REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 7283/2013

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

17/04/2014

In the matter between:

ABSA TECHNOLOGY FINANCE SOLUTIONS (PTY) LIMITED [previously known as UNION FINANCE HOLDINGS (PTY) LIMITED] Plaintiff

And

THANDO FUNERAL SERVICE CC First Defendant

MQENEKELWA ISAAC MATHE Second Defendant

J U D G M E N T

KATHREE-SETILOANE, J:

[1] The plaintiff, Absa Technology Finance Solutions (Pty) Ltd instituted action against the first and second defendants jointly and severally, for the payment of the amount of R319 141.20 plus interest at the rate of 16.5% (interest at prime rate plus 6%) from date of service of summons, being 18 February 2010, to date of final payment, and costs of suit on the scale as between attorney and client. In additional, the plaintiff seeks an order that the first defendant return a New Itec C451 Colour Copier machine ("the machine") with serial number A000K040003664, failing which that the Sheriff or his deputy is authorised to attach, seize and hand over to the plaintiff the machine.

MASTER RENTAL AGREEMENT

[2] The plaintiff's cause of action is founded on a written Master Rental Agreement ("MRA") concluded between the first defendant Thando Funeral Services, represented by the second defendant Mr MI Mathe, and a representative of Itec Finance (Pty) Limited ("Itec") on the 12th of December 2008 at Phuthaditjhaba. All of Itec's rights, title and interest in the MRA were ceded to the plaintiff by way of a written cession agreement concluded on 29 April 2004. The material terms of the MRA are as follows:

(i) The rental period would be for 60 months;

(ii) The monthly rental would escalate at a rate of 15% per annum (Clause 4.1);

(iii) The first defendant would pay an initial rental in the amount of R4 788.00. The payments would be made without demand, and will not be subject to any set-off or counterclaim and shall be made without deduction of any nature (Clause 3.1);

(iv) The first defendant would thereafter make payment of 59 monthly rentals in the amount of R4 788.00 per month subject to the annual escalation mentioned before;

(v) The plaintiff would at all times be and remain the owner of the machine ("goods") and either the first defendant or any other

person on its behalf shall at any stage before or after the termination of the MRA acquire ownership of the goods (Clause2.1.7);

(vi) If the first defendant fails to effect any payment in terms of the agreement on the due date thereof, such overdue amount shall bear interest at the rate equal to 6% above the prime rate (Clause 3.3);

(vii) If the first defendant defaults in the punctual payment of the monies as it falls due in terms of MRA, plaintiff may elect to immediately terminate the agreement without notice, take possession of the goods, retain all amounts already paid and claim all amounts which are in arrears at date of termination together with as pre-estimate liquidated damages, the future rentals which would have fallen due in terms of the MRA from the date of termination until the earliest possible date on which the MRA could have terminated by notice. (Clause 8.2);

(viii) A certificate under the hand of any manager, as given from time to time, in respect of the indebtedness of the first defendant in terms of the MRA or in respect of any other fact shall be prima facie evidence of the first defendant's indebtedness to the plaintiff. It shall not be necessary to prove the appointment of the person signing the certificate (Clause 12);

(ix) In the event of a breach of the MRA by the first defendant, then all costs and disbursements, including costs on the attorney and client scale, incurred by the plaintiff in recovering possession of the goods or in tracing the first defendant and locating the goods and in collecting or endeavouring to collect all or any amounts payable by the first defendant to plaintiff in terms of the MRA, shall be for the account of the first defendant (Clause 15.2);

(x) The MRA is the complete and entire agreement between the parties. No agreement from the terms and conditions of this agreement, including consensual cancellation, shall be of any force or create any estoppel, unless it is in writing and signed by the parties to the MRA (Clause 14);

(xi) The first defendant acknowledges and warrants that:

(a) the plaintiff gives no warranties in connection with the goods (Clause 2.1.3);

(b) all warranties implied by common law are expressly excluded (Clause 2.1.4);

(c) no representation of any nature whatsoever in connection with the goods are made by or on behalf of the plaintiff (Clause 2.1.5);

(xii) The first defendant would only be entitled to cancel the MRA due to a material breach by the plaintiff of the obligations in terms of the MRA if the plaintiff has not remedied its breach within 14days of receipt of written notice from the first defendant calling upon the plaintiff to do so (Clause18).

