



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

CASE NO: 3450/2022

In the matter between:

**GAIL FRANCIS BUECHEL** **Applicant**

and

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

**SASFIN BANK LIMITED** **Second Respondent**

**SUNLYN (PTY) LTD** **Third Respondent**

IN RE:

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

**SASFIN BANK LIMITED** **Second Plaintiff**

**SUNLYN (PTY) LTD** **Third Plaintiff**

and

**GAIL FRANCIS BUECHEL** **Defendant**

Coram: Bishop, AJ

Dates of Hearing: 2 November 2023

Date of Judgment: 5 December 2023

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## JUDGMENT

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### **BISHOP, AJ**

[1] This is an application for rescission in terms of rule 31(2)(b). Its genesis is three agreements to lease printers. The agreements were concluded in August 2020 between the Third Respondent (**Sunlyn**) and Gragood Development (Pty) Ltd, through a supplier called Custom Cut IT Solutions (Pty) Ltd. The Applicant has been sued because she signed a written guarantee binding herself as guarantor and co-principal debtor.

[2] Sunlyn acted as an originator for the Second Respondent (**Sasfin**). They operated in the realm of equipment finance. Suppliers who had customers that required financing for equipment would approach Sunlyn. It would put together applications for finance to Sasfin which would decide whether to finance the agreements. If the financing was approved, Sunlyn would provide the agreements to the supplier, who would arrange for the customer to sign and return the agreements to Sunlyn. The agreements are ultimately between Sunlyn and the customer. The rights under the lease agreements would be ceded by Sunlyn to the Second Respondent, who in turn would cede them to the Third Respondent (**SASP**).

[3] That is what happened with the lease agreements in this case. Custom Cut approached Sunlyn for financing on behalf of Gragood. After approval (more on that below), Sunlyn signed the leases with Gragood, and guarantees with the Applicant. The circumstances in which the lease agreements and the guarantees were signed are of some moment.

[4] Gragood was the developer of two sectional title schemes – the Palm Gardens Retreat Sectional Title Scheme, and the Palm Gardens Retreat (Helen Zille Wing). Both schemes regularly procured goods and services through Gragood. The Applicant was a director of Gragood.

[5] During 2020, she was caring for her late husband and was persuaded by a Mr Koegelenberg to let him manage Gragood's affairs. It was Koegelenberg who advised her that Gragood required printers as did the Palm Gardens Body Corporate (**PGBC**). He planned to procure those printers through Custom Cut, and to finance them through Sunlyn. Koegelenberg advised her that the PGBC would pay for the printers. Based on Mr Koegelenberg's representations, she agreed to Gragood renting the printers.

[6] Sunlyn initially rejected Gragood's application for financing. It was approved only after Gragood submitted additional documents, and subject to the Applicant agreeing to stand as a guarantor. She did so, signing the lease agreements as director of Gragood, and the guarantees in her personal capacity. The leases included an acceleration clause; if Gragood failed to pay the rent, Sunlyn could claim the full outstanding amount for the five-year term.

[7] The printers were duly delivered. But it turned out that neither PGBC nor Gragood needed the printers. PGBC refused to pay for them. Gragood barely used them.

[8] Why were these printers rented and hardly used? The Applicant alleges that she was “fraudulently induced by Willem Koegelenberg (a convicted fraudster, now deceased) to provide the Guarantees”. She also alleges that “Sunlyn’s Sales Representative in respect of the Agreements relied upon by the Plaintiffs, was a friend of Koegelenberg and unbeknown to me at the time, the leasing charges were exorbitant and completely out of kilter with leasing charges for similar equipment.” She claims that if she had known that the printers were not needed, that PGBC would not pay for them, that the prices were exorbitant, and that Koegelenberg “was setting me up to take the fall”, she would not have signed the lease agreements or the guarantees.

[9] The Respondents deny any knowledge of any fraud. Sunlyn’s representative was Mr Gary Kalt, its Asset Finance Regional Manager for Cape Town. He deposed to an affidavit confirming he had no contact with Koegelenberg or the Applicant, and does not know Koegelenberg. His interaction was through the supplier – Custom Cut. Its representative in the deal was Mr Jan Nel. Any fraud, the Respondents claim, had nothing to do with them.

[10] Gragood failed to pay its regular monthly rentals. Precisely when and how it failed is not clear, but there is no dispute that it did not pay.

