Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case number: 16569/2019

Before: The Hon. Mr Justice Binns-Ward

Hearing : 28 January 2021
Judgment: 4 February 2021

In the matter between:

SOUTH AFRICAN SECURITISATION PROGRAMME (RF) LTD Plaintiff

and

FULLIMPUT 11 (PTY) LTD t/a BARONS PLACE First Defendant
FOURIE, PIERRE DU PRE Second Defendant

JUDGMENT
(Delivered by email to the parties' legal representatives and by release to SAFLII. The judgment shall be deemed to have been handed down at 10h00 on 4 February 2021.)

BINNS-WARD J:

[1] In this matter the plaintiff has applied for summary judgment in the action it instituted against the defendants for performance in terms of a 'Master Rental Agreement' in respect of certain camera equipment supplied to the first defendant and a related 'guarantee' agreement in terms of which the second defendant bound himself personally as co-principal debtor with the first defendant in respect of the latter's obligations under the rental agreement. The

application is opposed. It was brought in terms of the quite recently amended rule 32, and therefore after the defendants had already delivered their plea.

[2] Much of the factual background is uncontentious. The second defendant runs a hotel business in Oudtshoorn. The business is housed in the first defendant company. The second defendant determined that the hotel needed an upgraded security camera system. He consulted with one Michiel Marais of Canon in that regard and accepted the product that Marais recommended. The new system was installed in due course, whereafter, according to the second defendant's opposing affidavit, one Robert Mostert, evidently also of Canon, for he installed the new system, presented the second defendant with the relevant documentation for the rental agreement and 'guarantee' agreement to be executed. As I shall discuss in some detail later in this judgment, the terms of the rental agreement recorded that the lessor (referred to as 'the hirer') had purchased the camera system chosen by the first defendant for the purpose of hiring it to the latter (referred to as 'the user') in terms of the rental contract.

[3] The rental and associated 'guarantee' agreements were, according to their tenor, concluded between Astfin EC (Pty) Ltd t/a Astfin, of the one part, and the first and second defendants, respectively, of the other parts. In terms of certain preceding contractual arrangements to which the defendants were strangers, Astfin had ceded its rights in all agreements of the nature concluded by it with the defendants to a third party. The rights so ceded had in turn been on-ceded to Sasfin Bank Ltd. Sometime after the conclusion of the two agreements at issue in the current case, Sasfin sold its rights in the agreements to South African Securitisation Programme (RF) Ltd, which, qua ultimate cessionary, is the plaintiff in the action now before the court.

[4] The application for summary judgment was brought outside the time limit prescribed in rule 32. The plaintiff accordingly applied for condonation of its non-compliance with the rule. The defendants opposed that application too. I do not propose to go into the detail of why the application for summary judgment was brought late. Suffice it to say that a few days before the expiry of the period within which the application should have been lodged a stage-5 lockdown was announced by Government in terms of the Disaster Management Act because of the Covid-19 pandemic. During that lockdown, which endured from late March until the beginning of May 2020, the registrar's office was closed for the filing of documents. The application was filed promptly as soon as it again became possible to lodge papers at the court. The late filing therefore occurred in a type of *vis major* context.

[5] The defendants have complained, however, that the plaintiff neglected to apply timeously for the required condonation and that it has not given a full enough explanation for the delay. It is trite that condonation, when it is needed, should be applied for without delay. I agree that condonation could and should have been sought sooner than it was, but the essential question in determining whether to condone non-compliance with procedural rules is where the interests of justice lie. The dislocating consequences of the pandemic-related lockdowns have been all around us and starkly evident for everyone to see. I doubt that there is anyone who has not been affected in some or other way by them. The defendants have not shown that the plaintiff's delay in bringing the application for condonation has occasioned them any prejudice. Time is no longer as important as it used to be under rule 32 in its pre-amendment form. It is evident that the parties were actually engaged in settlement discussions during some of the period concerned. Mr *Lotz*, who appeared for the defendants at the hearing (which was conducted online because of the continuing effects of the pandemic), admitted that the principal reason for the defendants' dogged opposition to the condonation application was strategic; viz. mindful that if condonation were refused, the matter would go to trial by default and the defendants 'would get their day in court', as he put it.

