manner in accordance with the rules. There must be a verification and confirmation of the cause of action and the material facts setting out the cause of action. Counsel contended that the application for summary judgment in the instant matter, was defective and did not comply with the rules of court in that the affidavit of Mr Govender supporting the application against the appellants purports to confirm the material facts and grounds justifying the first respondent's claim against the appellants in respect of claim A, and the second respondent's claim against the second appellant in respect of claims B and C. According to Mr Hoffman, this obviously begs the question which material facts are being confirmed. Counsel submitted that it is entirely unclear which respondent is alleged to be entitled to claim payment as the respondents pray for relief in favour of the first respondent, alternatively, the second respondent, and in the further alternative in favour of the third respondent. The questions beg, so the argument went, which of the respondents is entitled to payment from the second appellant.

[21] On the other hand, Mr Frasser, the respondents' Counsel, submitted that in terms of Rule 10 of the Uniform Rules, multiple plaintiffs are entitled to institute action against a defendant in the alternative (see, *Opperman v Labuschagne* 1954 (2) SA 150 (E)). Counsel submitted that it is true that the appellant should not be simultaneously liable for the same amounts to the first respondent, the second respondent, and the third respondent with respect to each of the three claims. Mr Frasser further submitted that the appellant can only be liable to the respondent, who, in fact, holds the rights to the respective rental agreement. The indebtedness of the appellant to the first respondent was separately confirmed and verified

in Claim A, while the second appellant's indebtedness to the second respondent was also separately confirmed in Claims B and C.

- [22] The court a quo dismissed this preliminary point and succinctly found that this point in limine has no merit, particularly as the pertinent facts underlying the action are common cause on the papers. The court a quo found that Mr Govender is a litigation manager employed by the second respondent. Furthermore, Mr Govender clearly explained that the second respondent was the juristic entity that provided all the administrative and managerial functions on behalf of the first respondent. The court found that Mr Govender explained further that he has all the original agreements, statement of account, and all the cession agreements under his control and possession. The court a quo separately granted judgment in favour of the first respondent for Claim A against the second appellant. The court also granted judgment against the second appellant in favour of the second respondent for claims B and C.
- [23] In my view, the finding of the court a quo on this point is underpinned by sound reasoning and cannot be faulted or criticised. From the pleadings filed, Mr Govender indeed asserted that it is part of his duties as a legal manager to peruse and consider the Master Rental Agreement forming the subject matter of this action. He stated further that he had in his possession the original contracts, guarantees, records, accounts, certificates, cession agreements and all other relevant documentation upon which the cause of action against the second appellant was predicated.
- [24] More pertinently, Mr Govender has confirmed the cession of the respective Master Rental Agreements from the third respondent to the second respondent and finally to the first respondent. He has also confirmed the alleged breaches of the Master Rental Agreement by the first appellant because of non-payment and the quantum of the first appellant's indebtedness. Mr Govender explained in his affidavit that it is an essential part of his duties and functions to depose to affidavits in support of applications for summary judgment for each respondent. Each respondent in this matter is before court suing, in the alternative, as a plaintiff in its own right.
- [25] Based on these facts, I hold the view that Mr Govender has demonstrated that he has personal knowledge of the material facts set out in the respondents' summons and particulars of claim, as well as the grounds and amounts therein against the second appellant. The finding of the court a quo in this regard is unimpeachable. It follows, therefore, that Mr Hoffmann's argument that the respondent's application is defective must fail. I now turn to consider the two principal defences raised by the second appellant in the court a quo; the justus error, and the Conventional Penalties Act defences.

The justus error defence

- [26] The second appellant contended that she was unaware that the various rental agreements she signed contained onerous guarantees binding her as a co-principal debtor. The second appellant further contended that she was not informed that the various rental agreements

contained such onerous guarantees. According to the second appellant, the Deed of suretyship (the guarantee) was surreptitiously hidden in the body of the main agreement to extend personal liability to the signatory of the agreement. To this end, the second appellant contends that as a sophisticated financial institution, the respondents had a legal

duty to draw her attention to the guarantees and their legal import, but they failed to do so. She simply signed the document presented to her including the onerous guarantees in the bona fide and mistaken belief that the document did not include guarantees. According to the second appellant, the guarantees were a trap for the unwary in that her mistake in signing the guarantees was justus because she was not informed of the guarantees' existence and its terms.