[11] For reasons that are not directly relevant, Gragood was placed in business rescue on 25 September 2020. A business rescue plan for Gragood was adopted on 9 March 2021. The Respondents ultimately received R37 061.14 from the business rescue process, which constituted just 6c in the Rand. The business rescue released Gragood from its obligations; whether that release extended to the Applicant as guarantor is in debate between the parties.

[12] Because Gragood was in arrears, the rental agreement permitted the Respondents to repossess the printers. The printers were collected from Gragood on 2 June 2021. They were sold at auction on 8 July 2021 for just R 1 495. That was less than the cost of collection and storage and sale, which amounted to R3 369.50.

[13] The Respondents only cancelled the various agreements between November 2021 and February 2022. In terms of the acceleration clause, the Respondents claimed the full outstanding five years of rental, plus interest from the Applicant under the guarantees. A summons to that effect was served on the Applicant's chosen domicilium on 21 April 2022.

[14] But the Applicant did not receive the summons, as she had by then moved to a new address. No appearance to defend was entered, and the Respondents obtained default judgment on 4 August 2022.

[15] The Applicant first became aware that there might be litigation on 25 November 2022 when the sheriff attempted to serve a writ of execution. It took until 2 December 2022 for her to determine that the basis for the writ was the Respondents' action. Her attorneys asked for an indulgence to launch an application for rescission by 20 January 2023. The Respondents' attorneys granted the indulgence. This application for rescission was launched a few days late on 24 January 2023. Condonation was not opposed, and it is granted.

[16] The application explains that, had she been aware of the action, the Applicant would have defended it. It was only because she did not receive the summons that she did not defend. The Applicant also raises a number of defences, three of which were persisted with in argument:

[16.1] The business rescue proceedings compromised the debt Gragood owed the Respondents. As there was no underlying debt, the Respondents had no claim against the Applicant under the guarantees.

[16.2] The agreements had been induced by fraud, and were therefore invalid because “fraud unravels all”.

[16.3] The claim constituted a penalty under the Conventional Penalties Act 15 of 1962, and should be reduced as it was “out of proportion to the prejudice suffered by the creditor”.

[17] The Respondents opposed rescission. They initially contended that the Applicant failed to show she was not in wilful default, although that argument was not pressed with much vigour in oral argument. But they contended strongly that the Applicants’ defences were not bona fide because:

[17.1] The business rescue plan expressly preserved the creditors’ rights to pursue guarantors;

[17.2] The Respondents were not involved in any fraud; and

[17.3] Their prejudice was the full outstanding value of the rental agreements because they had not recovered any value from the repossessed machines.

[18] To determine whether the Applicant has made a case for rescission, I first briefly set out the standard she must meet. I then consider whether she is in wilful default. I next discuss each of the three defences. Finally, I deal with costs.

### **The Standard for Rescission**

[19] Rescission of judgment under rule 31(2)(b) is in the discretion of the Court. The defendant seeking rescission must generally establish: (a) that she was not in wilful default; (b) that the application is brought in good faith to allow her to defend the action; and (c) that she has a bona fide defence to the claim.<sup>1</sup> The last two elements are related. The defendant must identify a bona fide defence *and* convince the court that she honestly intends to pursue that defence. These are not strict requirements. Rather they are factors the court will consider in exercising its discretion to rescind.<sup>2</sup>

[20] The main issue in this application is whether the Applicant has a bona fide defence. She does not need to show that her defence is likely to succeed; but she must demonstrate an issue that, if proved at trial, would be a defence to all or part of the claim.<sup>3</sup>

### **Wilful Default**

[21] The Applicant was not aware of the summons or the application for default judgment. Once she became aware, she immediately took steps to have the default judgment rescinded. While summons may have been served on her domicilium consistently with the rules, that does not mean she was in wilful default.

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<sup>1</sup> *Morkel v Absa Bank Bpk en 'n Ander* 1996 (1) SA 899 (C) at 903D-E.

<sup>2</sup> *Wahl v Prinswil Beleggings (Edms) Bpk* 1984 (1) SA 457 (T).

<sup>3</sup> *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at para 11.

[22] Wilful default exists where a litigant is in fact aware of the litigation and does nothing to defend it.<sup>4</sup> That is not the case here. While there may have been proper service, there is no evidence that the Applicant knew of the action until November 2022. Her actions thereafter evince a real intent to oppose.