[6] Various authorities were cited by the defendants' counsel in support of the argument that the application for condonation was deficient. Heavy reliance was placed on *Van Wyk v Unitas Hospital and Another* [2007] ZACC 24 (6 December 2007); 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at para 22, in particular.

[7] In *Van Wyk v Unitas*, at the place cited, the court stated '*An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable.*' The statement should be read in context. When that is done it is evident that the intention was to express an ideal, not an imperative. The criterion by which applications for condonation are decided is well established. It was referred to in the very first sentence of the opening paragraph of the section on condonation in the Constitutional Court's judgment[1] as follows: '*This Court has held that the standard for considering an application for condonation is the interests of justice*'. It is a misconception to construe the jurisprudence as laying down rigid rules or requirements.

[1] In para 20.

[8] There is not an exclusive list of factors to which a court will have regard in deciding whether it would be in the interests of justice to grant condonation. The factors to which regard will usually be had were described in the following terms in *Van Wyk v Unitas*: '*Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success.*'[2] The weight to be given to each of the various factors taken into consideration will vary depending on the circumstances of the case; thus a weak explanation for the delay might in a given case be compensated by the applicant's strong prospects of success in the main case or the importance of the issue in that case. That is wholly inconsistent with the prescriptive approach that the defendants' counsel misapprehended the judgment in *Van Wyk v Unitas* to lay down.

[9] Condonation of non-compliance with the time limits prescribed in the rules of court is a matter within the court's discretion - to be exercised judicially, of course. It will be granted where there is sufficient cause to do so. The term 'sufficient cause' equates to 'good cause' in the sense in which the latter expression is used in rule 27 of the Uniform Rules.[3] The literature testifies to the interchangeable use of the expressions.[4] It has very wisely long been acknowledged that 'sufficient cause' is a concept that defies finite definition; see *Cairns Executors v Gaarn* 1912 AD 181 at 186. As Innes J noted in that judgment, endorsing what Cotton LJ said in *In re Manchester Economic Society*, 24 Ch.D., at p. 48, sufficient cause is '*"something which entitles him* [the applicant for condonation] *to ask for the indulgence of the Court." What that something is must be decided upon the circumstances of each particular application.*'[5]

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[2] Ibid. Repeating the rehearsal of applicable principles by Yacoob J in *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* [2000] ZACC 3 (30 March 2000); 2000 (5) BCLR 465 ; 2000 (2) SA 837 (CC) in para 3.

[3] Rule 27 regulates the basis upon which the court may upon application make an order extending or abridging any time prescribed by the rules. The plaintiff's application for condonation is in essence an application in terms of rule 27.

[4] See e.g. *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352 in fin-353A, where the expressions were described by Schreiner JA as being '*practically synonymous*'.

[5] Most recently endorsed by the Constitutional Court in *National Credit Regulator v Quick Step Finance (Pty) Ltd* [2018] ZACC 203 (20 February 2018) at para 19.

[10] I am satisfied in all the circumstances that sufficient cause has been shown for the late filing of the summary judgment application to be condoned. It would not be in the interests of the efficient administration of justice in the circumstances of this case to require an action to go to trial when there was a reasonable prospect that it could be finally determined in a summary judgment application. Sending the matter to trial in those circumstances would also be inimical to the objectively assessed best interests of the litigants on both sides because it might materially and quite unnecessarily increase the costs of the litigation. The opposition to the application was unreasonable in my view. Fairness suggests that each party should bear its own costs in regard to the proceedings for condonation.