[27] The court a quo dismissed this defence and found, amongst others, that the second appellant did not allege in her plea that the respondents were the cause of the second appellant's mistake or that the respondents were the parties that physically presented the guarantees to the second appellant for signature. Furthermore, the court a quo held that there is a legal duty to draw a party's attention to a clause in a written agreement only when the documents in which the clause is contained are misleading or the clause is not usually found in the type of agreement being concluded or the clause

is hidden in the agreement. The court concluded, amongst other things, that the second appellant is a businesswoman and a managing

member of the first appellant and cannot use her negligence to escape the obligations placed upon her by the guarantees. The court found that the second appellant's defence of justus error did not give rise to a triable issue and was not bona fide.

[28] At the hearing of this appeal, Mr Hoffman, for the second appellant, submitted that in the context of a sophisticated institution as the respondents are, they had an obligation to have said to the appellant that by signing the agreement, she is binding herself personally for the debts of the Company and that if the Company does not pay, they will sue her directly. Counsel further submitted that the second appellant was just given documents, and she signed them unwittingly and unknowingly and never intended to bind herself. Mr Fasser, on the other hand, argued that this defence is not bona fide in that the second appellant attempts to escape the caveat subscriptor rule, which binds a signatory to a written agreement even if she did not read the agreement. Counsel submitted that the very first clause of each of the respective guarantees makes it explicitly clear that the signatories are binding themselves as co-principal debtors for the debts of the principal debtor.

[29] In our law, there is no general obligation on an offeror to enquire whether or not the other party to the contract has read and understood the offer documentation accepted by him or her. (*Constantia Insurance Co Ltd v Compusource (Pty) Ltd* 2005 (4) SA 345 (SCA) para 19). He must do so, however, where there are terms that could not reasonably have been expected in the contract (*Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) para 36). It is also well established in our law that only to a limited category of mistakes will the law attach the quality of 'justus', and the fault principle looms large in determining this question (Horty

Investment (Pty) Ltd v Interior Acoustics (Pty) Ltd 1984

- (3) SA 537 (W) at 539G). In *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) at 471, Fagan CJ, as he then was, stated:

"When can an error be said to be justus for the purpose of entitling a man to repudiate his apparent consent to a contractual term? As I read the decisions, our Courts, in applying the test, have taken into account the fact that there is another party involved and have considered his position. They have, in effect, said: Has the first party - the one who is trying to resile - been to blame in the sense that by his conduct he has led the other party, as a reasonable man, to believe that he was binding himself? (Vide *Logan v Beit* (1890) 7 SC 197; *I Pieters & Co v Salomon* 1911 AD 121 especially at 130, 137; *Van Ryn Wine and Spirit Co v Chandos Bar* 1928 TPD 417 especially 422, 423, 424; *Hodgson Bros v South African Railways* 1928 CPD 257 at 261.) If his mistake is due to a misrepresentation, whether innocent or fraudulent, by the other party, then, of course, it is the second party who is to blame and the first party is not bound."

- [30] The learned justice further stated:

"When a man is asked to put his signature to a document, he cannot fail to realise that he is called upon to signify, by doing so, his assent to whatever words appear above his signature. In cases of the type of which the three I have mentioned are examples; the party who seeks relief must convince the Court that he was misled as to the purport of the words to which he was thus signifying his assent. That must, in each case, be a question of fact, to be decided on all the evidence led in that particular case." (my underlining)

- [31] In the present matter, the question is whether the second appellant had reason to believe that the documents she had to sign contained a guarantee agreement which made her personally liable in the event her Company (the first appellant) defaulted and whether the respondents had reason to believe that the second appellant would have been prepared to sign the agreement if she had known that she was about to incur personal liability in the event the principal debtor defaulted as aforesaid (see *Spindrifter (Pty) v Lester Donovan (Pty) Ltd* 1986 (1) SA 303 (A)).
- [32] It is common cause that the second appellant signed the Master Rental Agreement and the guarantees. The second appellant averred that it was never brought to her attention that the Master Rental Agreement contained a Guarantee Agreement. The second appellant stated further that when she signed the documents presented to her, she particularly signed and initialled where the third respondent asked her to sign and initial.
- [33] The court a quo dismissed this defence and stated amongst others, that the headings of the guarantees are highlighted in a bigger font and in bolder writing to draw attention to the nature of the documents. The court also found that the guarantees are not misleading. I do not agree with this finding.