[3] The second defendant concluded a deed of suretyship in terms of which the second defendant bound himself as surety and co-principal debtor *in solidum* with the first defendant.

[4] The defendants' defence is one of misrepresentation, which they allege induced the first defendant to enter into the MRA with the plaintiff. They accordingly deny that the MRA exists between the parties, as the second defendant was induced to sign the MRA by the representative of Itec, Mr Van der Walt ("Van der Walt") who knew that the first defendant intended a joint venture with one George Mahlatsi, which was conditional upon Mahlatsi providing the first and second defendants with financial statements relating to Mahlatsi's business for their and Itec's assessment; yet Van der Walt deliberately, alternatively negligently, represented to the second defendant that his initials and signature were required on the MRA to enable Itec to assess the first defendant's creditworthiness. The defendants furthermore allege that the MRA was not signed on 12 December 2008 at Phutadithjaba, but on 4 December 2008 at Reitz in the Free State.

[5] The following facts are common cause between the parties:

(a) A validly enforceable cession agreement was concluded between the plaintiff and Itec Finance (Pty) Limited.
(b) The second defendant's signature appears at page 1 of the MRA under the heading "SURETYSHIP".
(c) The second defendant's signature appears as "User" on the Equipment Schedule to the MRA under the heading "SURETYSHIP".
(d) The second defendant's signature appears under the heading "CERTIFICATE OF ACCEPTANCE" on the Equipment Schedule to the MRA.

[6] In view of the defence of misrepresentation raised, the defendants correctly elected to adduce evidence first. The second defendant was the only witness to testify on behalf of the defendants. The plaintiff only called Mr Kugen Govender, a legal recoveries manager, whose testimony was limited to the certificate of indebtedness as provided for in the MRA. Mr Van der Walt who acted on behalf of Itec, and who is alleged by the defendants to have made the misrepresentation which purportedly induced the second defendant to sign the MRA was not called to give evidence on behalf of the plaintiff.

[7] The material aspects of the second defendant's evidence can be summarised as follows: He has been a magistrate for approximately 26 years. He operates a funeral service, with permission of the Minister of Law and Constitutional Development, under the name and style of Thando Funeral Services (the first defendant), which has various branches across the country, two of which are situated in Phutadithjaba.

[8] A client approached the second defendant for funeral services. In addition, the client required posters of the deceased to be made and monitors on which to broadcast the funeral proceedings. Since the second defendant did not provide these additional services, the client referred him to one George Mahlatsi ("Mahlatsi"). The second defendant approached Mahlatsi, who provided him with the required services. During the second

defendant's discussion with Mahlatsi, and before the actual services were rendered, Mahlatsi indicated to the second defendant that he did not own the machine but outsourced it. He said that he would like to rent his own machine, but was unable to because he was not creditworthy. He then suggested to the second defendant that he would like to enter into a joint venture with him in order to rent a machine.

[9] The second defendant requested Mahlatsi to provide him with financial statements of his close corporation in order to assess the "fluidity" of the business. Mahlatsi did not provide the second defendant with financial statements. The second defendant was shortly thereafter approached by Van der Walt who informed him that Mahlatsi mentioned the joint venture between himself and the first/second defendant, and that the acquisition of a machine would enhance and boost the business. The second defendant knew neither Mahlatsi nor Van der Walt before and only met with each of them respectively, once. The second defendant met Van der Walt at a Total Garage in Reitz on 4 December 2008 where second defendant was presented with a number of documents for his signature on the boot of his car. He said he was persuaded by Van der Walt to sign these documents to have his creditworthiness assessed.

[10] The second defendant did not read the documents and signed them in blank. He acknowledged that this was stupid and reckless of him. The second defendant also gave Van der Walt permission to obtain any further information that he may require from the first defendant's offices in Phutadithjaba. During May 2009, when the second defendant went through the first defendant's bank statement in order to cancel certain policies belonging to his father who had recently passed away, he noticed certain debit order deductions in favour of Itec. Having obtained the details of Itec Bethlehem from the Bank, and he tried to contact them, but to no avail. He then contacted Itec Welkom, and spoke to one Julia, who informed him that the debit orders related to a "machine". He advised Julia that he had not rented the "machine" from Itec, and would immediately stop the debit order payment.

