REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 24908/2018

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

14/8/19 .....

Date **ML TWALA**

In the matter between:

SASFIN BANK LIMITED (REGISTRTION NO:1951/002280/06)	**FIRST APPLICANT**
SUNLYN (PTY) LIMITED (REGISTRATION NO: 1988/000147/07)	**SECOND APPLICANT**
AND	
ORMENDE PRIMARY SCHOOL	**FIRST RESPONDENT**
THE MECE OF EDUCATION: GAUTENG PROVINCE	**SECOND RESPONDENT**

JUDGMENT

TWALA J

[1] In this opposed summary judgment application, the applicant seeks an order against the respondents for payment of the sum of R562 389.06 together with interest thereon calculated at 2% above the prime interest rate as applicable from time to time per annum, calculated from the date of summons until the date of final payment. The applicant seeks and order for costs on the attorney and client scale.

[2] It is common cause that on the 14th of June 2017 the second applicant and the first respondent concluded a written rental agreement in terms whereof the first defendant rented from the second applicant certain equipment specified in the schedules and addendums to the Master Agreement of Hire for the duration of a contract period of 60 months. The first respondent was represented by Prinavin Naick in his capacity as principal and the monthly rental amount was agreed at the sum of R9 342.3 (excluding Vat). It is not in dispute that the further term of the agreement was that should the first respondent fail to pay any amount due to the second applicant, the second applicant has the right to claim immediate payment of all amounts which would have been payable in terms of the agreement of hire until expiry of the rental period whether such amounts are then due for payment or not. Further, that the second applicant would be entitled to cancel the agreement, take possession of the equipment and retain all amounts that have been paid.

[3] It was submitted by counsel for the respondents that a representative of the second applicant misrepresented to the first respondent that it was installing cameras to the promises for the purposes of demonstration only and was not renting it out the first respondent. It was contended further that the debiting of the school account was illegal and fraudulent and the first applicant had no authority to debit the account for the rental amount – hence the debit order was stopped. Counsel argued further that the terms of the agreement were different from what was initially agreed upon and the first respondent was never informed of the cession of the rights of the second applicant to the first applicant which cession occurred long before the conclusion of the rental agreement. The agreement, so it was argued, was signed by the first respondent on the 15th of May 2017 and the annexure to thereto was signed on the 14th of June 2017.

[4] Counsel for the applicants contended that there is a written rental agreement and a debit order authorisation signed by the principal of the first respondent. The first respondent met the debit order on numerous occasions and then stopped and or returned the debit order – hence the arrears in the amount of R67 247.16 as at the 19th of January 2018. The first respondent simply stopped the debit order and did not cancel the agreement as alleged as there was no notice of cancellation directed at the second applicant. It was contended further that the respondents do not dispute the existence of the rental agreement but allege that the terms are different from that agreed upon but do not elaborate on those terms or the difference thereon. There is no confirmatory affidavit from the School Governing Body as to what was agreed upon or how the agreement differs from the initial agreement between the parties.

[5] I do not understand the respondents to say that there was no agreement signed between the parties, but that the terms are different from that agreed upon by the School Governing Body (SGB). However, the respondents failed to disclose the terms alleged to have been agreed upon between the parties or to show the difference in the terms. I am in disagreement with the respondent that the debit order was not authorised for it would not have been met if it did not have the signature of the person responsible for signing on the first respondent's bank account. Further, the respondents are silent as to the steps taken to report the fraudulent or unauthorised debit orders to the police or recovery of the amounts debited from the bank.

[6] The common cause facts bore out that an agreement was concluded between the parties and that both parties performed in terms of the agreement. The equipment was delivered by the first applicant to the first respondent who also performed his obligations in terms of the agreement until the breach occurred. The intention of the parties can be inferred from their conduct that they accepted that they are bound by the terms of the agreement – hence both parties performed in terms of the agreement. It is therefore absurd for the respondents to now raise the issue that the annexure to the rental agreement was signed on a different date from the rental agreement. There is nothing before this Court that suggests that the rental agreement would be invalid or voidable if it, together with its annexures, is not signed on the same date. It is my considered view therefore, that it is irrelevant that the annexure to the rental agreement was signed on date different from that of the Master agreement. In this regard, see the case of **Pillay and Another v Shaik and Others 2009 (4) SA 74**).

