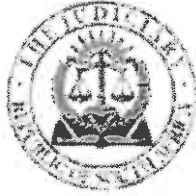
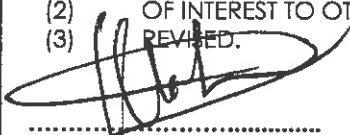


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 28176/2011

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED.
	
SIGNATURE	07/07/2015 DATE

In the matter between:

NEDBANK LIMITED

Plaintiff

versus

MAJOR TRUCK AND BUS SPARES CC

First Defendant

DHARAMPHAL SINGH

Second Defendant

JUDGMENT

MATOJANE J**Introduction**

[1] The Plaintiff sued the Second Defendant as a surety for payment of an amount of R228 566.63 as being due and owing under a Master Rental Agreement concluded on 21 July 2008 which rights, title and interest were ceded to the Plaintiff under the Master Sale and Cession Agreement entered into between the Plaintiff and Profin (Pty) Ltd.

[2] The Master Rental Agreement was concluded to hire 16 X Star Track MT2000 TRACKING UNITS from Profin (Pty) Ltd. The goods were purchased from Pulsit Electronic CC and Profin (Pty) Ltd financed the purchase and the goods were made available to the First Defendant.

[3] On 4 August 2008, Profin (Pty) Ltd, ceded to the Plaintiff all its rights, title and interest as provided for in the Master Rental Agreement, read together with the express provisions of the Master Sale and Cession agreement attached to the Plaintiff's Particular of Claim.

[4] The first and Second Defendant does not dispute the contents of the Master Rental Agreement and or that the terms govern the contractual relationship between the parties. It is also common cause between the parties that the First Defendant breached the terms of the Master Rental Agreement on or about May 2011 and that a certificate of indebtedness signed by the legal manager of the Plaintiff confirms the amount of indebtedness of the First Defendant to the Plaintiff.

The Plea

[5] The Second Respondent raises the following defences in his amended plea, namely:

5.1 The second Defendant admits having signed annexure A. The Second Defendant is married in community of property. Mrs Singh did not consent in terms of section 15(2) of the Matrimonial Property Act to the Second Defendant entering into a deed of suretyship and in the premises the deed of suretyship is invalid alternatively unenforceable as against the Second Defendant.

5.2 The Second Defendant admits having signed annexure A. When the Second Defendant signed annexure A he did so on the basis that he was signing in his representative capacity on behalf of the First Defendant in concluding the master rental agreement. The representative from Profin negligently did not make the Second Defendant aware that by signing and appending his signature to annexure A he was also standing surety and co-principal debtor with the First Defendant. The Second Defendant never intended to stand surety and to the extent he may have signed the deed of surety he did so in error.

5.3 Annexure A was blank when he signed it. Annexure A, to the extent that it purports to be a deed of suretyship does not comply with section 6 of the General Laws Amendment Act in that the following information did not appear from the master rental agreement at the time the Second Defendant appended his signature to it, the name of the surety, the name of the principal debtor.

[6] The Plaintiff's first witness, Kobus Muller confirmed his position as Legal Recoveries Manager with the Plaintiff and that he was the author of the "certificate of indebtedness" annexed to the Particulars of Claim which confirmed the indebtedness of the First Defendant to the Plaintiff as set out in paragraph 19 of the Particulars of Claim.

[7] Mr Muller referred to clause 17 of the Master Rental agreement which dealt with the "Certificate of indebtedness" which stated that:

"A certificate under the hand of any director or manager of the time being Profin, whose authority or appointment shall not be necessary to prove in respect of any indebtedness of the hirer under the agreement or in respect of any other fact, shall be prima facie proof the hirer's indebtedness to Profin and / or such other fact for the purposes of obtaining a judgment or order against the hirer in any competent Court"

[8] Mr Muller was referred to paragraph 19 of the Particular of the Claim which provides as follows:

"19 Despite demand, the Second Defendant has failed, refused or neglected to make payment of the amount of R228 566.63.