[11] The defendants took two preliminary points against the summary judgment application. Firstly, as to the form in which the application was brought and secondly, to the competence of the deponent to the supporting affidavit to confirm the cause of action and the facts upon which the claim was brought.

[12] As to the first point, the defendants contended that the application should have been brought in the long form. There is no merit in the contention, and the defendants' counsel advisedly did not advance any oral argument in support of it. An application for summary judgment is incidental to a pending action; it is not a stand-alone application. It is brought on notice (i.e. in the form contemplated by rule 6(11)). That follows from rule 32(2)(a), which speaks of 'a notice of application'.[6] The rule does not contemplate an application on 'notice of motion' (i.e. in the form contemplated by rule 6(1)). The only matter that a plaintiff needs to take into account when bringing an application for summary judgment is that the selection of the date of set down must allow time for the defendant to deliver an opposing affidavit as provided in rule 32(3)(b), if it so wishes.

[13] The second preliminary point taken by the defendants is also without merit in my judgment.

[14] The deponent to the supporting affidavit qualified herself in these terms:

> 1.1 I am a major female employed by Sasfin bank limited (Sasfin) as its litigation manager.
>
> 1.2 Sasfin inter alia administers and manages rental agreements ceded to the plaintiff and performs all administrative functions in relation to the enforcement of the said rental agreements.

[6] See also DE Van Loggerenberg, *Erasmus, Superior Court Practice* vol 2, RS 11 2019, at D1-392B, s.v. '*notice of application*'.

2. I have the plaintiff's records relating to the transactions forming the subject matter of the plaintiff's current action under the above case number in my possession and under my control.

3. In the premises the facts set out herein are within my own personal knowledge and all to the best of my belief both true and correct.

4. I am duly authorized to represent the plaintiff and depose to this affidavit in support of summary judgment on the plaintiff's behalf.

5. I swear positively to the facts set out in the plaintiff's particulars of claim insofar as same relates two Sasfin and the plaintiff and I verified the parties, the cause of action and the amount claimed.

[15] The objection taken by the defendants is not a novel one. It is of a sort that has been raised and addressed in a number of comparable cases. In my view, the dicta of Swain AJA in *Stamford Sales & Distribution (Pty) Limited v Metraclark (Pty) Limited* [2014] ZASCA 79 (29 May 2014) at para 10-12 are dispositive of the point adversely to the defendants. The learned judge pronounced himself as follows at the place cited:

> [10] This court in *Dean Gillian Rees v Investec Bank Limited* (330/13) [2014] ZASCA 38 (28 March 2014),[7] in dealing with the issue of whether personal knowledge of all of the facts forming the basis for the cause of action, had to be possessed by the deponent to the verifying affidavit, said the following in para 15:
>
> > 'As stated in *Maharaj*, [8] "undue formalism in procedural matters is always to be eschewed" and must give way to commercial pragmatism. At the end of the day, whether or not to grant summary judgment is a *fact-based enquiry*. Many summary judgment applications are brought by financial institutions and large corporations. First-hand knowledge of every fact cannot and should not be required of the official who deposes to the affidavit on behalf of such financial institutions and large corporations. To insist on first-hand knowledge is not consistent with the principles espoused in *Maharaj*.' (My emphasis.)
>
> In my view, as long as there is direct knowledge of the material facts underlying the cause of action, which may be gained by a person who has possession of all of the documentation, that is sufficient.
>
> [11] The enquiry, which is fact-based, considers the contents of the verifying affidavit together with the other documents properly before the court. The object is to decide whether the positive affirmation of the facts forming the basis for the cause of action, by the deponent to the verifying affidavit, is sufficiently reliable to justify the grant of summary judgment. Those high court decisions which have required personal knowledge of all of the material facts on the part of the deponent to the verifying affidavit are accordingly not in accordance with the principles laid down by this court in *Maharaj*.

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[7] 2014 (4) SA 220 (SCA).

[8] *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A).

