

SOUTH AFRICA / JUDGMENT

South Africa Securitisation Programme (RF) Limited v T Abrahams Transport Services (Pty) Ltd and Another (381/2023) [2025] ZAWCHC 215 (22 May 2025)

[2025] ZAWCHC 215

COURT

Western Cape High Court, Cape Town

BEFORE

P. S. Van Zyl

CASE / FILE NUMBER

381/2023

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case number: 381/2023

In the matter between:

SOUTH AFRICA SECURITISATION PROGRAMME Plaintiff

(RF) LIMITED

and

T ABRAHAMS TRANSPORT SERVICES (PTY) LTD First defendant

KAUTHAR ABRAHAMS

Second defendant

JUDGMENT DELIVERED ON 22 MAY 2025

VAN ZYL AJ:

Introduction

1. This is an opposed application for summary judgment. The plaintiff sues for payment of rental owing on a rental contract[1] and guarantee concluded by the second defendant on behalf of the first defendant during March 2022. In terms of the rental

contract, the first defendant leased a printer/copier machine from the plaintiff for a period of 60 months. In terms of the

guarantee, the second defendant renounced the benefits of division and excussion and, as a result, the second defendant is liable to the plaintiff in the amounts for which the first defendant is liable.[2]

2. The plaintiff sues as cessionary. The defendants contracted with an entity known as Sunlyn (Pty) Ltd. The contract was ceded to Sasfin Bank Ltd in terms of a standing arrangement between Sunlyn and Sasfin. On 17 May 2022, the plaintiff acquired the rental contract from Sasfin by way of cession.
3. The primary ground on which the plaintiff relies for relief is the so-called caveat subscriptor principle which in essence binds the defendants to the content of the contract regardless of whether they were aware of the content thereof. The general principle in our law is that when a person signs a contractual document, he or she agrees to be bound by the contents of the document.[3] In *George v Fairmead (Pty) Ltd*[4] it was stated that:

"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."

4. The defendants' defence is broadly that the particular facts of this matter provide an exception to the caveat subscriptor rule, and therefore raise a triable issue which necessitates the refusal of summary judgment. Various other defences arise in the circumstances.
5. I reiterate the broad principles applicable to summary judgment applications, and consider the merits of the defendants' defences thereafter.

The principles applicable to summary judgment applications

6. The purpose of Rule 32 is to prevent a plaintiff's claim, when based upon certain causes of action, from being delayed by what amounts to an abuse of the process of the court. The plaintiff is allowed to apply for judgment to be entered summarily against the defendant, thus disposing of the matter without putting the plaintiff to the expense of a trial. The procedure is not intended to shut out a defendant who can show that there is a triable issue applicable to the claim as a whole from placing his or her defence before the court.[5]

7. Rule 32(3)(b) provides that a defendant in summary judgment proceedings may “satisfy the court by affidavit ..., or with the leave of the court by oral evidence of such defendant or of any other person who can swear positively to the fact that the defendant has a bona fide defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor”.
8. In *Breitenbach v Fiat SA (Edms) Bpk*[6] the Court held as follows in relation to the defendant’s affidavit:

“... no more is called for than this: that the statement of material facts be sufficiently full to persuade the Court that what the defendant has alleged, if it is proved at the trial, will constitute a defence to the plaintiff’s claim. What I would add, however, is that if the defence is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will

constitute material for the Court to consider in relation to the requirement of bona fides”.

9. The defendant who elects to deliver an affidavit in opposition to a summary judgment application must thus show that they have a bona fide defence to the action. They must fully disclose the nature and grounds of the defence, and the material facts relied upon and which they genuinely desire and intend to adduce at trial. The facts should not be inherently and seriously unconvincing and should, if true, constitute a valid defence.[7] A bona fide defence is accordingly one that is good in law, and that is pleaded with sufficient particularity.[8] The defendant’s prospects of success are irrelevant to the enquiry.[9]
10. The word “may” in Rule 32(5) confers a discretion on the Court, so that even if the defendant’s affidavit does not measure up fully to the requirements of subrule (3)(b), the Court may nevertheless refuse to grant summary judgment if it thinks fit.[10] The discretion is not to be exercised capriciously, so as to deprive a plaintiff of summary judgment when he or she ought to have such relief.[11]
11. If it is reasonably possible that the plaintiff’s application is defective or that the defendant has a good defence, the issue must be decided in favour of the defendant.[12] If, on the material before it, the Court sees a reasonable possibility that an injustice may be done if summary

judgment

is granted, that is a sufficient basis on which to exercise its discretion in favour of the defendant.
[13]