[23] The first element for rescission is met.

### **Surety and Business Rescue**

[24] The Applicant's first defence is that the business rescue plan extinguished her obligations as guarantor. She contends that the business rescue constituted a compromise of the Respondents' claims against Gragood, and that her secondary liability as guarantor cannot survive that compromise.

[25] It is so that, absent any indication to the contrary in a business rescue plan, the termination of a primary debt extinguishes a guarantor's liability.<sup>5</sup> That is the effect of 154(1) of the Companies Act 71 of 2008, at least for those creditors who accede to the discharge.<sup>6</sup> But that is not an absolute rule; as s 154(2) of the Companies Act makes clear, it depends on the business rescue plan.<sup>7</sup> The position was set out in *Van*

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<sup>4</sup> *Morkel* (n 1 above) at 905C-D.

<sup>5</sup> See *Tuning Fork (Pty) Ltd t/a Balanced Audio v Greeff & Another* 2014 (4) SA 521 (C).

<sup>6</sup> Section 154(1) reads: "A business rescue plan may provide that, if it is implemented in accordance with its terms and conditions, a creditor who has acceded to the discharge of the whole or part of a debt owing to that creditor will lose the right to enforce the relevant debt or part of it."

<sup>7</sup> Section 154(2) reads: "If a business rescue plan has been approved and implemented in accordance with this Chapter, a creditor is not entitled to enforce any debt owed by the company immediately before the beginning of the business rescue process, except to the extent provided for in the business rescue plan."



*Zyl v Auto Commodities (Pty) Ltd.*<sup>8</sup> It is possible for a creditor and a principal debtor to conclude an agreement where “the creditor’s right to pursue the surety remains extant.”<sup>9</sup> It takes the form of an agreement that the creditor will not sue the principal debtor – a *pactum de non petendo* – without compromising the underlying debt. The creditor is then free to pursue the surety or guarantor because the primary debt has not been discharged.

[26] That is what happened here. The business rescue plan expressly preserves the creditors’ right to act against any sureties and guarantors. Paragraph 29 reads: “The adoption of the Business Rescue Plan shall not affect the right of any Creditor to pursue any party who bound itself as guarantor, surety and co-principal debtor and/or indemnity with the Company for any debt owing, of whatsoever nature and howsoever arising, by the Company to such party.” The creditors – the Respondents – have not abandoned any right they have against the Applicant. They have, instead, agreed not to sue Gragood, while making no such agreement not to sue its guarantor. For this reason alone, the defence is bad.

[27] The Respondents also contend that clause 2 of each of the guarantees obliges her to indemnify Sunlyn even if any of the guaranteed obligation becomes “void, voidable, unenforceable or ineffective for any reason whatsoever”. The argument was that, even if the business rescue rendered the primary obligations unenforceable, it did not affect the Applicant’s obligations under clause 2 of the guarantees. Given my view that paragraph 29 of the business rescue plan in any event does not preclude

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<sup>8</sup> 2021 (5) SA 171 (SCA).

<sup>9</sup> *Ibid* at para 31.

the Respondents from seeking to recover from the Applicant, I prefer not to express an opinion on this argument.

[28] The Applicant's reliance on the business rescue plan is not, therefore, a bona fide defence.

### **Fraud**

[29] The fraud – as initially pleaded – involved Koegelenberg and an unnamed sales representative of Sunlyn who was a friend of Koegelenberg's. They had induced the Applicant to rent the unneeded printers.

[30] The Respondents' answer was simple: Koegelenberg had no connection to them. Jan Nel worked for the supplier, not for Sunlyn. Sunlyn's sales representative – Kalt – denied in an affidavit that he had any involvement in fraud and denied knowing Koegelenberg. Put bluntly, the Respondents had no connection to any fraud Koegelenberg had perpetrated, and could not be responsible for it.

[31] In reply, the Applicant said that she "was defrauded by Koegelenberg and Jan Nel". Her counsel appeared to accept that the sales representative referred to in the founding papers was Nel, not Kalt. But she sought to drag Kalt into the conspiracy by alleging that he "must surely have been aware of the true value of the machines and of what Custom Cut and Jan Nel were seeking to do to Gragood (and to me)."

[32] I am willing to accept that the Applicant may well have been fraudulently induced to sign the leases and the guarantees. But the key question is who is responsible for the fraud.

