

REPUBLIC OF SOUTH AFRICA



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

Case Number: 5835/2022

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
26 June 2023	
DATE	SIGNATURE

In the matter between:

**SOUTH AFRICAN SECURITISATION
PROGRAMME (RF) LIMITED**

Plaintiff/ Applicant

and

PRELENE JAGLAL – GOVINDPERSHAD

Defendant/First Respondent

JUDGMENT

MIA, J

Introduction

- [1] The plaintiff seeks summary judgment for payment of the amount of R 115 405.14, based on a Master Rental Agreement (the agreement) between the cedent, Safin Bank Limited (Sasfin) and the defendant on 24 December 2018. The amount is in respect of (i) purported outstanding rentals for the period 25 August 2020 – 25 October 2021; and (ii) future rentals for the remaining duration

of the Master Rental Agreement (“the Claim”) for telephonic equipment rented by the defendant. The defendant resisted summary judgment and raised three defences, namely cancellation of the agreement, further, she disputed that she was in arrears and contended that Sasfin did not perform in terms of the agreement. The third defence raised was that she had no knowledge of the rights, title and interest as the cession was not properly pleaded.

- [2] During the hearing of the matter, counsel were requested to file supplementary submissions in view of questions which arose, namely, the applicability of the Notice to Exempt Banks from the Provisions of Section 14 of the Act published under GN 532 in GG 34399 of 27 June 2011 (“the Gazette notice”); and the applicability of the unreported decision of *South African Securitisation Programme (RF) Ltd v Fullimput 11 (Pty) Ltd* to the present matter regarding the applicable order to be granted in relation to the return of the equipment to the plaintiff upon payment of the outstanding balance, in the event that plaintiff’s request for summary judgment is granted. I am indebted to both counsel for the supplementary submissions filed herein.

Background facts

- [3] On 24 December 2018 the defendant, a medical practitioner entered into an agreement with Sasfin, to lease equipment for a period of 60 months from 19 January 2019. The defendant contends that she cancelled the agreement on or about 12 May 2020, in terms of section 14(2)(b)(i) of the Consumer Protection Act 68 of 2008 (“the Consumer Protection Act”) which afforded her 20 business days to cancel. The cancellation of the agreement, accordingly, became effective on 17 June 2020.

Issue for determination

- [4] The issue for determination is whether the defendant raised a bona fide defence in resisting summary judgment.

Submissions

- [5] In support of the application for summary judgment, counsel for the applicant submitted that clause 3 of the agreement stipulated that Sasfin sold its rights as follows:

“...all of the Seller’s right, title and interest in and to each of the Specified equipment leases, subject to the provisions of this Agreement.”¹.

Thus, he continued that the agreement does not amount to a delegation which he submitted was a form of novation² and a form of a cession. Thus in the present matter, there is only an agreement of cession³ of Sasfin’s rights in terms of the master rental agreement. The agreement remained between Sasfin and the defendant. Sasfin only ceded its right, title and interest in the master rental agreement. The defendant thus retained the right to cancel in terms of section 14 of the CPA and this right the defendant could exercise against Sasfin, not the plaintiff.

- [6] In relation to use of the word “bank” counsel submitted the plaintiff was precluded from use as it is an offence to use the name of a “bank” in terms of section 22 of the Banks Act, 94 of 1990, unless the entity is in fact registered as a bank. Section 22(4) of the Banks Act provides:

“(4) Any person who, in connection with any business conducted by such person- (a) uses any name, description or symbol indicating, or calculated to

¹ Record, Caselines 001-45, Particulars of Claim, Annexure “SAS2”, clause 3.1

²Delegation is a form of novation by which, by tri-partite agreement, between all concerned, a third party is introduced as debtor in substitution of the original debtor, who is discharged. (See: Van Achterberg v Walters 1950 (3) SA 734 (T) at 745; Jacobz v Fall 1981 (2) SA 863 (C) at 868G to 869H.)

³ Cession involves a substitution of a new creditor (the cessionary) for the original creditor (the cedent), the debtor remaining the same. Cession is sometimes described as a form of novation but differs from novation in not requiring consent of the debtor and in not resulting in a new contract to replace the existing one. See Christie’s Law of Contract in South Africa (7th Edition) at page 537. Assignment is generally used in our law to denote a transfer of both rights and obligations. Stepping into another’s shoes involves acquiring its rights which can be done by cession without the debtor’s consent, and undertaking its obligations, which can be done by delegation with the creditor’s consent. Since the lesser is included in the greater, it follows that the whole process of substitution cannot take place without the consent of the other party to the contract, which consent may be given in advance. See Christie above at page 546.

lead persons to infer, that such person is a bank registered as such under this Act; or (b) in any other manner purports to be a bank registered as such under this Act, while such person is not so registered as a bank, shall be guilty of an offence”

