



NORTH WEST HIGH COURT, MAFIKENG

CASE NO.: 303/2009

In the matter between:-

ABSA TECHNOLOGY FINANCE SOLUTIONS (PTY) LTD Plaintiff

and

LAM-MED HEALTH CC 1st Defendant

LAMEESE LAKHI 2nd Defendant

JUDGMENT

GURA J

Introduction

[1] The plaintiff sued the defendants (jointly and severally, the one paying the other to be absolved) for:

- 1.1 Payment of R123 762-89;
- 1.2 Interest on the said amount at the prime interest rate plus 6% per annum;
- 1.3 Confirmation of cancellation of the agreement;
- 1.4 The return of the following:
 - 1.4.1 One Brother MFC 8460 copier with serial No. F7J453316; and

1.4.2 One HP 530 Laptop with serial No. CMD 737124.

Factual Background

- [2] The case for the plaintiff is that on 2 August 2004 at Sandton, Square One Capital (Pty) Ltd and the plaintiff entered into a written Main Cession Agreement. On 04 December 2007, Square One Capital ceded the agreement between it (Square One Capital) and both defendants to the plaintiff.
- [3] *Ex facie* the document entitled “Master Rental Agreement”, on 29 November 2007 at Mafikeng, Square One Capital and the first defendant entered into a written Master Rental Agreement (the Agreement) in terms of which the plaintiff rented to the first defendant the following:

Quantity	Description of Goods	Serial No.
1	Brother MFC 8460 copier	F7J453316
1	HP 530 Laptop	CMD 737124Q

The rental period would be 60 months and the monthly rental would escalate at a rate of 15% per annum. The first defendant would pay an initial monthly rental of R1480-86 and thereafter 59 monthly rental payments of R1480-86 (subject to the escalation).

- [4] The evidence which was tendered on behalf of the plaintiff is to the effect that the defendants failed to pay their monthly instalment in that they failed to keep sufficient funds in the bank account. The first debit order went through successfully but the second one did not due to lack of funds in Lakhi’s bank account.
- [5] It is common cause that the Agreement was signed by the second defendant

(Lakhi) in five spaces on the same page. *Ex facie* the document, by so signing, she authorised the debit order from the first defendant's bank account in favour of the plaintiff; she signed as surety for the first defendant, she also signed the schedule, the acceptance certificate and the resolution. She then initialled the "Terms and Conditions" of the agreement overleaf the document.

- [6] In terms of par. 5.1 of the terms and conditions (of the Agreement) signature by the user on the acceptance certificate, shall be deemed to be an acknowledgment that the user has inspected and approved the goods and that same are in every way satisfactory to the user. Par. 5.4 provides:

"5.4 User shall have no claim against the Hirer nor shall User be entitled to cancel this agreement if after having signed the schedule and acceptance certificate it subsequently transpires that the goods or any part thereof are for any reason unacceptable to User."

- [7] The acceptance certificate also, which Lakhi signed, provides:

"User hereby irrevocably declares to the Hirer that the goods described in the schedule above have:

- a) Been delivered and installed in accordance with all the conditions of the Agreement.
- b) Where applicable been subjected to all field operating and/or similar tests which have now been completed and the results are satisfactory.
- c) Been inspected, are in good order and condition, free from defect and ready for use in every respect.
- d) That no representations, undertaking or warranties not specifically contained herein are binding on the Hirer. User acknowledges that User was referred to the Hirer by the supplier of the goods and that the Hirer has purchased the goods from the supplier at the User's special instance and request. Accordingly User hereby indemnifies Hirer against

any claim that may be made against Hirer or for any loss that the Hirer may sustain arising out of or in relation to the purchase by Hirer of the goods from the supplier of the ownership thereof.

- e) User confirms that the serial number/s of the goods correspond with the serial number/s or the schedule.”

[8] Lakhi testified on behalf of both defendants as follows: She is the only member of the first defendant. In November 2007 a sales representative from Digi-Tech, Rustenburg came into her office in Mafikeng. He offered to sell to her a laptop, a photo copier and computers. She told him that she was interested in a big copier and a Pavillion HP Laptop which has a camera. He did not have the equipment at that stage but he showed her photos of what he offered. She wanted a big copier because she trained about ten people in one week and she had branches in Bloemfontein and Upington.

[9] The sales representative then asked for her bank statement, proof of residence and a copy of the identity document so that he could assess whether or not she would qualify for the contract. She gave him a copy of her identity document and the subsequent day she faxed her bank statement to him.

[10] A few days later, the sales representative delivered the copier and the laptop. He was in a hurry and he asked her to have a look at the equipment. The laptop was not a Pavillion neither did it have a camera. She was therefore not happy with it. The advantage of using a Pavillion laptop was that it had a bigger hardware and it could produce more work than the one which was delivered. Through the laptop which is fitted with a camera it was possible for her to communicate with her managers at her branches.

[11] Although she was not happy with the copier but she decided to keep it. The sales representative took the laptop with him and promised to bring the

Pavillion one. He told her that the copier which he had delivered, could fulfil the same needs as the one which Lakhi needed.