[11] During May 2009, the second defendant received a letter of demand from Itec for payment. He made enquiries with the Sheriff, who advised him that the "machine" was delivered to Mahlatsi in Bethlehem, but had been subsequently attached in terms of an automatic rental interdict. The Sheriff provided him with the documents relating to the rent of the machine. On perusal, he discovered that he had signed the application for credit on 1 December 2008 in Phuthadithjaba, and the MRA on 12 December 2008 in Phuthadithjaba as well. The second defendant testified, in this regard, that the only time he met Van der Walt was on 4 December 2008 in Reitz, and produced various pages which purported to be from a court book, to demonstrate that he had presided at the Alberton Magistrates' Court on 1 December 2008 and 12 December 2008, respectively.

[12] He testified that he never intended to sign the MRA, but only intended to sign a credit application. He also denied that the financial statements which were submitted to Itec for purposes of assessing the first defendant's creditworthiness were those of the first defendant, as he had no knowledge of the bookkeepers who had compiled them.

[13] Mr Van der Walt, who represented Itec in conclusion of the MRA was not called to refute the evidence of the second defendant. The defendants accordingly contend that by virtue of the plaintiff's failure to call Van der Walt who acted on behalf of the Itec, the allegation that the second defendant was induced by Van der Walt's misrepresentation to enter into the MRA for the rental of the photocopier stands uncontroverted.

[14] Although the allegation of misrepresentation is not rebutted by the the failure of the plaintiff to call Van der Walt, the court must still be satisfied that the defendants have proved misrepresentation on a balance of probabilities. Despite having only the version of the defendants before it on the issue of misrepresentation, the court must be still be satisfied that on the probabilities, that version is the truth. Thus, a defendant who relies on his rescission as a defence to a claim founded on the contract bears the onus of proving that the misrepresentation entitles him to rescind. If he fails to discharge this onus

and raises no other successful defence, judgment must be given against him.[1] In *Stellenbosch Farmer's Winery Ltd Vlachos t/a Liquor Den* 2001 3 ALL SA 577 (SCA) 581H -I; 2001 3 SA 597(SCA), it was held that:

"where a misrepresentation is relied upon, the party relying thereon had to establish the misrepresentation and a reliance thereon by the defendant, which reliance was 'the cause of his acting to his detriment'"[2].

A misrepresentation is described as a false statement of fact, not law or opinion, made by one party to another before or at the time of the contract concerning some matter or circumstance relating to it. Hence, a party seeking to avoid a contract on the ground of misrepresentation must prove that:

(a) the misrepresentation relied upon was made;
(b) it was a representation as to a fact;
(c) the representation was false;
(d) it was material in the sense that it would have influenced a reasonable person to enter into the contract; and
(e) it was intended to induce the person to whom it was made to enter into the transaction sought to be avoided.

[15] I am not satisfied on a consideration of the evidence adduced by the defendants that they have succeeded in proving misrepresentation on a balance of probabilities. On an examination of the second defendant's testimony, it is clear that the probabilities disfavour the defendants' version. In fact the second defendant conceded as much in cross examination due to the existence of the following salient facts:

(a) Although the second defendant did not know Mahlatsi having met him briefly once only, he knew that Mahlatsi was not creditworthy.

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[1] *Alexander v Owen* (1882) 1 BAC 159; *Standard Bank v Du Plooy* (1899) 16 SC 161
[2] (cf *Oakland Nominees (Pty) Ltd v Gelria Mining & Investments Co (Pty) Ltd* 1976 1 SA 441 (A) at 452G; *Quenty's Motors (Pty) Ltd v Standard Credit Corporation Ltd* 1994 3 SA 188 (A) at 198 g- 199g)

(b) The second defendant did not know Van der Walt, having also only met him for the first time in Reitz in the Free State, yet he foolishly did not read the documentation that was presented to him before signing them.

(c) The second defendant had not received the financial statements from Mahlatsi, and therefore had no intention of concluding a joint business venture with him, yet he was prepared on his version to sign documentation to assess his creditworthiness for the purpose of purchasing a photocopier that neither him nor the second defendant required.

(d) Despite claiming to have no involvement in the business of Mahlatsi, and not requiring the machine for either himself or the second defendant, the first defendant gave Van der Walt permission to obtain whatever documents he required from the first defendants' office in Phutadithjaba.