[9] Under cross-examination, Mr Muller stated that he was the deponent to the Plaintiff's discovery affidavit. He confirmed that the seven documents forming part of the schedule to the discovery affidavit all came from his file and were the only documents discovered by the Plaintiff because these were the only documents which he considered to be relevant to the dispute between the parties.

[10] Mr Muller under re-examination confirmed that he had not received any requests from the First Defendant for any additional information.

[11] The Plaintiff then called Mr Fourie as its second witness. He is a CEO of Pulsit Electronics CC which entity supplied the 16 "Star Track MT 2000 Terminal Trucking units to the First Defendant. He testified that purchasers of tracking units must elect whether they intend purchasing tracking units directly from Pulsit Electronics CC alternatively through a third party being a finance house [Profin (Pty) Ltd.

[12] He testified that the First Defendant elected to finance the purchase of the sixteen "Star Track MT 2000 Terminal Trucking" units through Profin as the units were expensive. Fourie caused a tax invoice to be issued on behalf of Pulsit Electronics CC in favour of Profin (Pty) Ltd for the supply of the 16 satellite tracking units which units Profin agreed to finance on behalf of the Second Defendant.

[13] Pulsit Electronics CC and or Fourie were not a party to the Master Rental Agreement entered into between Profin and the First Defendant which agreement was regulated by its standard terms and conditions.

[14] After the First Defendant had obtained credit approval from Profin (Pty) Ltd, Fourie, in order to expedite payment dropped off the Master Rental agreement at the premises of the First Defendant and that after it was completed he collected it and returned it to Profin. He testified that it had been completed in full at the time he affixed his signature as a witness in the presence of the Second Defendant.

[15] Mr Fourie caused the installation of the 16 MT 2000 satellite-tracking units in the vehicles of the First Defendant. He testified that Second Defendant indicated to him that he had legal background.

[16] In cross examination, the version of the Second Defendant as recorded in his opposing affidavit resisting summary judgment was put to Mr Fourie and he stated testified that he never agreed to the terms and conditions of the Master Rental Agreement with the Second Respondent as he never had a mandate to do so. He testified that in his experience a suretyship is a general requirement as far as the Master Rental Agreement s are concerned and that at no stage had he conveyed to Second Defendant that a suretyship was required from Second Defendant.

[17] He testified that the Master Rental Agreement was not blank when he signed as a witness on various occasions on the face of the Master Rental Agreement, including the reverse side. He stated that he was not able to say whether or not, when Second Defendant signed the Master Rental Agreement it was blank as contended for by Second Defendant and only thereafter completed in full by Mrs Reddy and then given to him.

[18] Mr Fourie was not able to say that Second Defendant was aware that when he signed the Master Rental Agreement he was also binding himself as surety.

[19] The Second Defendant elected not to give evidence at the trial.

[20] In his affidavit opposing summary judgment, Second Respondent admits that he signed the Master Rental Agreement in six places by stating that:

- "3.1 I signed under hirer's signature;
- 3.2 I signed under authorised signatories;
- 3.3 I signed in the surety section to the right....
- 3.4 I signed in the schedule section;
- 3.5 I signed under the acceptance certificate;"

[21] The Second Defendant state further in his affidavit resisting summary judgment that he never agreed to stand surety for the First Defendant and he did not read the Master Rental Agreement nor did he read the obverse of the agreement prior to affixing his signatures in the places referred to above and on the obverse side of the Master Rental Agreement.

[22] The second Defendant claims further that the Master Rental Agreement at the time he affixed his signature was blank and that it was completed afterwards by Alicia Reddy after he had affixed his signature but before the Master Rental Agreement was removed from his possession and taken to Profin. Second Defendant confirmed that all the information inserted by Alicia Reddy and appearing in the face of the Master Rental Agreement was known to Alicia Reddy as she was his personal assistant and administrative manager at the time.