> [12] An insistence upon personal knowledge by a deponent to a verifying affidavit of all of the material facts forming the basis for the cause of action, where the cessionary of a claim seeks summary judgment against the debtor, in most cases would effectively preclude the grant of summary judgment. The consequences of this narrow approach is illustrated by the decision in *Trekker Investments (Pty) Ltd v Wimpy Bar* 1977 (3) SA 447 (W). It was held that it had to appear from the verifying affidavit that the facts relating to the claim of the cedent against the debtor were within the knowledge of the deponent who was able to swear positively thereto. The deponent in such a case was prima facie making the affidavit on behalf of a cessionary and there was nothing in the affidavit to indicate that the deponent had any connection with the cedent, which presumably would have enabled him to acquire this knowledge. To insist on personal knowledge by the deponent to the verifying affidavit on behalf of the cessionary of all of the material facts of the claim of the cedent against the debtor, emphasises formalism in procedural matters at the expense of commercial pragmatism.'
>
> (Underlining supplied for emphasis.)

It was pointed out by Corbett JA in *Maharaj* (supra) that an evident lack of first-hand knowledge of the facts by the deponent that might detract from the supporting affidavit's strict compliance with the requirements of rule 32(2) may, depending on the circumstances, be cured by the effect of reference to the papers in the matter as a whole. The court looks at the matter 'at the end of the day' on the basis of all the material that is properly before it. As Mr *Botha* for the plaintiff reminded me, I rehearsed the pertinent principles in some detail in an earlier judgment, in *Absa Bank Ltd v Future Indefinite Investments 201 (Pty) Ltd and Others* [2016] ZAWCHC 118 (12 September 2016). There is no need for me to repeat here what may easily be read there.[9]

[16] Subject to the matter of rectification that has been raised by the defendants (of which I shall treat presently), the issue in this case turns on the meaning and effect of the written contracts that are properly before the court. Those contracts are under the deponent's administration, at least in matters in which a default gives rise to litigation as the ones in issue in the current case have. I accordingly consider, with regard to the aforementioned principles and the matters that are in issue in the case, that the deponent was adequately qualified for the purposes of meeting the requirements of rule 32(2)(a) and (b).

[17] Turning then to the claims themselves and the defendants' answers to them. It is apparent from the pleadings and affidavits that the rental agreement is in the nature of a financing agreement. The new camera system was evidently supplied to the first defendant

[9] The relevant part of the judgment is quoted *in extenso* in the commentary on rule 32 in *Erasmus, Superior Court Practice* supra, in vol 2 at RS 3, 2016, D1-402 – RS 13, 2020, D1-402F.

by Canon at the second defendant's instance and paid for by Atfin or its delegatees. The circumstances in which the rental and associated 'guarantee' agreement were executed were described as follows in the defendants' opposing affidavit:

26. I asked Mr Michiel Marais [of Canon] to provide me with a quotation for the replacement costs of the existing cameras.

27. Mr Michiel Marais furnished me with a single page from Canon, George, which I accepted.

28. At a later juncture, and after the new camera system was installed, Mr Robert Mostert furnished me with the documentation from AssetFin. Mr Mostert was in a hurry and requested me to sign the aforesaid documentation from AssetFin. Unfortunately, and due to the fact that I trusted Mr Mostert, I did not read the documentation from AssetFin and signed the documentation.

29. After the installation, the 1st Defendant had various problems with the camera equipment as installed by Mr Robert Mostert.

[18] The camera system did not work satisfactorily. It appears from the nature of the problems, which are enumerated in the defendants' plea and supported by a report commissioned by the first defendant from Scholtz Management Services, a copy of which is attached as an annexure to the plea, that they lie in the installation of the equipment, rather than in the integrity of the camera system itself.