[33] The identity of the fraudster(s) matters because “if the fraud which induces a contract does not proceed from one of the parties, but from an independent third person, it will have no effect upon the contract. The fraud must be the fraud of one of the parties or of a third party acting in collusion with, or as the agent of, one of the parties.”<sup>10</sup> As Cameron J put it, the maxim that “fraud unravels all” is not “a flame-thrower, withering all within reach. Fraud unravels all directly within its compass, but only between victim and perpetrator, at the instance of the victim.”<sup>11</sup>

[34] So, if only Koegelenberg and Nel were involved in the alleged fraud, the Applicant would have no basis to set aside the contract, and no bona fide defence against the Respondents’ action. She may have a separate claim against Koegelenberg and Nel, but that is of no moment here. But if Kalt was involved in the fraud, then the Applicant would be entitled to set aside the leases and the guarantees, and would have a bona fide defence to the action.

[35] On the evidence in the founding papers, there is no basis to conclude that Kalt was involved. While the Applicant refers to a sales representative of Sunlyn, she is plainly referring to Nel, not Kalt. That is because she alleges that person was known to Koegelenberg. Kalt denies knowing Koegelenberg, and there is no reason to disbelieve him. Kalt is only linked to the fraud in reply, and not by evidence but by inference. The argument is that he must have known of the fraud, and therefore been complicit in it, because the charges were exorbitant.

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<sup>10</sup> *Karabus Motors (1959) Ltd v Van Eck* 1962 (1) SA 451 (C) at 453.

<sup>11</sup> *Absa Bank Limited v Moore and Another* [2016] ZACC 34; 2017 (1) SA 255 (CC); 2017 (2) BCLR 131 (CC) at para 39.

[36] The problem with this case is that it was only made in reply. As a general rule, applicants “must stand or fall by their founding papers”,<sup>12</sup> and cannot make a new case in reply. The Applicant did not do so here. The only question is whether to relax that rule in this case.

[37] I do not think it should be. If the Applicant had made the case properly in her founding papers, the Respondents and Kalt would have had a chance to answer it. Instead, they quite reasonably answered the charge of fraud by explaining that Kalt had never met Koegelenberg, could not have been the unnamed sales representative, and therefore was not involved in the fraud the Applicant alleged.

[38] It is so that the Applicant alleged in her founding papers that the rental charges were exorbitant. The Respondents denied this, but did not elaborate on the denial. They did not, for example, show that the rates charged to Gragood were consistent with the rates Sunlyn ordinarily charged in similar agreements. But that silence is understandable given the way the case was pleaded. The allegedly exorbitant charges were not the evidence on which a claim of fraud was levelled against the Respondents. The evidence was that Koegelenberg and Nel conspired to defraud. The Respondents were entitled to answer that claim by pointing out that, even if there was a fraud, it did not involve them.

[39] Absent some evidence of individualized price-gouging or collusion in the fraud by the Respondents, it seems inherently unlikely to me that Kalt would have increased the rates for this one deal. It seems more likely to me that – if the rates are exorbitant – it is because the Respondents charge extremely high rates and take advantage of

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<sup>12</sup> *Pilane and Another v Pilane and Another* [2013] ZACC 3; 2013 (4) BCLR 431 (CC) at para 40.

all customers, while carefully avoiding both the National Credit Act 34 of 2005 and the Consumer Protection Act 68 of 2008. If that is the case, it would be reprehensible; but it would not be evidence of fraud in this case.

[40] To infer fraud by the Respondents, the Applicant would have to show not only that the rates were unreasonably high, but also that they were made higher in her specific case, or that there were charged as part of a practice of fraudulent activity to take advantage of vulnerable consumers. There is no evidence of that before me, and therefore no basis to believe that the Applicant will be able to prove her allegation at trial.

[41] I am sympathetic to the Applicant's position. It does seem she was duped into signing the agreements and has now been landed with a debt for which neither she nor Gragood received any meaningful benefit. But the remedy the law affords her is not to escape her contractual obligations, but to pursue those she alleges are responsible for defrauding her.