[23] It is trite that a signature on a written contract binds the signatory to the terms of the contract. In **JZ Brink v Humphries & Jewel (Pty) Ltd**¹ the Supreme Court of Appeal explained that the *caveat subscriptor* rule was based on the doctrine of *quasi*-mutual assent. The court pointed out that if the other party caused the signatory's mistake, it would be unconscionable to allow the latter to enforce the contract, even if the other party's misrepresentation was entirely innocent.

[24] The Second Respondent's central contention is that at the time he signed as a surety, it was never brought to his attention that by signing and appending his signature as provided for in the Master Rental Agreement he bound himself in his personal capacity as surety for the debts of the First Respondent. The Second Respondent avers that he never intended to stand surety for the debts of the First Respondent and as such at the time he affixed his signature in the space provided for the designated surety, he did so in error.

[25] A similar argument was rejected by the Supreme Court of Appeal in **Afrox Healthcare Bpk v Strydom**² a private hospital relied on the exemption clause to avoid liability for damages suffered by Strydom as a result of negligent conduct by a nurse. Strydom argued that he had, when signing the admission document, been unaware of the provisions of the clause. The evidence was that he had signed the document without

¹ 2005(2)SA 419 SCA

² 2002(6)SA 21 (SCA) par 34-35

reading it even though he had an opportunity to do so. Strydom contended that the admission clerk had a legal duty to inform him of the content of the clause and had failed to do so.

[26] The court held that a person who signed a written agreement without reading it did so at his peril and was consequently bound by the provisions contained therein as if he were aware of them and had expressly agreed thereto. There were exceptions, such as in the event of a legal duty to point out certain of the provisions in the contract.

[27] The court stated that Strydom's subjective expectations about the content of the agreement played no role in the question of whether a legal duty rested on the admission clerk to point out the content of the exclusionary clause to him. The court held that the duty to point out unexpected terms only arose if the term was objectively unexpected in the contract of this nature. In the present matter Mr Fourie testified that in his experience a suretyship is a general requirement as far as the Master Rental Agreements are concerned.

[28] In my view, objectively speaking, a suretyship would be expected in a contract of this nature and the Second Respondent's subjective perception that such a clause was not be expected in the agreement is unreasonable.

[29] In **Hartly v Pyramid Freight (Pty) Ltd v t/a Sun Couriers**³ appellant allowed his wife to sign a contract knowing that the contract would contain terms and conditions and could well contain exclusions, which it did. He did not bother to read them, he thereafter contended that the representative of the respondent ought to have known that he was unaware of the ambit of the exclusionary clauses. The court held that appellant's mistake was not excusable and the appeal was dismissed.

[30] In the present matter, the Second Defendant admits that he was provided with a copy of the Master Rental Agreement for signature in terms of which the First Defendant agreed to hire "trucking units" from Profin (Pty) Ltd, on his version, he did not bother to read the express terms and conditions of the agreement but signed in the places on the face of the Master Rental Agreement which required his signature including a visually separate section that required to be signed by a surety.

[31] Counsel for the Second Defendant submitted in his head of argument and in court that the facts considered by the Supreme Court of Appeal in **Brink v Humphries** *supra* were consistent with the facts presently under consideration. I disagree. The court in Brink dealt with a credit application form embodying a personal surety obligation. The majority came to the conclusion that a reasonable man would also have

³ 2007 (2) SA 599

been misled by the document in question given the company's past track record in business dealings.

[32] The court held that the form of the document was itself misleading as it was headed 'Credit Application' instead of 'Credit Application and Suretyship' and Brink was required to sign once in his representative capacity without an indication that he was also signing in his personal capacity as a surety.

[33] The majority found on the evidence that Brink had indeed been under the impression that the document only contained a credit application on behalf of the company and that he was unaware of the suretyship

[34] In the present matter the Master Rental Agreement was not unclear, uncertain or attempting to hide facts and a reasonable person would not have been misled by it. The form of the document is simple; it has six sections with headings in capital letters, which prominently deal with hirer, debit order authorization, surety, schedule and acceptance certificate. Each section was required to be signed individually. Defendant signed on behalf of the First Respondent and again signed separately as a surety in a separate specific section, there is no evidence of attempt to mislead. The space provided for signature on each section is highlighted in purple on each section on the right hand side.

