IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISON)

NOT REPORTABLE CASE NO.: 18036/03

9/3/05

In the matter between:

PLAINTIFF

TECHNOLOGIES ACCEPTANCES (PTY) L TD

AND

DEFENDANT

PALABORWA MINING COMPANY LIMITED

JUDGMENT

BOTHA. J:

In this matter the plaintiff, Technologies Acceptances (Pty) Ltd (TA) claims damages from the defendant, Palaborwa Mining Company Ltd (PM), arising out of the cancellation of an agreement for the lease of a Xerox 5665 copier.

At the request of the parties I directed in terms of Rule 33(4) that all the issues except the issue of the value of the copier at the date of recovery be determined first and separately.

It is alleged that the copier with serial number 2230730442 was leased by defendant in terms of an agreement dated 19 December 2000. The agreement was for a period of 60 months. The rental was R17 441-20 per month plus VAT payable as from 1 January 2001.

It is alleged that the agreement was exclusively in writing and subject to a non-variation clause.

It is alleged that defendant fell into arrears and that the agreement was cancelled. The plaintiff's claim is for arrear rentals and future rentals from which the value of the copier has to be deducted.

In terms of the agreement a certificate proving the amount outstanding was annexed.

The defendant pleaded that on 1 January 1999 a 5100 Xerox copier was delivered to it in terms of a rental agreement with the plaintiff, the plaintiff being represented by Data Master Office Automation CC (Data Master), who acted through mr Jacques Nel and mr D Gouws. The monthly rental of the 5100 copier was R21 277-46 excluding VAT. The period of the lease was 36 months.

In November 2000 an oral agreement was concluded between plaintiff, represented by Data Master acting through mr D Gouws and mr G Vermeulen, in terms of which plaintiff would provide a Xerox 5665 as a standby copier during periods when the 5100 copier was not operational. The rental agreement relating to the 5100 copier would be cancelled and replaced by an agreement in terms of which the 5100 copier would be rented for a further 60 months at a reduced rental of R17 441-20 per month. The 5665 copier would be provided as a standby free of charge. It is also alleged that it was agreed that the two copiers would be used as a unit. Pursuant to this oral agreement documents were submitted to defendant for signature. It is alleged that it was falsely represented to defendant that the documents submitted for signature were in accordance with the said oral agreement. The representation was false in that the documents submitted for signature did not reflect the terms of the oral agreement.

Accordingly defendant contends that the written document, which is the agreement on which plaintiff relies, is void *ab initio,* or voidable as a result of a unilateral mistake induced by an intentional misrepresentation by plaintiff.

In paragraph 10.3 of its plea defendant alleged that in breach of the oral agreement, plaintiff had caused the removal of the 5100 copier from defendant's premises on 18 January 2002.

It is alleged that the defendant's obligations were reciprocal to the plaintiff s obligation to leave the defendant in undisturbed possession of both copiers.

It is alleged that the defendant has cancelled the oral agreement. It tendered return of the 5665 copier.

In respect of damages, apart from putting plaintiff to the proof thereof, defendant denied that plaintiff had mitigated its damages in that it had failed to collect the 5665 copier on cancellation and renting or selling it.

Plaintiff filed a replication in which it denied that Data Master was authorized to represent it.

In paragraph 7.2 it admitted that it had caused the 5100 copier to be removed.

The defendant filed a rejoinder in which it raised estoppel in the event of the court finding that Data Master had not been authorized to represent the plaintiff. It relied on the fact that Data Master was allowed to promote plaintiff as a financier; that Data Master was provided with plaintiffs standard contract; that Data Master's messrs Nel and Gouws were allowed to complete plaintiff s contracts and submit them for signature; and that Data Master was used as the sole instrument of communication with defendant.

At the beginning of the trial mr Bank, who appeared for the plaintiff indicated that plaintiff would apply for the withdrawal of the admission contained in paragraph 7.2 of the replication.

Plaintiff assumed the duty to begin and called the following witnesses: Mr R Piper who, at the time was its head of collections, mr Nagel, plaintiffs sales manager, and rnrs De Mendonca, plaintiff s sales administration manager.