- [7] In response to the question posed to counsel was whether banks were exempt from the application of s 14 of the CPA, counsel for the plaintiff submitted that banks were and referred to the Government Notice 532 in Government Gazette 34399 of 27 June 2011. Counsel continued and submitted that apart from being exempt, Sasfin was not the supplier as contended by the defendant but the financier. Thus, the defendant was not permitted to withhold payments due to defects as she had a claim against the supplier of the equipment and was obliged to pay Sasfin who was out of pocket in the interim for the payment it had made to the supplier of the equipment.
- [8] Counsel for the plaintiff confirmed that the goods had, in the interim, been returned in October 2022 after the plaintiff launched its application for summary judgment in May 2022. In view of the initial order proposed, counsel proposed that the order make provision for the return of the goods upon full payment of the amounts due.
- [9] In opposing the application, counsel for the defendant also confirmed the return of the leased equipment on 7 October 2022. In view of the return of the goods, counsel argued that the order proposed by the plaintiff cannot include the return of the rental equipment. This was counsel submitted because the only remedies available to the plaintiff are those contained in section 3 of the CPA, specifically the reasonable cancellation penalty. He submitted that the plaintiff was entitled only to arrear rental amounts, and the defendant disputed that it was in arrears as it cancelled the agreement. The plaintiff was not entitled to any interest counsel continued.
- [10] The defendant relied on the principle in *Maharaj v Barclays National Bank Ltd*⁴ which states:

⁴1976 (1) SA 418 (A) at 426 A-D

“Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the Court enquires into is: (a) whether the defendant had “fully” disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law. If satisfied on these matters the Court must refuse summary judgment either wholly or in part, as the case may be.”

- [11] Having regard to the defendant’s affidavit resisting summary judgment, the defendant’s assertion is that she was not in arrears at the time of cancellation in 2020. If the agreement were cancelled, the defendant would not be liable for future rentals in terms of the agreement. Counsel submitted the defendant’s defences raised, indicated that summary judgment be refused.⁵ This was because her defences indicated that there is a reasonable possibility that the defences she advanced may succeed at trial.
- [12] I have noted the plaintiff’s contention that the bank is exempt from the application of s14 of the Consumer Protection Act 68 of 2008 (CPA) in terms of Government Notice 532 in Government Gazette 34399 of 27 June 2011. However, in having regard to the purpose of the CPA and the Government Gazette, the purpose of exempting the bank from the application of s14 could not have the intention of depriving the consumer of the protection afforded in the CPA. Nor could it deprive the consumer of its right to cancel granted in terms of s14. Section 14 2(b)(i) of the CPA permits consumers to cancel any fixed-term agreement without reason by giving 20 business days’ notice.
- [13] The defendant did cancel the agreement which was a ‘fixed-term agreement provided for in the Consumer Protection Act. Upon cancellation the defendant remained liable to the supplier in terms of the agreement up to date of cancellation and the plaintiff can impose a reasonable cancellation penalty with

⁵ Breitenbach v Fiat SA (Edms) Bpk 1976 (2) SA 226 (T); He & She Investments (Pty) Ltd v Brand NO 2019 (5) SA 492 (WCC) at 497B

respect to goods supplied in contemplation of the agreement enduring for the intended term. However, it must credit the defendant with any amount that remains due to the defendant at the date of cancellation. In view of the goods being returned in October 2022 and the application for summary judgment being issued in May 2022, the calculation could not reasonably have taken proper account of section 14(3) (a) and (b). The amount claimed by the plaintiff cannot be correct as per the plaintiff certificate of balance. It follows that the defendant is entitled to a proper accounting and has reasonably entered a defence. I have noted also that the Consumer Protection Act ensures that a supplier does not unlawfully place a limitation on the rights of a consumer afforded to it by the Consumer Protection Act. On the contrary, sections 51(a) and (b) of the Consumer Protection Act, provides specifically for what is known as the 'trumping provisions'.⁶ The purpose is to avoid contractual exclusion or limitation of the consumer's rights.

- [14] The third defence raised by the defendant was that the plaintiff received only the reversionary interest, namely the defendant's obligation to perform under the contract and not the interest in the cessionary after the cedent satisfies the secured debt. The extent of the rights vested does not extend to transferring ownership of the ceded right outrightly to the cessionary. On this basis the defendant avers that the plaintiff has not set out in full the indebtedness. It has not set out on what basis the purported cession entitles it to recover contractual damages arising out of the agreement. She contends she has no knowledge of the cession by the cedent to the plaintiff. The plaintiff is required to prove the cession and the extent thereof. Moreover, she states that she was not notified of

⁶ 51 Prohibited transactions, agreements, terms or conditions

(1) A supplier must not make a transaction or agreement subject to any term or condition if—

(a) its general purpose or effect is to—

- (i) defeat the purposes and policy of this Act;
- (ii) mislead or deceive the consumer; or
- (iii) subject the consumer to fraudulent conduct;

(b) it directly or indirectly purports to—

- (i) waive or deprive a consumer of a right in terms of this Act;
- (ii) avoid a supplier's obligation or duty in terms of this Act;
- (iii) set aside or override the effect of any provision of this Act; or
- (iv) authorise the supplier to—
 - (aa) do anything that is unlawful in terms of this Act; or

(bb) fail to do anything that is required in terms of this Act;"

the cession and that she, without knowledge of the cession, continued to tend to its obligations in attempt to discharge of her indebtedness.

[15] I am satisfied that the defendant has raised defences which are *bona fide* and good in law and there is a reasonable possibility that the defences she advanced may succeed at trial.

[16] Consequently, I make the following order:

Order

The application for summary judgment is dismissed with costs.

A handwritten signature in black ink, appearing to read 'SC MIA', is written over a horizontal line.

**SC MIA
JUDGE OF THE HIGH COURT
JOHANNESBURG**

For the Applicant:

Adv. J G Botha
instructed by ODBB INC.

For the Respondent:

Adv. N. Moyo
instructed by Africa and Associates

Heard: 30 January 2023

Delivered: 26 June 2023