- [34] It must be stressed that the second appellant asserted in her affidavit resisting summary judgment that the Guarantees were surreptitiously hidden in the body of the agreement to extend personal liability to her when she signed the Master Rental Agreement. In other words, at the critical moment when the agreement was signed, the fact that there was a guarantee in the pack of documents presented to her was hidden. This defence, in my view, raises a triable issue.
- [35] More pertinently, in paragraph 27 of the affidavit resisting summary judgment, the second appellant asserted that the third respondent's representative had presented the agreement and other documents to her, asked her to initial and sign the document, and did not advise her that the documents contained the guarantee. However, based on her interaction with the third respondent's representative, the second appellant assumed that no guarantee was contained in the pack of documents. The assumption that there was no guarantee in the pack of documents was based on the second appellant's interaction with the third respondent's representative before she could sign the agreement.
- [36] In my opinion, the second appellant should have been granted leave to defend so that she could clarify the basis for her assumption through evidence during the trial proceedings. Furthermore, I agree with the argument raised by Mr Hoffman that where a contract contains an onerous term that one would not expect to find in a contract, there exists a duty upon the offeror to bring the incorporation of the condition to the attention of the offeree (see, *Mercurius Motors v Lopez* [2008] ZASCA 22; 2008 (3) SA 572 (SCA) at para 3).
- [37] In addition, it is apposite to remind ourselves that the law recognises that it would be unconscionable for a person to enforce the terms of a document where he misled the signatory, whether intentionally or not (*Brink v Humphries & Jewell (Pty) Ltd* 2005 (2) SA 419 (SCA)). Where such a misrepresentation is material, the signatory can rescind the contract because of the misrepresentation, provided he can show that he would not have entered into the contract if he had known the truth (*Trollip v Jordaan* 1961 (1) SA238 (A)).
- [38] The defence that the second appellant raised in the plea and in the affidavit resisting summary judgment suggested that the Master Rental Agreement contained terms on which the third respondent was prepared to contract but which were at variance with the previous representations the third respondent's representative made to the second appellant. In my view, this is an issue that should be referred to trial for the consideration of the evidence of the second appellant and the representative of the third respondent to determine the factual circumstances which led to the second appellant concluding the agreement with the third respondent.
- [39] I am also mindful that the respondents have, in their affidavit for summary judgment, disputed that the terms of the guarantee were surreptitiously hidden in the body of the respective Master Rental Agreement. In my view, this issue raises a material dispute of fact which should be properly ventilated at trial where viva voce evidence would be led, and witnesses are cross-examined. To my mind, the defence that the second appellant raised in

this regard (justus error) raises a triable issue. It is a defence which if proven at the trial would be dispositive of the respondent's claim. I repeat, this is a triable issue that will require oral evidence from the sales representative of the third respondent as well as the testimony of the second appellant to determine their interaction, which led to the first appellant concluding the agreements and how the guarantee was allegedly hidden to the second appellant. In my view, the court a quo erred in finding against the second appellant on this issue and consequently granting summary judgment.

- [40] Notwithstanding this finding, for the sake of completeness, I turn to consider the second principal defence raised in the second appellant's affidavit.

Conventional Penalty Defence

- [41] The second appellant invoked the Conventional Penalties Act 15 of 1962 ("the CPA") as one of her primary defences. The second appellant submitted that the various Agreements of Hire contain a provision entitling the respondents to claim damages from the first appellant comprising the rental that would have been charged for the remainder of the agreement period, notwithstanding that the hired machinery was returned to the respondents. The second appellant averred that this is unreasonable, unfair, and unjust as it allows the respondents to claim payment from the first appellant for future rentals without imposing an obligation upon them to mitigate their damages.
- [42] At the hearing of this appeal, Mr Hoffman argued that the first appellant had been liquidated, and the respondents had not shown whether they had recovered their claim at the liquidation. Counsel further submitted that the respondents have uplifted the hired goods. However, the respondents did not indicate what they had done with these goods. They have not stated whether they sold or rehired them, as these goods have a residual value. Mr Hoffman submitted that the respondents are claiming from the second appellant the arrear amounts owing in terms of the agreement and the entire future rental as if the contract continued until the end of the agreement.
- [43] According to Counsel, this penalty falls squarely within the purview of the CPA. If the penalty is disproportionate, the contention proceeded; the second appellant wants a reduction as it is known that the respondents uplifted the goods. If the respondents sold the goods, they would be double-dipping. And if they received money from the liquidation, Counsel argued, they would also be double-dipping.
- [44] Mr Fasser argued in opposition that even at the summary judgment stage, when one relies on the CPA and seeks a reduction as a defendant, the defendant is obliged at the very least to prima facie allege the amount of the reduction. Mr Fasser submitted that in a summary judgment application where the defendant is desirous of raising the CPA, one of the things he is obliged to do, is to put forward facts that speak to the amount of the reduction. The defendant is not required to prove the reduction but must allege the grounds upon which the reduction is sought and the amount that he will be asking the court to have the amount reduced with. According to Mr Fasser, this was not done in this matter.