[19] The first defendant stopped payment of the monthly rental that it had undertaken to pay in terms of the rental agreement because of its dissatisfaction with the new camera system. The defendants contend that the first defendant is entitled to suspend payment because of the shortcomings in the operation of the new camera system. The rental agreement provided that in the event of the first defendant defaulting on its rental payments, the hirer was entitled to claim return of the goods and enforce payment of the full amount outstanding for remainder of the lease period, upon payment of which the goods would again be made available to the user until the expiry date of the contract. The plaintiff claims return of the goods and payment of the total outstanding rental in respect of the remainder of the lease, against receipt of which the goods will be made available for return to the first defendant for use until the expiry of the lease. The claim against the second defendant is under the aforementioned 'guarantee agreement'.

[20] Against that background it is appropriate at this stage to consider certain of the terms of the rental agreement.

[21] On the facing page of the deed of contract, in a section printed immediately above a place signed by the second defendant on behalf of the first defendant, the following appears in capital letters:

1. YOU [i.e. the first defendant] HEREBY ACKNOWLEDGE AND AGREE THAT
    a. NOTHING THAT IS NOT DISTINCTLY SET OUT HEREIN IS BINDING ON US (i.e. Assetfin)
    b. YOU WERE REFERRED BY THE SUPPLIER OF THE EQUIPMENT TO US.
    c. WE HAVE BOUGHT THE EQUIPMENT FROM THE SUPPLIER AT YOUR SPECIAL INSTANCE AND REQUEST.

[22] Clause 24 of the rental agreement provides:

> The USER [i.e. the first defendant] confirms that maintenance or service for or relating to THE EQUIPMENT is expressly excluded from the terms of this agreement and dissatisfaction by the USER relating to the serviceability or performance of THE EQUIPMENT does not in any way constitute an excuse to withhold any rental payment to HIRER.

Clause 28 provides:

> THE EQUIPMENT has been or will be acquired by HIRER [i.e. Assetfin] at USER'S request and solely for the purposes of renting THE EQUIPMENT to USER. THE EQUIPMENT and the supplier have been selected by USER and USER has negotiated the specifications, warranties and guarantees required by it with the Supplier. HIRER makes no warranties or representations whatsoever whether expressed or implied to user as to the condition of THE EQUIPMENT and/or the Supplier, whether singularly or jointly, as to their fitness for any purpose whatsoever.

[23] It is plain that those provisions are inconsistent with, and indeed exclude, any right by the first defendant to stop payment of the rentals on account of its dissatisfaction with the camera system equipment.

[24] The rental agreement also expressly recorded Assetfin's right to cede any or all of its rights in terms of the agreement to any third party without prior notice to 'the user'.

[25] At the same time as the rental and guarantee agreements were signed, the second defendant, acting in a representative capacity for the first defendant, also signed a written '*Acknowledgment of Receipt of Equipment*' that was printed under an Assetfin logo header. That document listed the components of the equipment hired in terms of the rental agreement and set out the following in clearly legible print immediately above the space provided for the second defendant's signature:

> I/We hereby state that I/we have received all of the goods as scheduled above.
>
> The goods have been installed at the address / addresses stated above.
>
> The goods are exactly what I/we ordered.
>
> I/ We have tested it and found it to be in good working order.
>
> You, the hirer, may pay for the purchase of the goods.
>
> The serial number/s on the goods correspond with the serial number/s on the schedule and have been insured in accordance with clause 20 and its subclauses.

(The reference to clause 20 is a reference to one of the standard clauses in the rental agreement that imposes an obligation on the party renting the goods to insure them against loss or damage.) The wording makes it clear that 'the supplier' and 'the hirer' are different parties and that the hirer will pay for the goods only upon the lessee's assurance that the goods are those that it ordered and they have been received by the lessee in good working order.