(e) The second defendant conceded that the letter head of the first defendant and copy of the second defendant's identity document must have been obtained from the first defendant's offices, but this notwithstanding denies the fact that the financials similarly emanated therefrom.

[16] The second defendant is a magistrate of 26 years standing yet he foolishly appended his signature to a credit application to assess his creditworthiness to rent a machine for a business venture that he did not intend to undertake with Mahlatsi. In view of the second defendant experience as a magistrate, it is highly improbable that he would have signed an application for credit and the MRA for the rental of a photocopier that he did not intend to rent. In addition, it is improbable that a man of his legal standing would have appended his signature to a credit application and MRA without first reading the documents, and would have provided Mr Van der Walt with permission to obtain whatever documentation he required from the first defendant' office in Phutadithjaba. He would furthermore, on the probabilities, not have appended his signature to a blank document without the information having been filled out. It is also improbable that a man of his legal standing would have foolishly agreed to drive to Reitz in the Free State to sign

documents to assess his creditworthiness to rent equipment which he did not need – but was instead needed by a man who was not creditworthy and whom he barely knew.

[17] Hence, notwithstanding the fact that the defendants evidence as to the misrepresentation is uncontroverted by failure of the plaintiff to call Van der Walt to testify on its behalf, I am unable to find that the defendants' version is probable, and reject it for that reason. I am also unable to draw a negative inference from the plaintiff's failure to call Van der Walt to testify on its behalf. The contention that Van der Walt was not called by the plaintiff because his evidence would have disfavoured the plaintiff is, in my view, without merit, as that is not the only inference to be drawn from the plaintiff's failure to call him.

Court Book Records

The second defendant denied that he signed the MRA on 12 December 2008 in Phuthadithjaba. He also denied signing the credit application on 1 December 2008. Pursuant to this denial he presented pages from a court book to demonstrate that he was presiding at Alberton Magistrates' Court on 1 and 12 December 2008, respectively and could therefore not have signed the credit application or the MRA on these days. The pages from the court book presented were, in my view unreliable. In this regard, the second defendant conceded during cross-examination that he had not filled out all of the information on the pages from the court book presented to court during the hearing. He, however, failed to call the clerk who had in fact filled out some of the information on the pages from the court book. Moreover, it could not be established *ex facie* the pages from the court book relied upon by the defendants, that they emanated from a court book for Alberton Magistrates' Court. It could also not be established *ex facie* the pages what amount of time the second defendant spent in court on the days in issue, and when he had adjourned court. In addition, only pages from the court records for 12 December 2008 were certified by a supervisor, but the supervisor was not called to confirm the correctness of the entries on these pages. Curiously, the date appearing on one of the pages referred to a date in the year 2018 and not 2008, but the second defendant could not explain this, despite having

personally, and selectively, made copies of only some of the pages of the court book relating to the dates in question as he wanted to be "economical". The original court book was also not presented into evidence during the hearing. I accordingly reject as unreliable the testimony of the second defendant in relation to the pages of the court book which he presented into evidence.

[18] Our courts have consistently held that a person who signs a contractual document thereby signifies his assent to the contents of the documents, and if these subsequently turn out not to be to his liking he has no one to blame but himself (*Burger v Central South African Railways* 1903 TS 57). In terms of this principle of law known as the *caveat subscriptor* rule "when a person signs a contract, he or she is taken to be bound by the ordinary meaning and effect of the words which appear over his or her signature"[3]. According to Christie in the *Law of Contract in South Africa* (5th edition) at 175, the true basis of the caveat subscriptor rule is the doctrine of quasi mutual assent, the question being simply whether the other party is reasonably entitled to assume that the signatory, by signing the document, was signing his intention to be bound by it.[4]

[19] The second defendant, in the current matter, had by signing the credit application and the MRA, without reading them, signified his intention to be bound by them. The plaintiff/Itec was therefore reasonably entitled to assume that the second defendant, by signing the documents without reading them was signifying his intention to be bound by them.[5] So even though the second defendant had not read the documents, by signing them he indicated that he was prepared to be bound by them. Thus in *Goedhals v Massey – Harris & Co* 1939 EDL 314, a farmer who signed an order form in the presence of an agricultural implement salesman was held bound by conditions printed on the