[35] Accordingly Mr Fourie would have had no reason to suspect that the Second Defendant did not intend to be bound to the surety clause. I

conclude that the alleged error on the part of the Second Respondent was not *iustus* as a signatory has a responsibility to ascertain the terms to the documents he is signing.

[36] I have appended a copy of the front side of the form to this judgment.

[37] The Second Defendant correctly, in my view, disavowed his reliance on the fact that his wife did not in terms of section 15(2) of the Matrimonial Property Act, Act 88 of 1984 consent to the Second Defendant signing surety for the first Defendant. Section 15(6) provides that spousal consent in relation to most transactions identified in s15(2) and (3) of the Act is not required where those transactions are entered into in the ordinary course of the spouses business, trade or profession.

[38] The Second Defendant avers that the Master Rental Agreement was blank / incomplete when he signed it and as such the Master Rental Agreement at the time of signature failed to comply with the provisions of section 6 of the General Law Amendment Act 50 of 1956 in that at the time Second Defendant affixed his signature the agreement failed to identify the name of the surety and/or the name of the principal debtor and as a consequence the deed of suretyship is invalid.

[39] As the Second Defendant elected not to give evidence at the trial nor called Reddy to support his allegation that the form was blank, I see no reason not to accept the evidence of Mr Fourie that when he collected the Master Rental Agreement from the Second Defendant, the name of

the surety and the name of the principal debtor had been inserted in the agreement by Reddy which details complied with the requirements of section 6 of the General Laws Amendment Act.

[40] The Second Respondent submits that the Plaintiff has not established its quantum. He argues that the certificate of balance certifies an amount owing between the Plaintiff and First Respondent and does not certify the indebtedness between the Second Defendant and the Plaintiff. Second Respondent relies for this contention of the full bench decision of **Thrupp Investment Holdings (Pty) Ltd v Goldrich⁴**.

[41] The **Thrupp** case is distinguishable on the facts because in that case the suretyship concerned was an annexure to the lease agreement and the suretyship did not contain a certificate of indebtedness. The court stated that the suretyship although collateral to the lease agreement remained a separate and independent agreement and the certificate of balance clause therefore did not by reference become incorporated into the suretyship.

[42] In *casu* the suretyship and the Master Rental Agreement is one document that incorporates the certificate of indebtedness, the status of which is recorded in clause 17 which provides as follows:


⁴ 2008(2)SA 523 WLD

"A certificate under the hand of any Director or Manager of the time being of Profin, whose authority or appointment shall not be necessary to prove, in respect of any indebtedness of the Hirer under this Agreement or in respect of any other fact, shall be prima facie proof of the Hirer's indebtedness to Profin and/or such other fact for the purpose of obtaining a judgment or order against the Hirer in any competent court.

[43] In my view, clause 17 is an express term of the Master Rental Agreement and the certificate of indebtedness constitutes proof of indebtedness in favour of the Plaintiff by the Second Defendant. In Clause 23 dealing with suretyship terms and conditions, the second defendant bound himself jointly and severally as a surety and co-principal in *solidum* for all amounts for all amounts payable by First Defendant.

[44] In the result I made the following order:

1. Judgment is granted against 1st and 2nd Defendant jointly and severally the one paying the other to be absolved in the following terms:
 - 1.1 Payment of the amount of R228 566.63
 - 1.2 Interest on the aforesaid amount at a rate of 15.50% per annum from date of summons to date of payment
 - 1.3 Costs



K MATOJANE

JUDGE OF THE HIGH COURT

Date of Hearing:	01 June 2015
Date of Judgment:	07 July 2015
Attorneys for Plaintiff:	DAVID SWANEPOEL ATTORNEYS
Counsel for Plaintiff:	M MEYER
Attorneys for Defendants:	CIVIN & ALEXANDER
Counsel for Defendants:	S S COHEN



Profin (Pty) Ltd

Co. Reg. No. 2001/0078207 - VAT No. 4550212411

Master Rental Agreement

Between
Profin (Pty) Ltd (Profin)
of P.O. Box 2500, White River 1240
Mamabalinga
and