Defendant called the following witnesses: mr B Hone, who was its secretary in 2000, mr A Nemengaya, its archives supervisor, and mr A Low, who in 2000 - 2001 was the acting supervisor of its Contracted Services department.

Mr Piper explained that Data Master was one of plaintiff s suppliers, supplying Xerox equipment. Plaintiff financed Xerox equipment as well as Altron equipment.

Exhibit A 1 - 5 was the rental agreement relating to the 5100 Xerox copier. He referred to the other documentation in exhibit A relating to that copier. A 11 is a settlement notification which shows that the contract could be terminated by payment of R279 323-11 if the copier was replaced in a so-called upgrade. He referred to B16, an annexure to the agreement relating to the 5665 copier on which plaintiffs claim is based, to show that the 5100 copier had been replaced by the 5665 copier.

He also referred to the documents in exhibit B which relate to the rental of the 5665 copier.

The 5100 copier is still on plaintiff's system even though the agreement had been terminated. It is on the system for record purposes.

He denied that Data Master could enter into an agreement on plaintiff's behalf without its acceptance. Data Master had copies of plaintiff's agreement. They also had plaintiff's credit application forms. They also had plaintiff's factor sheets from which monthly payments could be determined.

He was referred to exhibit E, a joint venture agreement between plaintiff and Northern Transvaal Copiers CC which, he thinks, was a predecessor of Data Master. Plaintiff's sales staff know more about this agreement.

In respect of the allegation that the plaintiff removed the 5100 copier on 18 January 2002, he said that plaintiff would not have removed the copier from mine premises. Permission was needed. Plaintiff would have asked the supplier to uplift it. In this case no upliftment form was sent to the supplier. With reference to exhibit F 146, apparently a permit to remove the copier, he said that the vehicles mentioned in the permit did not have familiar registration numbers.

He described how time went by as efforts were made to resolve the matter. The fact that the 5665 copier had not been removed in the mean time was due to an oversight.

The document C 48, a Data Master document in which it is noted that the 5665 copier was to be placed as a standby, he saw much later.

With regard to the arrears he stated that the correct amount was R181 349-95. He confirmed the amounts set out in the letter of his attorney dated 27 June 2003, C 56.

The amount of damages included all future rentals plus VAT. The prevailing prime rate was taken into account.

The 5100 copier was sold back by Data Master and is presently rented by the Molemole Municipality. In September 2002, according to C 62, it had a capital value of R287 261-15, which amount was paid by plaintiff to Data Master.

He confirmed that rentals were subject to adjustment as underlying factors like the prime rate change.

He also confirmed that in the determination of the damages claim he had not worked with a nett present day value. Also included in the damages calculation was VAT.

He agreed that if the 5665 copier had been uplifted at the time of cancellation a contemporaneous valuation could have been obtained.

When a machine has to be uplifted the plaintiff would ask an auctioneer or the supplier to do so. In either case the machine would go back into the market. The latter route will be followed if the supplier is prepared to assist.

He agreed that if a machine that is uplifted is leased again to a new lessee in a short period, the plaintiff's damage would be less.

He did not agree that plaintiff delayed unreasonably in following that course. There was no point in doing that whilst the matter was the subject of discussions. He agreed that those discussions took place before the issue of summons.

He confirmed that the plaintiff had an employee, ms PeIser, who was based in Data Master's Polokwane office. She was a sales representative based there to assist with financing and agreements. She would provide stationary and act as a conduit for passing on contracts generated by Data Master.

Data Master would obtain business and plaintiff had a right of first refusal.

Data Master was in possession of plaintiff's stationary like standard agreements and credit application forms. It had the factor sheets from which plaintiff's rentals were calculated. Data Master would have negotiated with the defendant. It would have completed contracts with defendant and it would have conveyed information to the defendant. He agreed that the faces that the defendant would have seem would have been those of the representatives of Data Master.

He was referred to the joint venture agreement and confirmed that Data Master had to promote plaintiff as a financier. It was put to him that that posed a risk for plaintiff. He agreed but added that plaintiff was careful with its contracts.