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[3] *Burger v Central SAR* 1903 TS 571
[4] *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A)
[5] *Nightingale v SAR&H* 1921 EDL 91 105; *George v Farmead* (Pty) Ltd 1958 2 SA 465 (A) 471B; *Coetzee v Van der Westhuizen* 1958 3 SA 847 (T) 851; *Dlovo v Brian Porter Motors Ltd* 1994 2 SA 518 (C) 524D-H; *Kuehne &Nagel (Pty) Ltd v Breathetex Corpoartion (Pty) Ltd* [2008] 2 ALL SA 446 (SE) [9]; *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2010 1 SA 8 (GSJ) [24]-[27].

form which he had obviously not read. Similarly, in *Bhikhagee v Southern Aviation (Pty) Ltd* 1949 4 SA 105 (E) an experienced business man who could not read or write English was held bound by conditions on a flight ticket he had signed without reading, after jokingly asking whether he was signing his death warrant, Gardner JP observed at 110: "By his signature he elected to take the risk, and he is bound". In *Mathole v Mothole* 1951 1 SA 256 (T) a sick man, who could not concentrate was held bound by his signature on a document containing Latin phrases he obviously would not have understood, because (per Clayden J at 259D) "he was content to execute the document without desiring that it be explained to him in a language which he could understand". In *George v Fairmead (Pty) Ltd* 1958 2 SA 465 (A) a hotel guest was held bound by a hotel register obviously containing contractual terms which he had signed without reading. Fagan CJ stated thus at 472A:

"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, he assents to whatever words appear above his signature".

[20] *In Moshal Gevisser (Tradenmarket) Ltd v Midlands Paraffin Co* 1977 1 SA 64 (N) a business man was held bound by a consent to judgment he had signed without having it read or explained to him by his attorney, and without reading it himself. In *National and Grindlays Bank Ltd v Yelverton* 1972 4 SA 114 (R) Davies J applied the *caveat subscriptor* principle to a contract signed in blank, that is, a printed form containing blank spaces allegedly not filled in before signature, holding that the signatory could escape liability only by raising one of the defences that would have been available if the blank spaces had been filled in - the normal defences available to any signatory, being misrepresentation or fraud. In so far as it is contended by the defendants, in the current matter, that Van der Walt was obliged to point out to the second defendant that he was signing the MRA, there is no general rule that the signatory must always be expressly warned of what is in the document before he signs it (*Hartley v Pyramid Freight (Pty) Ltd t/a Couriers* 2007 2 SA 599 (SCA).

[21] Accordingly, I am of the view that the second defendant signed the MRA as a consequence of his own negligence in not having read the documents, and is therefore bound by it. On the defendants' own version, payment for the rent of the goods in terms of the MRA was stopped during May 2009, and no subsequent payments had been made. Plaintiff called Mr Kudhen Govender, a legal recoveries manager who presented into evidence a certificate of indebtedness as provided for in the MRA. Although cross-examined at length by the defendants' counsel, this had no effect on the probative value of the certificate of indebtedness. In the circumstances, I am satisfied that the plaintiff has proved on a balance of probabilities that the first defendant has breached the MRA by defaulting on its rentals in terms thereof by not making due and monthly payments. The plaintiff's action must accordingly succeed.

[22] In the result, I make the following order:

1. The plaintiff is granted judgment against the first and second defendants jointly and severally, the one paying the other to be absolved for;

(a) Payment of the amount of R319, 141, 20;

(b) Interest on R319, 141, 20 at the rate of 16.5% from date of summons to date of final payment;

(c) The first defendant is ordered forthwith to return the New Itec C451 Colour Copier with serial number A000K040003664, failing which the Sheriff or his deputy is authorised to attach, seize and hand over to the plaintiff the machine;

(d) Costs of suit on the scale as between attorney and client;

2. The first and second defendants' counterclaim is dismissed
3. The defendants are ordered to pay the costs of the counterclaim jointly and severally, the one paying the other to be absolved.

F KATHREE-SETILOANE
JUDGE OF THE HIGH COURT OF SOUTAFRICA, GAUTENG LOCAL DIVISION, JOHANNESBURG

Counsel for the Plaintiff:	F Bezuidenhout
Instructed by:	Jay Mathobi Incorporated
Counsel for the Respondent:	JJ Roestorf
Instructed by:	Senekal Simmonds
Date of Hearing:	10 March 2014
Date of Judgment:	17 April 2014