[26] In the face of the aforegoing provisions of the rental agreement and 'Acknowledgment of Receipt', the second defendant made the following averments in the defendants' opposing affidavit in the summary judgment application:

> 37. The Plaintiff avers that the equipment as furnished by Assetfin was selected by the 1st and 2nd Defendant and that we negotiated the specifications, warranties and guarantees with the supplier.
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> 38. I categorically deny that:
>
> 38.1 I was referred, on behalf of the 1st Defendant by the "SUPPLIER OF THE EQUIPMENT" to AssetFin.
>
> 38.2 I and/or the 1st Defendant selected the "EQUIPMENT".
>
> 38.3 I and/or the 1st Defendant selected the "*Supplier*".
>
> 38.4 I and/or the 1st Defendant "*...has negotiated the specifications, warranties and guarantees required by it, with the supplier*".
>
> 39. I invite the Plaintiff to provide proof to the contrary as stated above.
>
> 40. I respectfully submit that the allegations by the Plaintiff that I have selected the equipment and negotiated the specifications, warranties and guarantees as is required by it with the supplier, is totally absurd. I am a hotelier and know nothing about cameras, security systems as supplied by AssetFin. I trusted Mr Michiel Marais to furnish the 1st defendant with the equipment.

> 41. At all material times I was under the impression that AssetFin would be responsible for the warranties / guarantees of the equipment as well as all warranties / guarantees pertaining to the installation of the equipment.

It is notable that the second defendant gives no explanation of how the defendants came to deal with Assetfin and makes it clear that he trusted Marais (of Canon, *not* Assetfin) '*to furnish the 1st defendant with the equipment*'.

[27] In argument, Mr *Lotz* submitted that the second defendant had been mistaken when he concluded the agreements, and had thought that the defendants were contracting with Canon. How that could have been the case is difficult to credit because the documentation signed by the second defendant refers in bold letters in several places to AssetFin, and nowhere mentions Canon. More to the point, however, the submission derived no support from the content of the opposing affidavit, where no such claim was made. Indeed, the second defendant gives no explanation whatsoever of how the first defendant was to pay for or finance the new camera system that he had installed.

[28] What is clear from the content of the opposing affidavit is that the second defendant cannot have read the terms of the rental agreement or paid proper attention to the content of the acknowledgment of receipt of equipment document. He expressly admits as much in paragraph 28 of the affidavit, which has been quoted above.

[29] Relying on the well-established principles rehearsed in *George v Fairmead* (Pty) Ltd 1958 (2) SA 465 (A) and *National and Overseas Distributors Corporation (Pty) Ltd v National Potato Board* 1958 (2) SA 473 (A), the plaintiff's counsel pointed out that the defendants had not alleged or pleaded any facts that would establish that any error on the part of the second defendant in his apprehension of the terms of the rental agreement had been reasonable; in other words, the defendants had not shown that they might be able to establish at a trial that any error by the second defendant had been *iustus*. The submissions advanced by Mr *Botha* in this regard were well made in my judgment. There was no reliance by the defendants on fraud or misrepresentation by Assetfin.

[30] Insofar as the defendants' counsel appeared to contend that the defendants would be done an injustice by being held to the wording of the rental agreement signed by the second defendant, it must be remembered that the test is an objective one. The following observations by Schreiner JA in the *National Potato Board* case supra, at p. 479G-H succinctly summarise the position that pertains in law:

> Our law allows a party to set up his own mistake in certain circumstances in order to escape liability under a contract into which he has entered. But where the other party has not made any misrepresentation and has not appreciated at the time of acceptance that his offer was being accepted under a misapprehension, the scope for a defence of unilateral mistake is very narrow, if it exists at all. At least the mistake (error) would have to be reasonable (*justus*) and it would have to be pleaded. In the present case the plea makes no mention of mistake and there is no basis in the evidence for a contention that the mistake was reasonable.

[31] Similarly, at a trial it would not be permissible, save in the context of rectification, for the defendants to adduce evidence as to the terms of the agreement with Assetfin that were at variance with the objectively determinable import of the content of the written agreement, especially in a situation like the current matter where the deed of contract provides that it is the sole memorial of the agreement. That is the effect of the parol evidence rule; see *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA) at para 39.