He agreed that Data Master was in a position to make representations to end users.

If it made misrepresentations, plaintiff's agent it could saddle plaintiff with liability. He confirmed that plaintiff protected itself against that risk by means of clause 5.2.7 of the joint venture agreement. See E 115.

When referred to C 48, the Data Master document which referred to a 5665 copier to be placed as a standby, he said that he did not understand it. He agreed that the current cost coincided with the rental of the 5100 copier.

When defendant's defence was put to him, he confirmed that his only evidence was the paperwork.

He confirmed that he could not explain the vast difference between the prices of the two 5665 copiers that are reflected on B 18.

When defendant's version was put, it was suggested to him that the price of R690 467-14 for the 5665 copier in question could have included the price of the 5100 copier. He conceded that it made sense, but he added that it was not reflected by the paperwork.

He was referred to the various signatures of signatories and witnesses on the agreement B 12 - 16 and agreed that B 12 was not signed by the same persons as B 16. Ms PeIser who signed as a witness on B 16 was based in Pietersburg while the manager mrs De Mondenca was based in Sandton.

When defendant's version was put to him, he pointed out that in view of the fact that the 5100 copier had ceased to be plaintiff's property, there must have been an agreement between defendant and Data Master.

He agreed that defendant was not informed of the change of ownership in respect of the 5100 copier.

He was asked why, if the 5665 copier replaced the 5100 copier, the 5100 copier was only removed in January 2002.

When it was put to him that plaintiff had failed to inform defendant that Data Master was not authorized to make representations on its behalf, he answered that plaintiff would not have told defendant that. When it was put to him that defendant had the impression that Data Master was so authorized, he said that defendant could see it that way.

With regard to his certificate it was put to him, that his calculation conflated the costs of two copiers. He answered that his calculation was in respect of item 1, presumably item 1 of B 16.

He was referred to invoices from D 64 onward which refer to Data Master Finance as a division of plaintiff.

With regard to the value of recovered equipment, he agreed that a delay in recovery would lead to a lower value realized. That would prejudice the defendant.

According to him, if the 5100 copier was part of B 12 - 16, it would have figured as a separate item on the annexure B, 16.

Mr Charles Nagel is the sales manager of plaintiff.

He explained that Data Master was plaintiff's largest supplier.

Defendant was one of plaintiff's largest clients.

He explained the relationship between plaintiff and Data Master. He considered the joint venture agreement as binding.

He explained clauses 5.2.2. and 5.2.9.

When there is an upgrade a settlement calculation is made.

Sometimes the supplier does not pay the settlement amount, but capitalizes it into the value of a new transaction.

He explained that a 5100 copier made 100 copies a minute as against the 65 of a 5665 copier.

When asked about his knowledge of the 5100 copier that appears under item 11 **on** A6, he said that he had learnt that the machine was not performing and that another machine had to be installed. This one had to serve as a backup.

The 5100 was under a 36 month contract that would end in January 2002. It cost R542 376-71. Its upgrade value was R279 323-14.

The two 5665 machines reflected on B 18 are identical.

They were both brand new. Asked to explain the difference in their prices, he said that it looked as if the settlement price of the 5100 copier had been built into the price of the more expensive machine.

The 5100 did not appear on B 15.

The different rentals for the two 5665 copiers also indicate that the 5100 and 5855 machines mentioned in B 16 had been capitalized into the price of the first mentioned 5665 copier.

The mention in B 16 of the 5100 and the 5855 copiers being replaced means that the agreements relating to them had been terminated. The two machines would have gone back to Data Master.

It there was an agreement as suggested by the defendant the plaintiff's documentation does not reflect it.

On defendant's version the 5100 should have been reflected in the schedule B 16.

He denied that Data Master could commit the plaintiff. Plaintiff was not on site to control Data Master. Plaintiff did give training to the staff of Data Master on what they could say.

When referred to the Data Master document, C 48, he said that plaintiff was not bound by it.

When asked to comment on the allegation that Data Master had brought defendant under a certain impression, he answered that plaintiff had no representative on the floor of the supplier, but that plaintiff used a standard contract which were pretty clear.