### **Conventional Penalties**

[42] The Applicant's final defence is that, by relying on the acceleration clause, the Respondents are enforcing a penalty as defined in the Conventional Penalties Act. Section 3 of that Act grants a Court a discretion to reduce the penalty if it is disproportionate to the prejudice actually suffered. Section 3 reads:

*If upon the hearing of a claim for a penalty, it appears to the court that such penalty is out of proportion to the prejudice suffered by the creditor by reason of the act or omission in respect of which the penalty was stipulated, the court may reduce the penalty to such extent as it may consider equitable in the circumstances: Provided that*

*in determining the extent of such prejudice the court shall take into consideration not only the creditor's proprietary interest, but every other rightful interest which may be affected by the act or omission in question.*

The Applicant contends that the penalty here is out of proportion with the Respondents' loss.

[43] Mr Wessels – who appeared for the Respondent – accepted that in light of Bozalek J's decision in *Plumbago*,<sup>13</sup> the damages granted in the default judgment constituted a "penalty" for purposes of the Act.

[44] The debate was about whether the Applicant had a bona fide defence on the basis that the penalty was "out of proportion to the prejudice suffered by the creditor". I am, of course, not called to decide that issue – only whether it is a triable issue. But to determine that question, it is important to know where the onus to show disproportionality between the penalty and the prejudice lies. If the matter goes to trial, "in order to reduce the amount of the forfeiture, the actual prejudice suffered by the creditor must be proved by the debtor", that is, the Applicant.<sup>14</sup> She will have to establish the Respondents' actual prejudice, and then show that the penalty is out of proportion to the prejudice.

[45] The Applicant initially contended that the Respondents' prejudice was less than the penalty because they could have let out the machines after they repossessed them. The Respondents, she argued, "made no reasonable effort to collect and re-let

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<sup>13</sup> *Plumbago Financial Services (Pty) Ltd t/a Toshiba Rentals v Janap Joseph t/a Project Finance* 2008 (3) SA 47 (C).

<sup>14</sup> *National Sorghum Breweries v International Liquor Distributors* [2000] ZASCA 159; 2001 (2) SA 232 (SCA) para 8 and *Steinberg v Lazard* [2006] ZASCA 55; 2006 (5) SA 42 (SCA) at para 10.

the equipment timeously.” Had the printers been collected earlier they could have been re-let for longer. While the Applicant emphasised the delay, it seems to me that the real complaint is the failure to re-let the printers at all, not the delay in collecting them. The delay would affect only the extent of value the Respondents could realise from the printers.

[46] In answer, the Respondents explained the delay in collecting the printers. More importantly, they explained that that they had sold the printers shortly after collection for virtually nothing (R1 495); less even than the cost of collection and sale. So their prejudice was the full outstanding rental, which they had claimed.

[47] In reply, the Applicant complained that it was abusive for the printers to have been sold at such a low value – less than 1% of their value after only having been used for a few weeks. She argued that it was incumbent on the Respondent to seek to realise greater value for the sale of the equipment.

[48] There are different approaches to assessing prejudice in this type of case. In *Plumbago* Bozalek J considered a claim for reduction of a penalty flowing from an accelerated clause in a contract for the hire of photocopy machines. There, the plaintiff had made income from the machines after they were re-possessed. Bozalek J reduced the penalty by that amount. Here, no income was made from the sale. But Bozalek’s reasons went further. He held that it would be out of proportion with the loss suffered to award the plaintiff the full accelerated rental “even if the repossessed equipment earned no additional income.”<sup>15</sup> He did not explain when or why that reduction would be justified. As he concluded there was additional income, the remark is obiter.

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<sup>15</sup> *Plumbago* (n 13 above) at para 36.

[49] In *Plumbago*, the creditor was a supplier of photocopy machines. Here, the Respondents are financiers, not suppliers. In *Corner Savings*, Murphy J concluded that the financier in this type of equipment leasing contract “normally should not be expected to become a dealer in second hand equipment.”<sup>16</sup> It cannot be expected to re-let equipment that it re-possesses from a defaulting debtor. But it can be expected to sell the equipment, and its prejudice is reduced by whatever the residual value of the goods are. In *Corner Savings*, Murphy J did not grant a deduction in the penalty because the defendant had not met its onus to establish the residual value of the equipment.

[50] Where does that leave the Applicant in this case? Its initial case resting on the failure to rehire is bad in law. On the authority of *Corner Savings*, the Respondents – who are financiers not suppliers – are not required to rehire the equipment. That seems correct to me. Financiers cannot be expected to set up shop as suppliers of equipment rather than to recover what is owed to them. It is bad in fact because the Respondents explained their delay and realised no value from their sale of the equipment.