[32] The defendants have alleged that the rental agreement is susceptible to rectification in certain respects.[10] The plaintiff's counsel has pointed out that were the contract to be rectified in the manner contended for by the defendants it would be internally contradictory in material respects. That might be so, but if a case for rectification were made out, the difficulties to which rectification might give rise would be no reason to refuse it. It is a sad fact that it is not uncommon for persons to make unbusinesslike agreements. The fact that the rectification contended for would give rise to an unbusinesslike result is merely a factor to be weighed in the determination of whether or not the alleged common mistake relied upon by the party seeking rectification has been established on the probabilities. It is trite that a court seized of an opposed application for summary judgment should not base its decision on its assessment of the prospects of success (or lack thereof) of a defence made out on the papers. The court's enquiry is limited to whether the defendant has demonstrated 'a bona fide defence' in the well-established meaning of that term in rule 32(3)(b).[11]

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[10] The defendants alleged that the rental agreement fell to be rectified by the deletion of clause 1(b) (quoted in paragraph 21 above) and by the rewording of clause 28 (quoted in paragraph 22 above) by '*Substituting paragraph 28 with the following paragraph:*
"THE EQUIPMENT has been or will be acquired by hirer at user's request and solely for the purpose of renting the equipment to user. ***It is recorded that*** *THE EQUIPMENT and the Supplier have* ***not*** *been selected by USER, and* ***the*** *USER has* ***not*** *negotiated the specifications, warranties and guarantees required by it, with the Supplier."*' and by '*deleting the following words in paragraph 28: "HIRER makes no warranties or representations whatsoever whether expressed or implied to USER as to the condition of the equipment and/ or the Supplier, whether singularly or jointly, as to their fitness for any purpose whatsoever"*.'

[11] Cf. *Maharaj* supra, at p.426A-E and *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T), at 228B-229A.

[33] In the latter regard, it is significant that the defendants have not alleged any facts, other than their own mistake, that would support their claim for rectification. It is difficult to conceive how Assetfin could have been mistaken about the content of what on the face of matters appears to be a standard form contract document used by the company. The defendants have not made any allegations that would suggest how they might overcome that difficulty were the matter to go to trial. On the contrary, the second defendant has admitted that he signed the contract without reading it because he trusted Mr Mostert, apparently the installer of the equipment who handed him the finance contracts to be signed, no doubt intending to present them to Assetfin in order to obtain payment for the goods supplied to the first defendant. That does not afford a basis to claim rectification; cf. *Acacia Mines Ltd v Boschoff* 1957 (1) SA 93 (T) at 101H-102B.

[34] How was Assetfin to know that the second defendant did not by his signature to the contract intend to bind the first defendant to the recorded terms of the rental agreement? The defendants' plea and opposing affidavit do not provide an answer. Consider in this regard the oft quoted observations of Wessels JA in *South African Railways & Harbours v National Bank of South Africa Ltd* 1924 AD 704 at 715-716: '*The law does not concern itself with the working of the minds of parties to a contract, but with the external manifestation of their minds. Even therefore if from a philosophical standpoint the minds of the parties do not meet, yet, if by their acts their minds seem to have met, the law will, where fraud is not alleged, look to their acts and assume that their minds did meet and that they contracted in accordance with what the parties purport to accept as a record of their agreement. This is the only practical way in which Courts of law can determine the terms of a contract.*'

[35] It has not been alleged that there were any prior discussions on the terms of the agreement with a representative of Assetfin. There is no evidence that the second defendant had any discussions with anyone from AssetFin at all, which suggests as a matter of probability that the sales representatives of Canon must have attended to the formalities of arranging the financing of the transaction, which would explain Mr Mostert's conduct described above. There is also nothing in the opposing affidavit or the defendants' plea to indicate how the defendants might otherwise be able to show the *common* intention between the parties which by *mutual* error was wrongly expressed in the rental agreement. In my judgment, the allegations in the papers to support the pleaded defence of rectification are therefore fundamentally lacking. In the result, the defendants have failed to satisfy me that the defence that the defendants purport to advance is a bona fide defence.