[7] I am in agreement with counsel for the applicants that there is no collateral evidence that the terms of the agreement are different from what was agreed upon between the SGB and the first applicant. Further, nothing turns on the respondents not having been informed of the cession of rights between the applicants since it is a term of the agreement that the first applicant has the right to cede its rights without informing the respondents. I accept that the first applicant financed the transaction between the second applicant and the first respondent and that it has nothing do with the breakdown or malfunctioning of the equipment. It is my considered view therefore that there is no reason for the applicants to join the supplier in these proceedings.

[8] It is trite that for a defendant to succeed in resisting an application for summary judgment, it must show that it has a bona fide defence to the action of the plaintiff. Although the defendant does not have to establish such a defence as it would normally in a plea, but it must place certain facts before the Court which show that such defence may succeed in the trial that might ensue.

[9] In the case of *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture 2009 (5) SA 1 (SCA)*, the Court stated the following:

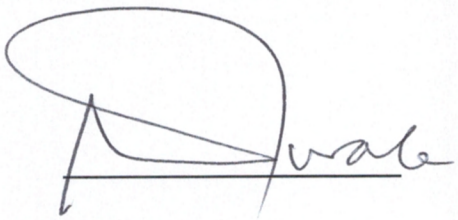
> *"The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out. In the Maharaj case at 425 G-426E, Corbett JA, was keen to ensure first, an examination of whether here has been sufficient disclosure by*

the defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both bona fide and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment. Corbett JA also warned against requiring of the defendant the precision apposite to pleadings. However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor."

[10] I find myself in agreement with counsel for the applicants that the respondents have failed to establish that they have a bona fide defence against the claim of the applicants. I am therefore satisfied that the applicants are entitled to the order as prayed for in the application for summary judgment.

[11] In the circumstances, I make the following order:

The draft order marked "X" annexed hereto is made an order of Court.



TWALA M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of hearing:	**8th August 2019**
Date of Judgment:	**14th August 2019**
For the Applicant:	**Adv N Lombard**
Instructed by:	**KWA Attorneys** **Tel: 011 728 7728**
For the Respondents:	**Adv. M Ramaili**
Instructed by:	**The State Attorney** **Tel: 011 330 7600**

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

14/8/19

Case No: 18/24908 ~~18/240908~~

In the matter between:

SASFIN BANK LIMITED	
(REG NO: 1951/002280/06)	First Plaintiff
SUNLYN (PTY) LIMITED	
(REG NO: 1988/000147/07)	Second Plaintiff
and	
ORMONDE PRIMARY SCHOOL	First Defendant
THE MEMBER OF THE EXECUTIVE COUNCIL FOR THE DEPARTMENT OF EDUCATION GAUTENG PROVINCE	Second Defendant

DRAFT ORDER

BEFORE THE HONOURABLE JUSTICE TWALA ON 8 AUGUST 2019

After having considered the papers filed of record, and having heard counsel, an order is granted in the following terms:

1. Summary judgment is granted in favour of the First Plaintiff, against the First and Second Defendants jointly and severally, the one paying, the other to be absolved, for:

    1.1. Payment of an amount of R 562 389.06.

    1.2. Payment of interest on the amount of R 562 389.06, calculated at 2% above the prime interest rate as applicable from time to time (which is currently 10.00%), per annum, calculated from date of service of the summons, until date of final payment, both days inclusive.

1.3. Payment of costs of suit on an attorney and client scale.

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BY ORDER OF COURT

Counsel for the First Plaintiff: N Lombard (082 96 46 537)

Attorney for the First Plaintiff: L Kriel of KWA Attorneys (011 – 728 – 7728)