[51] That leaves the case made in reply – that the Respondents *should* have realised value from the sale of the equipment, and that their failure to do so would justify a reduction in the penalty. That may be a basis to reduce the penalty, if the Applicant could show that the Respondents could, through reasonable care, have achieved a higher value when they sold the printers.

[52] But that case could and should have been made in the founding papers. The Applicant attached to her own founding affidavit a letter the Respondents’ attorneys

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<sup>16</sup> *ABSA Technology Finance Solutions (Pty) Ltd v Leon Hattingh t/a Corner Savings Supermarket* [2009] ZAGPPHC 37 at para 33.



sent on 19 January 2023. It informed her that “the costs in relation to the sale of the goods exceeded the value which the goods were sold for.” This was also set out in the particulars of claim, where the Respondents pleaded: “the cost of sale of the goods exceeded the amount the goods were sold for”. The Applicant therefore knew, when she brought the application for rescission, that the sale of the printers realised R0.

[53] If the Applicant wished to rely on the failure to obtain a better price for the sale of the goods, she should have made that case in her founding papers. That would have allowed the Respondents a fair opportunity to deal with it and to explain why the goods were sold for such a low value. The Applicant did not do so, despite being aware of the key fact that R0 was realised in selling the goods. There is no reason to suspect that the Respondents would intentionally sell the printers for less than they could; there would be no advantage to them in doing so.

[54] The Respondent referred me to the decision of this Court in *Manley Communications*.<sup>17</sup> A similar defence was raised in the context of summary judgment. Nuku J held that the consumer in that case did “not set out the facts to be relied upon in support of their contention that the penalty falls to be reduced”.<sup>18</sup> It relied only on a request for further information to determine prejudice to which the applicant had not responded. The same is true here, except that the Applicant had the facts to make the argument, and did not address them in the founding papers.

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<sup>17</sup> *South African Securitisation Programme (RF) Ltd & Others v Manley Communications – Publicity and Public Relations Consultants CC & Another* unreported judgment of the Western Cape High Court, Case No. 15549/2020 (16 August 2021).

<sup>18</sup> *Ibid* at para 21.

[55] Once again, I understand the Applicant's frustration. The Respondents appear to achieve a massive windfall – the full value of the contracts even though the printers were barely used. But that is the consequence of the guarantees she signed, our law which permits the recovery of this type of accelerated rental, and her failure to deal with the price for which they were sold in her founding affidavit.

[56] I conclude that the Applicant has not established a bona fide defence.

### **Conclusion**

[57] In conclusion, I find that the late launching of the application should be condoned, that the Applicant was not in wilful default, but that she has not established any bona fide defence.

[58] I reach this conclusion with a few misgivings. It does seem likely to me that the Applicant was induced into signing the agreements by Koegelenberg and Nel. She may have a claim against them or their estates to offset what she may owe the Respondents. The rental rates do seem high, and the failure to realise any value from the printers after they were repossessed compounds the unfairness. But a contract is a contract, and holding parties to their agreements is a “profoundly moral principle, on which the coherence of any society relies”.<sup>19</sup>

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<sup>19</sup> *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC), quoted with approval in *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) at para 35.

[59] On that note, the Respondents have sought costs on an attorney and client scale<sup>20</sup> because the guarantees entitle them to seek costs on that scale. Courts will ordinarily enforce that type of agreement.<sup>21</sup> While a court can depart from that rule, the mere fact that the successful party is enforcing an agreement that may seem unfair to a judge, is not a sufficient reason. The Respondents have done nothing in this case to justify a departure from the agreement.

[60] Accordingly, I make the following order:

1. The application for condonation is granted.
2. The application for rescission is dismissed.
3. The Applicant shall pay the Respondents' costs on an attorney and client scale.

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M J BISHOP  
Acting Judge of the High Court

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<sup>20</sup> The agreement actually refers to costs on an "attorney and own client scale", but the Respondents only a sought attorney and client costs. Whether there is a difference between the two seems to be a fraught issue (see *Aircraft Completions Centre (Pty) Ltd v Rossouw and Others* 2004 (1) SA 123 (W)) that fortunately I need not address.

<sup>21</sup> *Claude Neon Lights (SA) Ltd v Peroglou* 1977 (1) SA 575 (C).

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**Adv L Wessels (heads of argument  
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