- [45] To this end, Mr Fasser submitted that the second appellant knew what the equipment was that was rented, how long they had the equipment for and the state or quality of that equipment when it was given back, whether it was in a good or imperfect condition. Armed with this information, so the argument went, the appellants could have placed before court a residual value on the equipment in question. Counsel submitted that they did not need to prove it but had to plead it as a bona fide defence. Accordingly, Counsel submitted that the court a quo was correct in granting summary judgment against the second appellant. Counsel implored this court to dismiss the appeal with costs.
- [46] The court a quo dismissed this defence and found that the problem with the second appellant's plea is that no facts are set out upon which a basis for the defence is made out. The court found that the second appellant failed to allege the factual basis that would justify a reduction of the penalty in terms of section 3 of the CPA or the amount of the reduction if such a reduction was justified.
- [47] Whether or not a court will exercise a discretion in favour of a reduction in terms of the CPA, will obviously depend on the facts of each individual case. The onus of convincing a court to exercise that discretion must, of necessity, reside with the party who wishes the court to reduce the penalty: each case must be dealt with according to its own merits (*Maiden v David Jones (Pty) Ltd 1969 (1) SA 59 (N)*).
- [48] In this matter, in support of her claim in terms of the CPA, the second appellant averred in her plea and in her affidavit resisting summary judgment that the hired equipment was uplifted from the liquidators of the first appellant. The second appellant averred that the respondents would have rented the equipment out after the same was uplifted. The second appellant also asserted that the respondents would have claimed rental twice in respect of a single machine. In my view, the second appellant has set out her defence clearly and with sufficient particularity in her plea and in her affidavit resisting summary judgment.
- [49] The defences raised by the second appellant raise a triable issue which, in my view, warranted the dismissal of the summary judgment application. I accept that the second appellant has not set out the exact amount by which she alleges the penalty should be reduced. However, I am of the view that that is a matter for trial where it is expected that there will be a further exchange of pleadings, particularly the discovery and inspection of documents.
- [50] What I find very concerning in this matter is that in the second appellant's amended plea, the second appellant pleaded that pursuant to the first appellant being placed into liquidation, the respondents had to lodge a claim with the liquidators of the first appellant. The second appellant pleaded that the respondents have not adduced evidence whether they submitted the claim to the liquidator, received dividends from the liquidation of the first appellant, and whether the equipment that the respondents uplifted was refinanced and or sold after the first appellant was placed into final liquidation. In other words, the second

appellant challenged the respondents to comment on these aspects.

- [51] Despite these assertions, when the respondents filed their supplementary affidavit supporting the application for summary judgment, they chose not to deal with these aspects, notwithstanding that the relevant information raised by the second appellant falls exclusively within their knowledge. Crucially, the first appellant was finally liquidated in 2020, that is, before the respondents could issue summons against the second appellant. In other words, the respondents must know what happened to the equipment in question. In my view, the respondents had a duty to take the court into their confidence and indicate in their affidavit for summary judgment whether they had received any dividends in the liquidation of the first appellant, and whether they had uplifted the goods, or sold or leased them again.
- [52] The respondents criticised the second appellant, alleging that she has not shown how much stands to be reduced in terms of section 3 of the CPA. In my view, it will be objectively difficult for the second appellant at this stage of the proceedings to determine the exact amount by which the penalty should be reduced without the benefit of discovery and the protection that the rules of court provide to a defendant to advance her defence. Furthermore, the respondents possess the

relevant equipment, which has a residual value. They possibly had a claim against the liquidation, which would have provided dividends to them. The respondents possess exclusive knowledge of this information which is crucial in the determination of the exact amount necessary for the reduction of the penalty.

Conclusion

- [53] From a conspectus of all the evidence placed before this court, I am of the firm view that the second appellant raised triable issues in the amended plea, which, in my view, warrants a referral of this matter to trial. I am further of the opinion that the defence the second appellant raised has been set out with sufficient particularity in the plea and the affidavit opposing summary judgment. Consequently, the appeal must succeed, and the second appellant should be given leave to defend the matter.
- [54] In the result, I would propose that the following order be granted:
- 54.1 The appeal is upheld.
- 54.2 The summary judgment application is dismissed, and the second appellant is granted leave to defend.
- 54.3 The costs of the summary judgment application and the appeal will be costs in the action.

LEKHULENI JD

JUDGE OF THE HIGH COURT

I agree and it is so ordered:

ERASMUS N

I agree:

MANGCU-LOCKWOOD N

Appearances:

For the appellant: Adv Hoffman

Instructed by: Wart Weil Van der Merwe Greenberg Inc

For the Respondent: Adv Fasser

Instructed by: Wright, Rose-Innes Inc

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