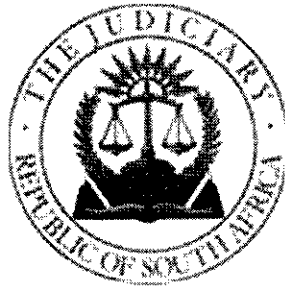


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 34754/2016

(1) REPORTABLE: no
(2) OF INTEREST TO OTHER JUDGES: no
(3) REVISED

19/5/2017

19 MAY 2017

G B ROME AJ

In the matter between: -

OSWALD JOHANNES ALBERT STORM

Applicant

and

**ABSA TECHNOLOGY
FINANCE SOLUTIONS (PTY) LIMITED**

Respondent

In re: -

**ABSA TECHNOLOGY FINANCE
SOLUTIONS (PTY) LIMITED**

Plaintiff

and

**LE BROS AUTO
ELECTRICAL SALES and Services Pty Ltd**

First Defendant

**OSWALD JOHANNES
ALBERT STORM**

Second Defendant

J U D G M E N T

ROME AJ:

- [1]. This matter concerns an application for rescission.
- [2]. The facts are fairly straightforward; the only issue that is necessary to address in this judgment in any particular detail is the second defendant's (the applicant for rescission) reliance on the provisions of the Conventional Penalties Act as being the basis of his bona fide defence. For convenience the second defendant and the applicant for rescission in this application is referred to as "the applicant"; the plaintiff, being the respondent to this application for rescission is referred to as "the respondent".
- [3]. The facts giving rise to the subject judgment are the following.
- [4]. The applicant is/was the authorised representative of the first defendant, a private company.
- [5]. On 16 September 2013 the second defendant represented by the applicant concluded a written agreement in respect of the rental from the respondent of certain vehicle tracking devices described as being a number of c-track units.
- [6]. The second defendant fell into arrears and the respondent invoked its rights under the rental agreement. The respondent (as plaintiff) then instituted summons against the first defendant and against the plaintiff jointly and severally for the following relief: confirmation of cancellation of the agreement, return of the equipment and payment of the amounts of R65 236.97 and R30 648.16
- [7]. The rental agreement made provision for the applicant to stand surety.
- [8]. Default judgment was granted by the registrar against the first defendant as principal debtor and against the applicant as surety. The exact date of the judgement is not entirely clear but it appear to have been granted on 20 June 2016.
- [9]. The applicant's ground for rescission (the requirements of which whether under Rule 31 or under the common law are well known; at the minimum such

requirements prescribe the applicant for rescission to demonstrate the existence of a bone fide defence), are said to be iustus error, duress, an agreement of some form of waiver of the rental agreement that was concluded some time after its conclusion and a reliance on the Conventional Penalties Act. In respect of the last ground the applicant contended that insofar as the claim under the rental agreement in terms of which judgment granted included a claim for future rentals it constituted a penalty which a trial court would reduce under the Act in circumstances where the applicant had not mitigated its damages.

- [10]. At the hearing of the matter I asked counsel for both parties to refer me to authorities as to whether claims for future rentals in the event of breach and cancellation amount to a penalty as provided for in the Act. Counsel very helpfully referred me Plumbago Financial Services (Pty) Ltd t/a Toshiba Rentals v Joseph t/a Project 2008 (3) SA 47 (C); in that case Bozalek J considered whether or not the Conventional Penalties Act should apply to a future rental claim such as was claimed herein, and held that it did.
- [11]. That however does not end the matter.
- [12]. A similar situation to that in the present application for recession presented itself in the case of Phedisa Civil Enterprises (Pty) Ltd and Another v Beaux Lane (SA) Properties (Pty) Limited (17086/2014) [2015] ZAGPPHC 377 (22 May 2015)
- [13]. In that case, as in the present matter one of the defences pertained to the Act. The relevant portion of the judgment¹ (of Dodson AJ) is apposite and is cited below-

"applicant says the following in the founding affidavit:

'The amount so claimed and granted by the registrar was for pre estimated liquidated damages. I submit that there should be a significant reduction in this pre-estimated damages in that the term in the lease agreement amounts to a penalty, in the sense that the plaintiff intended it to operate 'in terrorem'.

¹ At paras 21 and 22 thereof

The penalty is grossly disproportionate to any prejudice which may have been suffered by the plaintiff and I should be given an opportunity to prove the extent to which the penalty should be reduced.

In terms of the Conventional Penalties Act, 15 of 1962, section 3, I should be given an opportunity to defend the claim and plead for a reduction of the penalty.'

The allegations in this regard are bald and sketchy. No facts are put up to support the basis upon which the applicants intend to make their claim for a reduction. There is no suggestion that the respondent has been able to or is likely to be able to find a replacement tenant who might be in a position to mitigate the damages."

- [14]. The allegations herein are equally sketchy and bald. At the very least if the Act were to form the basis of an application for rescission of judgment, it would (in order to demonstrate the existence of a bona fide defence) be required of the applicant to make out a basis for his claim for a reduction. As in the Phedisa Civil Enterprises case the applicant has failed to do so.

- [15]. The reliance on the Act, in this matter accordingly does not provide any succour to the applicant in his attempt to unearth a *bona fide* defence.

- [16]. Similarly the remaining grounds likewise do not disclose the existence of a bona fide defence. The applicant's contention that he signed the suretyship under the reasonable but mistaken belief that all he was signing at the time was the rental agreement on behalf of the first respondent, is belied by the contents of the relevant document; this document is clearly and boldly marked "surety" and clearly and expressly makes provision for the applicant to be surety for the debts of the first defendant. The applicant alleges that he was subject to some form of duress. However none of the requirements necessary to mount a successful defence of this nature were alleged in the affidavit for rescission. As to the waiver agreement, this alleged agreement is pleaded in the most ephemeral and vague manner and in any event it flies in the face of the non-variation clause contained in the rental agreement.

- [17]. In the result the applicant has failed to make out a case for rescission. I make the following order:

1. The application is dismissed with costs.



G B ROME
ACTING JUDGE OF THE HIGH COURT