12. Have the defendants met this standard in the present matter?

The defences

13. In their plea and affidavit resisting summary judgment, the defendants have raised essentially four defences:

13.1. First, that they had no opportunity to read the contract before signing it;

13.2. Second, that the rental contract contained unusual clauses which should have been brought to their attention prior to signature, but were not;

13.3. Third, that the agent who negotiated the contract with the defendants materially misrepresented to them that the fee shown on the contract was the entire monthly expense that was being contracted for, and deliberately omitted to inform them that additional costs would be incurred per copy or print. Had the defendants known of the additional expenses, they would not have concluded the contract; and

13.4. Fourth, that the exemption clauses in the contract are so onerous and one-sided that they offend against public policy.

The defendants did not read the contract before signing it

14. There are several important facts that are undisputed. The first is that the plaintiff was not a party to the conclusion of the contract. As indicated earlier, the plaintiff sues as cessionary. It can therefore not testify as to what occurred during the contract negotiations and the subsequent conclusion of the rental contract and guarantee.
15. It is further not disputed that the copier machine provided to the first defendant was not in a working order from the outset, and that this was brought to the attention of the vendor, an outlet known as Seven Degrees. It is common cause that the vendor did not take any steps to remedy the situation. The defendants plead that the defective machine has not been used since, and is being stored at the defendants' business premises.
16. It is, thirdly, common cause that the rental contract did not specifically refer to the further charges that would be incurred on a "per print" basis. No schedule for such costs was attached to the contract or to the founding papers.
17. As indicated, the plaintiff relies on the caveat subscriber principle in contending that the plea raises no triable issue. It refers to *Motswane v BMW Financial Services*,^[14] in which the debtor alleged that he had not read the document that he had signed with the claimant finance company to purchase a vehicle. The debtor said that the finance company informed him that he should simply sign the agreement which he had not read and he would "drive a fancy car". The Court found that he had consented to the terms of the agreement and that this was confirmed by his conduct in making payments under the agreement.
18. *Motswane* has distinguishing features when compared to the present matter. In *Motswane*, the appellant had been in possession of the motor vehicle since 2008 or 2009 (summary judgment was granted against him in 2023) and even went to the extent of putting himself under debt review. He had initially paid diligently towards the agreement, and did not challenge the payment breakdown provided by the respondent in the course of the litigation between them. In contending that he had not read the agreement, he did not say what terms of the agreement would have caused him not to sign the agreement, had he read it.

19. In the present matter the machine was defective from the outset, and not used over an extended period of time. The defendants have taken issue with the payment schedule relied upon by the plaintiff. They have also identified the clauses in the contract that would have persuaded them not to sign it, had they known what the true position was.
20. It is clear from the pleadings and from the oral argument presented that the defendants did not read the contract at all before signing it. The reason for this omission is the foundation underpinning the three further specific defences referred to above. The defendants say, in their plea, that the contract “was shoved at them to sign by the vendor, who demanded immediate signature. Had they been afforded an opportunity to properly read the contents of [the contract] they would have refused to sign same”.
21. The defendants plead further that the contract “is largely unreadable and illegible due to the very small and blurred font, and that they, in any event, would have been unable to read the contents”.
22. The plaintiff argues that this defence is not properly pleaded, it being too sparse. I think, however, that the plea paints an adequate picture, at least to prevent the grant of summary judgment. The copy of the contract contained in the court file, especially page 2 which contains the “Terms of business”, is densely typed in single spacing, and indeed difficult to read, especially in hurried circumstances. I include a half-page extract to illustrate the point:
23. Page 1 is clearer, the salient part being typed in capital letters. A trial court should nevertheless be given the opportunity of evaluating oral evidence regarding the circumstances in which the contract was signed together with the manner in which it was presented to the defendants.
24. The further defences raised, and the plaintiff’s contentions in relation thereto, must be considered against this

background.

25. The plaintiff’s argument in relation to all of the defences is that, had the defendants read the contract, they would have seen what it entailed. This is of course correct – the defences are indeed excluded by the contract. The argument

however ignores the defendants’ plea to the effect that they had no opportunity of considering the contract before signing it, and further that certain clauses contained in the contract were not pointed out to them.