On 18 January 2002 Data Master should have been the party having the right to remove the 5100 copier. The admission made by plaintiff made no sense to him.

The invoices with the references to Data Master Finance were a result of a request of the supplier that its identity be displayed.

He agreed that the price of the 5665 copier in question was not only the price of a 5665 copier. It included the price of two other machines.

He accepted the proposition that plaintiff could be liable for misrepresentations by Data Master and therefore protected itself by means of the indemnity clause in the joint venture agreement.

He agreed that defendant would have communicated with plaintiff through Data Master except in so far as Charlene Pelser might have been involved.

He agreed that if the price of the 5665 in B 18 included the settlement of the 5100, there was still more than R200 000-00 short.

He also agreed that the rental of R 17 441-20 would have referred to two machines.

He accepted that defendant would not have been informed of a change of ownership.

He denied that Data Master was placed in the position to negotiate on plaintiff's behalf.

He could not say whether Data Master filled in defendant's agreement.

When defendant's version was put to him, he said that plaintiff would not have accepted the contract on that basis.

When it was put to him that defendant was misled, he referred to the terms of the agreement which, according to him, say that Data Master could not negotiate on plaintiff's behalf.

A calculation was put to him according to which the purchase price of the 5100 copier plus insurance plus the price of the 5665 add up to R696 483-00, which, it was pointed out, was very close to the price reflected in B 18.

In re-examination he was referred to the time lapse between the purchase of the 5100 and the determination of its upgrade settlement value.

He testified that the purchase price of the 5100 was not relevant to the price of R690 467-14 reflected on B 18.

When asked who had told him why the defendant had stopped making payments, he said it was plaintiff's counsel and attorney.

He accepted that it was possible that two machines could be rented as one, with one having an inflated value and the other one being free of charge. Plaintiff would require an explanation in such a case.

Mrs A De Mendonca testified that she was the sales administration manager of plaintiff in 2000.

She signed rental agreements and would check everything before signing. Her assistant, Annetjie Meyer, could deputize for her. She would sign after an agreement had been completed and the end user had signed it. Delivery would have taken place as evidenced by a signed certificate of acceptance.

She confirmed that B 12 was signed by ms Meyer and B 16 by herself. Ms PeIser signed as a witness for her. It is possible that ms PeIser signed it in Polokwane, that is not in her presence.

B 16 showed that the agreement relating to the 5100 had been cancelled. The settlement price would have been deducted from the payment for the new transaction.

If there was an oral agreement with a customer it was irrelevant. If a customer had any special requests, it had to be in writing. It would then be on the file.

Data Master could not approve a deal.

A supplier could deliver a contract to plaintiff for signature. The supplier could procure the signature of a customer.

She agreed that she had not signed B 12 - 15.

If a customer has signed she assumes that the agreement is correct.

When it was put to her that Data Master had filled in the agreement, she said that she did not know the sales process.

If there had been a request in the case of B 12 - 16 to deviate from the norm, there would have been something on the file.

She would have had the tax invoice, B 18, before her. She did not find the large discrepancy between the prices of the two 5665 copiers odd. There could have been a settlement included in the higher price.

If the previous copier was to remain with defendant there should have been a letter of abandonment on the file.

When defendant's version was put to her, she said that in that case the 5100 should have been re-financed. Another possibility was to put it in the annexure B 16, as a third item with a nil rental. The plaintiff would not accommodate two machines under one item in the annexure. Another possibility would have been to split the R17 441-20 rental between the 5100 and the 5665 copiers. If a nil rental was reflected, a letter of abandonment was not necessary.

That concluded the evidence on behalf of the plaintiff.

Mr Hone described the problems experience with the 5100 copier. In November or December 2000 the defendant was approached by messrs Vermeulen and Gouws of Data Master with a proposal which would lead to a reduction of the rental of the 5100 and the supply of a 5665 copier as a standby. The proposal was embodied in C 48, which was signed by messrs Vermeulen and Gouws as well as by mr Cheetham and himself on behalf of defendant. Mr Cheetham wrote the words in manuscript that appear on the document. The proposal was then referred to mr Low in the procurement division. The 5665 copier would have been provided at no cost.