[36] It follows that the plaintiff is entitled to summary judgment against the defendants. There is no reason for me to exercise my overriding discretion to withhold judgment at this stage and send the matter to trial.

[37] I should perhaps state for the record that during the argument of the matter I requested counsel to consider the possible application of the Consumer Protection Act on the given facts, more particularly in the context of the defendants' complaint that the rental agreement left them remediless in regard to the allegedly defective equipment supplied to the first defendant. I am grateful for the additional written submissions they provided after the hearing. I agree with the plaintiff's counsel that the Act appears to have no application in this case (and the defendant's counsel did not contend to the contrary), but that that does not mean that the first defendant necessarily has no right of recourse against the supplier and installer of the equipment.

[38] In response to my request for a note on the possible application of the Consumer Protection Act, the defendant's counsel took the opportunity to contend that the plaintiff 'as well as its predecessors' (by which I understood him to include Assetfin) are 'financial institutions' as defined in the Financial Advisory and Intermediary Services Act 37 of 2002 (the FAIS Act) and that Assetfin's transaction with the first defendant contravened the provisions of the General Code of Conduct for authorised financial services providers. I do not intend to traverse the argument advanced in this regard in any detail. It was a point not raised in either the plea or the opposing affidavit. Suffice it to say three things: (i) the term 'financial institution' is not defined in the FAIS Act, (ii) the lease agreement is not a 'financial product' within the meaning of the Act and Assetfin was not providing a 'financial service', as defined in the Act, by concluding the lease agreement and (iii) the alleged breaches of the Code of Conduct are in any event not established, even prima facie, on the papers.

[39] The following order will issue:

(a) The plaintiff's application for condonation of the late delivery of its application for summary judgment is granted, with no order as to costs.

(b) Summary judgment is granted in favour of the plaintiff:

    i. For delivery up, subject to the provisions of paragraph (iii) of this Order, by the first defendant of the following goods (as described in prayer 1 of the particulars of claim):

- 1 x CCTV Surveillance Camera System with serial no. 2F48775B00532;
- 1 x 32 CH embedded NVR;
- 3 x 16-CH HDTVI turbo DVR;
- 4 x 4MP vari-focal IR network dome cameras;
- 4 x 2-MP high performance vari-focal turbo bullet cameras;
- 24 x 2-MP Oudsthoor WDR infra-red network dome cameras;
- 37 x HD IR turbo turret cameras;
- 1 x Netgear prosafe smart switch;
- 1 x Netgear prosafe 8 port smart switch;
- 1 x Netgear 8 port unmanaged fast ethernet desktop switch;
- 5 x Seagate surveillance 4TB 3.5' SATA hard drive;
- 3 x 2000VA line interactive UPS;
- 3 x Samsung 32" HD FLAT TF; and
- 5 x Access Control Management PC.

ii. Jointly and severally against the first and second defendants, for –

a) Payment of the sum of R440 252, 56.

b) Interest thereon *a tempore morae* from 1 July 2019 to date of payment at the prime interest rate charged to its customers from time to time by the bankers of Assetfin EC (Pty) Ltd.

c) Costs of suit on the scale as between attorney and own client (as provided in terms of the Master Rental Agreement concluded between Assetfin EC (Pty) Ltd and the first defendant, a copy whereof is annexed marked SAS 1a and SAS 1b to the particulars of claim).

iii. As against payment in full by the defendants of the amounts due in terms of subparagraphs (ii) (a) and (b) of this Order, the plaintiff shall make available the goods surrendered by the first defendant in terms of paragraph (i) for use by the defendant during the then remaining currency of the Master Rental Agreement.

A.G. BINNS-WARD
Judge of the High Court