The contract contains unusual clauses

26. Clause 6 of the rental contract states that, if the consumer wants any protection for defective goods, he or she needs to conclude a separate contract with the vendor of the goods. The clause reads as follows:

“This Agreement applies only to the hiring of the goods, which you have accepted ‘a is’ and the rental does not include any payment in respect of licensing, service or maintenance or any other charges.

There is no licensing, service or maintenance

agreement between you and us, and if you require one it should be obtained from the vendor of the goods. You agree that any

dispute in respect of the goods, their licensing, maintenance or any other agreement that you may have, will not entitle you to cease complying with your obligations in terms of this Agreement and any such dispute will not entitle you to withhold any rental payments”.

27. This is, so the defendants argue, an unusual type of clause in a rental contract, and should have been brought to the defendants’ attention prior to signature. This would have enabled them to decide to conclude such separate contract before commencing with the lease. The defendants say that a clause exempting the owner of goods from any liability whatsoever, when the owner is renting those goods to a consumer and expecting the consumer to conclude a separate contract in order to safeguard its rights, is not a standard clause to be expected in such contracts.

28. The defendants refer, too, to the exemption clauses in the contract, of which they were not made aware. These include clauses 3a, b, and c on the first page of the contract, and clause 25(2) on page 2 which states that the defendants agree “that all warranties implied by the common law are excluded and that no representations of any nature have been made by or on behalf of us”. Clause 3 reads as follows:

“3. You hereby indemnify us:

- a. Against any legal responsibility for any claim that may be made against us;
 - b. For any loss that we may sustain from any breach of any of the aforesaid provisions or for the failure of the vendor to pass ownership of the goods or deliver the good to us; and
 - c. From any other loss which we may suffer in relation to the goods of whatsoever nature and howsoever arising and whether or not you are at fault in relation thereto”.
29. The defendants argue that a clause that absolves a party of any liability arising in any way whatsoever, even if the liability is not the fault of the consumer, is overly broad to the point of being draconian. The Supreme Court of Appeal (“SCA”) dealt with a similar clause in *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd*.^[15] In deciding that the clause offended against public policy, the SCA stated the following:^[16]

“In Johannesburg Country Club v Stott & another Harms JA observed:

‘The conduct sought to be exempted from liability may involve criminal liability, however, and the question is whether a contractual regime that permits such exemption is compatible with constitutional values, and whether growth of the common law consistently with the spirit, purport and objects of the Bill of Rights requires its adaptation’. but thought it unnecessary, in the light of the proper reading of the contractual exclusion encountered there, to determine it.

Of clause 4.6, Blieden J said: ‘this is not a limitation of liability clause, it is an indemnity by the “Customer” for any claims by third parties which may be lodged against the “Company” for losses suffered because of the company’s fault or ‘for any reason whatsoever’. Counsel for the defendant referred to this clause as “Draconian”. I would say this is an understatement.’

In my view the provision is so gratuitously harsh and oppressive that public policy could not tolerate it. Or, in the language of the majority judgment in *Sasfin v Beukes*, it is ‘... clearly inimical to the interests of the community, . . . or run[s] counter to social or economic expedience...’

30. The defendants argue that clause 3 of the contract is so overly broad that it offends against public policy. Counsel remarked, as an aside, that clause 25(2) of the contract stipulates that no warranties have been made. This, however, flies in the face of how Sunlyn was conducting its business. The contract was concluded based on the representations of the agent who negotiated with the defendants. It is against public policy for a company to be able to have an agent make any number of warranties to induce a contract, and then contractually renege on all those warranties through standard fine print terms and conditions.
31. The defendants did not expressly raise the public policy defence in their plea. It can therefore not be considered as a bona fide defence for the purposes of resisting the summary judgment application.[17] The clauses in question, however, seem to be of the kind which a trial court may consider should have been pointed out to the defendants before signature.
32. The plaintiff argues that the impugned clauses are not unusual and, had the defendants read the contract, they would have seen it. They have themselves to blame for their situation.
33. The SCA has looked past the caveat subscriptor rule in matters where unusual clauses were found to be present in contracts. In *Mercurius Motors v Lopez*, [18] for example, it was stated that:

“An exemption clause such as that contained in clause 5[19] of the conditions of contract, that undermines the very essence of the contract of deposit, should be clearly and pertinently brought to the attention of a customer who signs a standard instruction form, and not by way of an inconspicuous and barely legible clause that refers to the conditions on the reverse side of the page in question.”
34. Returning to clause 6 of the contract, I agree with the submission made by the defendants’ counsel that a clause that requires the consumer to conclude a further contract with a supplier who is no longer the owner of an item, before the consumer would have any recourse if the rented items were defective and not fit for purpose, should be brought to the

attention of the consumer. The defendants aver that this was not done, and since they were not given a reasonable chance of reading the contract before signing it, they did not realise what the position was. This is a triable issue.