The agreement would have been signed by mr Low, or someone in his department.

At the time defendant was engaged in a cost cutting exercise.

Various options were considered like the reduction of rentals and outsourcing. Discussions where held with Data Master, but they wanted a monopoly, which defendant did not want to allow.

Defendant was also approached by Cannon, who in anticipation of a deal unloaded a bulk copier on defendant. It was later returned unused.

When the 5100 copier was removed the defendant promptly responded by refusing to make written payments. It enabled the defendant to follow the route of outsourcing its photocopying.

He referred to a letter C 36 in which a summary is given which he confirmed.

According to him defendant's budget for photo copying was R 3 million per year. It used three suppliers.

He was referred to C 33, a letter dated 10 January 2002 in which Data Master advised mr Low that a machine would be removed. He pointed out that the machine was not mentioned in the letter. He could not say whether the machine had been removed with the co-operation of mr Low.

He conceded that the removal of the 5100 suited him because it enabled him to cancel the agreement.

Without the 5100 the 5665 was useless.

He could not explain mr Low's signature on D 146, the removal permit.

He was not aware of the fact that monthly payments were made to plaintiff. He had no sight of the agreement.

After the 5100 had been removed, the 5665 remained in the print room until last week. It was not used.

Mr Nema-ngaya confirmed the problems experienced with the 5100 copier. He was present when messrs Vermeulen and Gouws visited defendant and C 48 was signed. Messrs Vermeulen and Gouws said that the 5665 copier would be a standby.

In January 2002 a crew arrived and collected the 5100 copier. He thought it was for repairs. He tried to obtain confirmation from one Frances in Polokwane, but could not get hold of her. The crew simply told him that they had instructions to remove the machine.

He confirmed that a Cannon bulk printer was delivered and removed without having been used.

The 5665 was only used when the 5100 was out of order and then it was inadequate.

After the 5100 had been removed the print room was closed down. The 5665 was not used any more. Eventually it was moved into another room.

Mr Andre Low testified that in 2000 he was the acting supervisor of defendant's Contracted Services department. As such he had the authority to sign lease agreements for photo copiers.

Mr Nemangaya reported the problems with the 5100 copier to him. He then contacted Data Master. He made an appointment for messrs Gouws and Vermeulen with defendant's mr Hone. His discussion with messrs Gouws and Vermeulen were at the end of October or the beginning of November 2000.

He saw the quotation of Data Master, C 48. Normally they would come back with such a quotation after a day or two.

The arrangement with messrs Gouws and Vermeulen was that they would refinance the 5100 copier and provide a smaller machine as a standby.

After the quotation had been accepted he told messrs Gouws and Vermeulen that they could prepare a contract and deliver the standby machine.

He confirmed that he signed B 12, the rental agreement, B 15 the confirmation that the contract replaced an existing contract, and B 16 the annexure to the rental agreement. He confirmed that B 15 contained no reference to the 5100 copier.

The documents were submitted to him for signature by either mr Gouws or mr Vermeulen. He saw that the amount of the rental was correct and that the period was correct. He saw that it replaced the 5100 and assumed that it was the new contract. Mr

Gouws or mr Vermeulen said that it was the annexure for Brett's (mr Hone's) big machine.

If he had been told that there was no contract for the 5100 copier, he would not have signed.

He never had any direct dealings with plaintiff. All his dealings were with Data Master. He was aware of the fact that plaintiff was financing the contract. On plaintiff's invoices there was a reference to Data Master Finance. He thought it was one firm.

He explained how it came about that he signed E 146, the permit to remove some photo copiers. The defendant had, as it regularly does, informed Data Master that it did not want to retain machines of which the leases were about to expire. E 144 is a list of such machines. E 145 is such a list on which the number 5100 is written in manuscript. He does not know who wrote the number on it. He was authorized to sign a permit such as E 146. The permit was filled in by his assistant, mr Scheepers. After he had signed it, the technicians of Xerox would fill in the details of the machines. The details would then be checked by security. The reference to the 5100 machine had not been entered when he signed the permit. He did not see the 5100 copier being removed.