Agreement no: **PL001658**

Client's Name: (Legal Person) **MAJOR TRUCK & BUS SPARES CC**

Postal Address: **P.O. Box 3544, BENONI, 1500**

of (physical address) **235 FIFTH ROAD, WETPOORT, BRAKPAN**

Co. Reg. No. **2003/068319/23 A**

Tel. No. **011-7422339**

VAT No. **4550212411**

This rental agreement is executed at **BRAKPAN**

In User's capacity as **MEMBER**

for and on behalf of the User by

and duly authorized thereto on this the **21ST** day of **JULY 2008**

Witness Signature **Debbie M. [Signature]**

Full Name: **AUCIA [Signature]**

Hirer's Signature

FOR OFFICE USE ONLY

Signature

Signed at

PRETORIA

for and on behalf of Profin (Pty) Ltd

on this **26TH** day of **JULY 2008**

As Witness

Debbie M. [Signature]

DEBIT ORDER AUTHORIZATION: We hereby authorize Profin (Pty) Ltd or its cessionary in terms of clause 15 of the Master Rental Agreement to draw against my/our banking account, the amounts due in terms of this agreement from the following bank account details:

Bank **FNB**

Branch Code **250512**

Branch **BRAKPAN**

Account No **62057045249**

Account Name **MAJOR TRUCK & BUS SPARES CC TR MAJOR TRUCKING**

SURETY

We hereby bind myself/ourselves as sureties and co-principal debtors in accordance with the suretyship terms and conditions on set out overleaf.

1. Full Names: **DHARAMPHAL SINGH**

ID Number **670219512698**

of (Physical address) **37 VILLAGE ROAD, FAIRMEER, BENONI**

2. Full Names:

ID Number

of (Physical address):

3. Full Names:

ID Number

of (Physical address):

4. Full Names:

ID Number

of (Physical address):

Signature

Signature

Signature

Signature

Witness Signature

SCHEDULE To the Master Rental Agreement, the terms and conditions of which shall apply hereto, as though specifically set forth herein.

Quantity	Description of Goods	Serial Number's
16	MT2000 SATELLITE TRACKING UNITS	1 N1866/5/4/3/81/88/80 82/76/69/67 N1903/4/5/9/2

Initial Rental Period **60** Months

Agreed Monthly Rental

R 6 800-00

Commencement Date **04/08/2008**

VAT

R 952-00

Annual Rental Increase **0%**

Total Monthly Rental

R 7 752-00

Hirer confirms the payment plan was complete at time of signature
Rental are payable monthly in advance

Hirer's Signature

ACCEPTANCE CERTIFICATE

Hirer hereby irrevocably declares to Profin that the goods described in the schedule above have:

- a been delivered and installed in accordance with the conditions of the agreement (specifically as this relates to clause 5 of such agreement headed delivery and acceptance).
- b where applicable been subjected to all field operating and/or similar tests which have been now been completed and the results are to the Hirer's satisfaction, and
- c been inspected and are in good order and condition, free from defect and are ready for use in every respect.

Witness Signature

Debbie M. [Signature]

Signed at

BRAKPAN

on this

21ST

day of

JULY 2008

Hirer's Signature

[Signature]

RESOLUTION Extracts of the minutes of a meeting of the Hirer held at **BRAKPAN** on this **21ST** day of **JULY 2008**

Resolved: That the Hirer enters into a rental agreement with Profin for the renting of goods as specified in the above schedule upon such terms and conditions as are usually applicable to rental agreements and as may be agreed upon. Should the commencement date of the rental agreement's referred to, pre-date the date of this resolution, this resolution shall have the effect of having ratified and confirmed the rental agreement's.

That **DHARAMPHAL SINGH** in Hirer's capacity as **MEMBER**

be and is hereby authorized to sign, endorse and execute all documents for and on behalf of the Hirer to give effect to this resolution.

Signatories Name and Capacity

Authorized Signature

[Signature]