35. In fact, the following extract from the judgment of a Full Court of this Division in *Something Different Concepts and Shows CC and another v South African Securitisation Programme (RF) Ltd and others*[20] resonates as being apposite:

“[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.... He must do so, however, where there are terms that could not reasonably have been expected in the contract ...

- [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 ...

- [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.

- [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, ... 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

[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 ... 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 ...”

36. This is a somewhat lengthy quote but the circumstances referred to by the Full Court are reminiscent of the facts in the present matter. A similar approach is thus warranted.

Material misrepresentation

37. The defendants complain that they were induced to conclude the contract on the basis of misrepresentations[21] made to them by the agent who negotiated the Sunlyn contract, in particular that there would be no fees payable apart from the monthly amount for the rental of the machine. The agent worked at an outlet of the vendor, Seven Degrees.

38. In *Brink v Humphries & Jewell (Pty) Ltd*[22] the SCA found that a mistake induced by misrepresentation, whether innocent or deliberate, overruled the caveat subscriptor principle and rendered the contract void ab initio. In that matter, a credit application contained a surety clause which was not readily noticeable, and which was not conveyed to the party signing the contract. This misrepresentation by omission was found to be material, as the signing party had not intended to be bound as a surety, and the SCA refused to hold the appellant to the terms of the contract:[23]

“It is true that the appellant had ample opportunity to read the form carefully and he did not avail himself of that opportunity. But that is no answer. It is not reasonable for a party who has induced a justifiable mistake in a signatory as to the contents of a document to assert that the signatory would not have been misled had he read the document carefully; and such a party cannot accordingly rely on the doctrine of quasi-mutual assent.”

39. In the present matter the defendants did not read the contract, because they say they did not have the opportunity to do so. The question is therefore whether there was a misrepresentation on the part of the contract provider, which was the agent at Seven Degrees negotiating the Sunlyn contract. If there was a misrepresentation, then the next question is whether the misrepresentation was material, inducing the defendants to enter into the contract.
40. It is common cause that the contract was ceded to Sasfin Bank from Sunlyn. Sasfin Bank ceded it to the plaintiff thereafter. This leaves no doubt that the plaintiff has no personal knowledge of what representations were made to induce the contract on the part of the agent. The plaintiff argues that the agent at the centre of this dispute (that is, the salesperson at Seven Degrees) was in fact not Sunlyn's agent, but the defendants' own agent, as he negotiated with Sunlyn on the defendants' behalf. As such, there could not have been any misrepresentation as far as the defendants are concerned. Precisely what the situation was is oblique. Not having been party to the exchanges, the plaintiff does not know whether the agents of Seven Degrees were also representing Sunlyn and whether an agency relationship existed between Sunlyn and Seven Degrees.

The uncertainty of the situation is, in my view, further cause for the refusal of the summary judgment application.

41. This question can only be answered when evidence is led on the subject. What cannot be disputed by the plaintiff at this stage is that the defendants only interacted with one person throughout the process. The contract in terms of which Sunlyn became owner of the machine and rented it out to the defendants was produced and provided to the defendants for signature by the same person. There is, at least, the impression of ostensible authority on the part of this agent, with the associated consequences for the plaintiff in the litigation. [24] The plaintiff can also not dispute that the defendants never intended to bind themselves to further costs for each copy or print, and that the true position was never brought to their attention.
42. In opposition to the pleaded defence of misrepresentation the plaintiff refers to the content of clause 6 of the contract, which I have quoted earlier. This, however, reinforces their defence of misrepresentation. The defendants have pleaded that the agent never informed that there would be further costs on a per print basis. Nowhere does the contract stipulate such a cost or set out a schedule of what that cost would be. The referral to "any other costs" in clause 6 is ambiguous, and does not place the defendants in a position to be able to determine what the true costs involved in this venture are. Even had they read the contract, they would have been none the wiser.
43. There is also no reason to doubt the defendants' assertion that they would not have entered into the contract had they been informed of these extra costs, as they had an alternative option available to them. They have pleaded that they already owned a machine where they were not bound by a "per copy" cost.

44. Whether there was a material misrepresentation by the agent (whether by omission or commission) that induced the contract is, in my view, a triable issue.