After the removal mr Hone told him to make sure that no further payments be made.

There was no limitation to the value of contracts he could sign. Mr Hone had to approve beforehand.

He was not present when messrs Cheetham and Hone signed C 48.

He was referred to the service contracts of the two 5665 copiers, F 148 and F 150, and the Data Master equipment history list, F 154. He could not comment on the work done to the 5100 because he was not involved in call outs.

He confirmed that F 148 and F 150 appeared to be service contracts in respect of two 5665 machines, that F 148 contained a reference to a 5100 that had been settled and F 150 to a 5855 that had been settled.

He confirmed that the rental agreement, B 12, was under the heading Technologies Acceptances and that the agreement was therefore between the plaintiff and defendant. He confirmed that B 16 showed that plaintiff was a company as opposed to Data Master which was a close corporation, as appeared from F 148 and F 150.

He agreed that the service agreements were signed at more or less the same time as the rental agreement.

He agreed that plaintiff and Data Master was not the same entity.

He saw C 48 after messrs Cheetham and Hone had signed it. He kept a copy of it. When he signed B 12 and B 16 he was already in possession of C 48.

He conceded that he signed the acknowledgments on B 12. He was not sure what item 2 meant, but his predecessor, mr Pretorius, had told him that they had no problems with the standard contract.

It was put to him that if plaintiff was put in possession of B 12 - 16, it would be entitled to assume that it was an entire agreement and that it would know nothing about an agreement to refinance the 5100. All his dealings were with Data Master. Later he conceded that if plaintiff's only source of information was B 12 - 16, it could assume that defendant only offered to lease two 5665 machines.

He accepted that if there was an early termination of a lease, there had to be a settlement figure.

He accepted that once the 5100 had been settled, it became the property of Data Master. When it was suggested to him that Data Master was entitled to leave the 5100 in the print room, he said that it made no sense unless the 5100 was refinanced. That was defendant's understanding.

It was pointed out to him that if the 5100 was to be refinanced it should have figured as a third item in the schedule in B 16. He said he did not know how it would have been printed. His worry was that they had the machine, that they had their price and that the period was right.

When it was put to him that the two 5665 machines were upgrades, he answered that that was not what he understood.

He agreed that B 16 showed a 60 months lease for a 5665 copier. He queried it afterwards when he saw that the invoices referred to the wrong machine. He asked Scheepers to take it up with Data Master. He only took it up for audit purposes, because otherwise the 5100 was still working. D 71, dated 10 January 2001, was the first invoice referring to the 5665. He queried it. He was happy to pay the rental. The reply to the query was that they had signed for a 5665. They were not much worried because the 5100 was still there. It looked as if the deal was still intact.

He assumed that the 5100 was removed by Data Master.

He was referred to C 33, a removal instruction from Data Master dated 10 January 2002. The annexure to it is a letter dated the same day, C 34. That letter refers to a letter of defendant dated 3 October 2001. He said that that letter would have been a notice to Data Master that defendant did not intend to keep machines of which the leases were to expire at the end of December 2001.

That concluded the evidence.

Mr Bank, who appeared for the plaintiff submitted that the annexure B 12 - 16, having been signed first by defendant, was an offer which plaintiff accepted when it signed it. He contended that in terms of the reliance theory of contract the plaintiff as offeree was entitled to assume that the document signed by the offeror reflected the true intention of the offeror. In this regard he referred to H N **D Properties** CC v **Standard Bank of South Africa Ltd 2004(2) SA 471** SCA **at 480** E - **H.**

He pointed out that mr Low was aware of the fact that the plaintiff was a legal entity separate from Data Master. He submitted that mr Low acted unreasonably in not inquiring why the written document did not accord with the alleged oral agreement.

He relied on the *caveat subscriptor* rule as formulated in Burger v Central South African Railways 1903 TS 571 at 578.

He submitted that circumstances which could release a *subscriptor* such as those that were found to exist in the case of Home Fires Transvaal CC v Van Wyk and Another 2002(2) SA 375 W were not present in this case. He also submitted that there was no question of any misrepresentation by conduct as found to be present in Kempston Hire (Pty) Ltd 1988(4) SA 465 T at 468 G - J.

He argued that the defendant could not rely on a misrepresentation by a third party if its error was not *iustus.* In this regard he referred to Standard Credit Corporation Ltd v Naicker 1987(2) SA 49 N at 51 F.

In respect of ostensible authority he submitted that it was necessary that the plaintiff should have made a misrepresentation and that the defendant should have acted reasonably in forming the wrong impression. In this regard he referred to N B S Bank Ltd v Cape Produce Company (Pty) Ltd and others 2002(1) SA 396 SCA at 401.

Mr Labuschagne, who appeared for the defendant submitted that on the evidence, bearing in mind the provisions of the joint venture agreement, it was clear that the

plaintiff was aware that its customers might be misled. Customers were not informed of Data Master's lack of authority. He submitted that defendant acted to its detriment by accepting that the written contract was in accordance with the oral agreement. He submitted that it was not unreasonable for mr Low to have assumed that B 16 was in accordance with the agreement. There was no mention of an upgrade. The total rental was in consonance with a contract embracing two machines. He also pointed out that mr Low testified that he was told that the annexure was for "Brett's big machine", which could only have been a reference to the 5100 copier.

He submitted that Data Master acted as plaintiff's agent and in that capacity represented to the defendant that the annexure reflected the oral agreement.

In the circumstances he contended that no valid agreement had been concluded.

Mr Bank applied for a withdrawal of the admission contained in paragraph 7.2 of plaintiff's replication. He also applied for an amendment of the amount claimed for arrear rentals. Both applications are granted.

No submissions were made regarding the credibility of witnesses, and rightly so. The evidence of all the witnesses can be accepted as far as it goes. The problem is of course that each side has a different perception of the facts. That is so because defendant's witnesses testified that Data Master had brought them under a different impression as to the subject matter of the agreement.

The point was made that defendant should have called the relevant representatives of Data Master. I was not pertinently asked to draw an adverse inference from defendant's failure to do so, but I assume that that was the implication of the submission. I do not think that this is a proper case to draw an inference against either party for not calling someone from Data Master. Data Master is clearly in the firing line. If it misled the defendant it may be liable to the plaintiff. Furthermore the question of the availability of the Data Master's representatives involved was never explored.

At best, or at worst, depending on which way you look at it, those witnesses, if they were available, were available for either party. Then there is the question of *onus.* The *onus* to prove a binding agreement was on the plaintiff. Only in respect of estoppel the *onus* was on the defendant.

For all these reasons I decline to make an adverse inference against the defendant for not calling witnesses like mr Gouws, mnr Vermeulen etc.

In my view the evidence of messrs Hone and Low that an agreement was concluded in terms of which the 5100 copier would be refinanced over 60 months and a standby 5665 copier would be supplied without any extra charge must be accepted. That was the need of the defendant. Not only did it want a standby machine, but it also wanted a lower rental. The package presented to it by Data Master fulfilled all its requirements. It is also obvious that the reduction of the rental was illusory in view of the extension op the period. The only explanation for the huge additional amount that would be flowing to the plaintiff was that the package must have included the 5100

machine as well. Otherwise the rental should have been the same as that of the other 5665 copier: R3 041-43 per month. Exhibit C 48 is material corroboration for defendant's version of the package. Further corroboration is to be found in the fact that after the transaction had been concluded, the 5100 copier was left in defendant's possession. If it had been the intention that only the 5665 be leased, the 5100 would have become the property of Data Master and it would no doubt have recovered it and re-sold it.

The version of the defendant of what had been represented to it must therefore be accepted.