The exemption clauses in the contract offend against public policy

45. This defence, which was not raised in the plea, has been dealt with. Should the defendants wish to rely thereon they will have to amend their pleadings.
46. I have in any event found that the other defences raise triable issues. There are further aspects that arise from both counsel's interesting oral argument, but it is, for the purposes of this application, not necessary to discuss those.

Conclusion

47. I am of the view that summary judgment cannot be granted in these circumstances. The defendants have raised trial issues. It cannot be said that the plaintiff's claim is unimpeachable in the circumstances.
48. It is fair that costs stand over. The trial court would best be able decide, on consideration of the matter as a whole, whether the plaintiff was justified in seeking summary

judgment.

Order

49. In the circumstances, it is ordered as follows:
1. The application for summary judgment is refused, and the defendants are given leave to defend the action.
 2. The plaintiff may replicate to the defendants' plea within 15 days of the date of this order, and the action shall proceed in accordance with the Uniform Rules of Court.
 3. The costs of the summary judgment application stand over for determination at the trial.

P. S. VAN ZYL

Acting Judge of the High Court

Appearances:

For the plaintiff:

Ms R. More, instructed by Wright Rose-Innes Incorporated

For the defendants:

Mr A. Engelbrecht, instructed by R. Allom Incorporated

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- [1] The provisions of the National Credit Act 34 of 2005 and the Consumer Protection Act 68 of 2008 are not applicable to the agreement, because of the nature of the agreement and the first defendant's net asset value or annual turnover.
- [2] I refer to the "defendants" throughout this judgment, on the understanding that the second defendant acted on the first defendant's behalf at all material times.
- [3] See Christie The Law of Contract in South Africa (5ed, 2006) pp 174-179.
- [4] 1958
- (2) SA 465 (A) at 472A-B. Emphasis supplied.
- [5] Majola v Nitro Securitisation 1 (Pty) Ltd 2012
- (1) SA 226 (SCA) at 232F-G.
- [6] 1976
- (2) SA 226 (T) at 228D-E. Emphasis added.
- [7] 1976
- (2) SA 226 (T) at 227G-228B; Standard Bank of South Africa v Friedman 1999
- (2) SA 456 (C) at 461I-462G.
- [8] Maharaj v Barclays National Bank Ltd 1976
- (1) SA 418 (A) at 426C-D.
- [9] Tumileng Trading CC v National Security and Fire (Pty) Ltd 2020 (6) SA 624 (WCC) para 13.
- [10] First National Bank of South Africa Ltd v Myburgh 2002
- (4) SA 176 (C) at 180D-E.
- [11] Jili v Firststrand Bank Ltd 2015
- (3) SA 586 (SCA) at para [13].
- [12] Arend v Astra Furnishers (Pty) Ltd 1974
- (1) SA 298 (C) at 305C-F.
- [13] First National Bank of South Africa Ltd v Myburgh supra at 184H.
- [14] [2025] ZANWHC 1 (6 January 2025).
- [15] 2011

- (4) SA 276 (SCA). The clause read as follows: “The Customer indemnifies and holds the Company harmless against all claims, loss, damage, expense or proceedings of whatsoever nature against or on the part of the Company arising out of the sale or distribution of the goods whether defective or not for any reason whatsoever.”
- [16] Freddy Hirsch supra para
23. Emphasis supplied.
- [17] See AHMR Hospitality (Pty) Ltd t/a Bakenhof Winelands Venue v Da Silva 2024
- (3) SA 100 (WCC) at para [14]. I do not venture into a consideration of whether the trial court can mero motu raise the issue of public policy.
- [18]
- [2008] ZASCA 22; 2008
- (3) SA 572 (SCA) para 33.
- [19] Clause 5 (the exemption clause) read as follows: “I/we acknowledge that MERCURIUS shall not be liable in any way whatsoever or be responsible for any loss or damages sustained from fire and/or burglary and/or unlawful acts (including gross negligence) of their representatives, agents or employees.”
- [20] [2024] ZAWCHC 103 (19 April 2024) paras 29-37. Emphasis supplied.
- [21] See SPF and another v LBCC T/A LB and another
- [2016] ZAGPPHC 378 (20 April 2016) para 14.
- [22] 2005
- (2) SA 419 (SCA).
- [23] Brink supra para
11. Emphasis added.
- [24] See the discussion in Makate v Vodacom (Pty) Ltd 2016
- (4) SA 121 (CC) paras 42-68.

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