The plaintiff's case in essence is that the defendant is precluded from that by virtue of the fact that it had signed B 12 - 16. *Caveat subscriptor.*

If the defendant was misled by the plaintiff in believing that the written contract represented the actual agreement, it would be entitled to rely on a lack of consensus owing to *iustus* error in spite of the maximum *caveat subsriptor.*

That, in my view, is the effect of cases like **Du Toit v Atkinson's Motors Bpk 1989(2) SA 893 A at 904 I - 905 B, and Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd 1986(1) SA 303 a at 317** A - **318 I.**

The whole issue was whether the party who actually made the misrepresentation, Data Master, could be considered to be the plaintiff's agent or alternatively, whether plaintiff is estopped from denying that Data Master was its agent.

In my view plaintiff must fail on both scores.

In the first place it is clear that plaintiff used Data Master to act on its behalf with the parties who would ultimately become its lessees. In this case plaintiff had no presence in Palaborwa. All the negotiations were conducted with defendant on behalf of plaintiff by Data Master.

It does not help to say that in the end a completed document, signed by defendant was submitted to plaintiff in the form of the offer. The fact is that that document was supposed to reflect an agreement concluded by plaintiff, represented by Data Master, and defendant.

Plaintiff was represented by Data Master, who had been placed in possession of plaintiff's factor sheets by means of which Data Master could, on behalf of plaintiff, quote the monthly rental that would apply over the applicable period.

Defendant had no means of formulating an offer by proposing an appropriate amount of monthly rental over a period of 60 months. It did also not know what the purchase price of the equipment was. In regard to all those issues that affected plaintiff, Data Master must have been authorized to represent the plaintiff. Data Master could have done that because it had been placed in possession of plaintiff's factor lists.

Data Master was also placed in possession of plaintiff's stationary, in particular of its standard contract forms and the annexures thereto. Data Master was empowered to fill in the contract forms and to obtain the signed contract forms from the plaintiff's

customers. In respect of all these activities the inescapable inference is that Data Master acted as the plaintiff's agent.

This inference is reinforced by the fact that plaintiff had no representatives in the field to speak of, that it gave training to the representatives of Data Master as to what they may say, and that it had protected itself by an indemnity clause in the joint venture agreement.

It is clear that Data Master had no authority to sign agreements on behalf of plaintiff. Short of that there seems to have no limit to its power to represent the plaintiff.

To the extent that I may be wrong in inferring actual authority on the part of Data Master and to the extent that Data Master may not have been authorized to make misrepresentations, the plaintiff is estopped from relying on a lack of authority. It is estopped by its own conduct which amounts to a representation: clothing Data Master with all the appearance of authority by letting it use its stationary, by letting it work out rentals and negotiate terms, by letting it fill in contractual documents and obtaining the signatures of clients. For all intents and purposes Data Master was allowed to act as an extension of the plaintiff. Then it must be borne in mind that nothing was done to disabuse customers in respect of the actual scope of Data Master's authority.

There can be no doubt that the defendant in this case relied on such a representation and acted on it to its detriment.

In my view it cannot be said that it was unreasonable for mr Low to have accepted the document as correct. As it is the mistake was only detectable in the so-called matrix of the annexure. The amount of the rental was in order. The period was right. What was absent was the reference to the 5100 copier. There was a reference to it lower down reflecting the termination of the earlier contract. In the circumstances, where the contract was presented by plaintiff's representative, actual or ostensible, on the basis that it referred to the 5100 (Brett's big machine), it was not unreasonable for mr Low to have assumed that plaintiff's representatives had done their paperwork properly.

For all these reasons I am of the view that the defendant was to resile from the contract.

Accordingly the plaintiff's action must be dismissed. It is dismissed with costs.

C BOTHA
JUDGE OF THE HIGH COURT

TECHNOLOGIES ACCEPTANCES (PTY) L TD

Vs

PALABORWA MINING COMPANY LIMITED

CASE NO.: 18036/2003

Coram: Botha, J

Counsel for Plaintiff:	Adv Bank
Instructed by:	BRINK COHEN LE ROUX AND ROODT BCLR HOUSE 19 WEST STREET SANDTON
Counsel for Defendant:	Adv Labuschagne
Instructed by:	ROY SUTNER ATTORNEYS 24 BLYTON AVENUE SAVOY ESTATE HIGHLANDS NORTH
Date of hearing:	1 AND 2 MARCH 2005

Date of Judgment: 9 MARCH 2005