- [12] He gave her a blank Master Rental Agreement document and asked her to sign it as proof that she had received the copier. He promised to give her the original copy of the agreement upon delivery of the laptop. He said that it was standard procedure that she had to sign the document. The rental price of the laptop was not discussed. He promised to bring the laptop in two to three days time. He informed her that the monthly rental would be any amount from R200-00 to R800-00.
- [13] He did not deliver the laptop within two to three days as he had undertaken. She telephoned him and also telephoned Digi-Tech several times. On each occasion she was told that he had gone out. She then told them that if they did not deliver her laptop, they would have to come and fetch their copier from her (Lakhi). After several months, first respondent's landlord showed her a letter which was directed to her (landlord) by Square One Capital. The author of the letter informed the landlord that on first respondent's business premises, there was one Brother MFC 8460 copier co-printer which belonged to it (Square One Capital). The latter needed a written confirmation from the landlord that indeed the copier was there. The letter is dated 5 August 2008.
- [14] The landlord did not sign in the appropriate place on this letter to confirm that the equipment was there but instead Lakhi made the following endorsement, for Square One Capital, at the foot of the page.

"I Lameese confirm the copier is in my office but still waiting for the laptop. Please could u send me an account as well as the contract, that I don't have and when will I get my laptop because nothing yet are you not giving to me".

She faxed the letter to the fax number which was reflected thereon. The purpose of making that endorsement by Lakhi was to convey to ABSA that she neither had the copier nor the account from them. They confirmed that they received this message from Lakhi.

- [15] Lakhi then later called ABSA and asked them for a contract. Instead, the former informed her that she owed them R120 000-00.
- [16] The copier is still with Lakhi, she used it for few months after delivery then she asked Digi-Tech to come and collect it.
- [17] The monthly rental for the laptop and copier was supposed to be R800-00. The rental for the copier alone was supposed to be R286-00. However, a debit of about R1400-00 or R1600-00 went through Lakhi's bank account. When she noticed that on her cellphone she went to the bank and made inquiries about this payment. The payee was Digi-Tech. She then asked the bank to stop any further payments in this regard. At that stage only one debit had gone through.
- [18] She then called Digi-Tech and told them that they never agreed over the amount which had been debited. However, she was informed that included in that debited amount was the rental for the laptop. She then told them that she had never received the laptop.
- [19] The witness who allegedly signed as Lakhi's witness in the Agreement is unknown to her (Lakhi) and she did not sign in her presence. This signature is not even that of one of Lakhi's employees. Upon receipt of the letter which was addressed to her landlord, she called the author thereof and she was informed that it was from ABSA.

The Issues

[20] The following issues call for decision:

20.1 Is there a valid rental agreement between the parties?

20.2 The applicability of the National Credit Act, No.34 of 2005 to the rental agreement.

Submissions

[21] Mr Van Rooyen, for the plaintiff, submitted that what the defendants seek to accomplish is to import extrinsic evidence into the reading of the agreement so as to contradict the written agreement. Such evidence is inadmissible. Mr Scholtz, for the defendants, on the other hand submitted: A material misrepresentation was created to Lakhi. As a result, the plaintiff cannot successfully rely on the *caveat subscriptor doctrine*. In any event, the parties did not reach a consensus *ad idem* and accordingly no enforceable agreement saw the day.

The Caveat Subscriptor Principle

[22] In **Union Government v Vianini Ferro-Concrete Pipes (Pty) Ltd**¹ the court held that:

“When a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the document be contradicted, altered to or varied by parol evidence”.

The appellant in **Hartley’s case**² had entered into a contract with the respondent

¹ 1941 AD 43 at 47

² Hartley v Pyramid Freight (Pty) Ltd t/a Sun Couriers 2007 (2) SA 599 (SCA)

to convey traveller's cheques from South Africa to the Jersey Islands. The respondent lost the cheques and the appellant sued for their value. The respondent raised a defence that its liability for the loss had been excluded by the agreement. It appeared that at the time of the conclusion of the contract, the appellant had mistakenly believed that the respondent would compensate him for the loss and although he knew that the agreement contained standard terms and conditions, he allowed his wife to sign the agreement on his behalf without himself reading the document. The finding of the court, which was confirmed on appeal was that the appellant's unilateral mistake had not been reasonable.

- [23] The facts in **Langeveld**³ are almost similar to the present matter. The appellant, an established businesswoman of good experience in business, signed an agreement as surety. She claimed that she had signed it in a hurry without reading it, that no one had told her that she was signing as surety and she would not have signed had she been aware of that fact.
- [24] In rejecting the appellant's defence, Willis J, reasoned as follows:⁴

"[11] The probabilities favour the plaintiff's version that, at the time when the defendant signed the document, all relevant details, including the formalities, had been filled in already. How else does one explain the detail of the overleaf being initialled and the detail of the defendant's personal particulars relating not only to her full names but also her address and identity number (over which her signature was inscribed)?

[12] The appellant is no 'babe-in-the-wood', never mind an illiterate. She is an accomplished businesswoman of many years' standing. There is a strong *praesumptio hominis* (popular presumption or presumption common among persons) that anyone who has signed a document had the *animus* (intention) to enter into the transaction contained in it, and she is burdened with the *onus* of convincing the Court that she in fact had not entered into the transaction by virtue of the maxim *caveat subscriptor* (a person who signs must be careful).

³ Langeveld v Union Finance Holdings (Pty) Ltd 2007 (4) SA 572 (WLD)

⁴ At 575/6

As A J Kerr says: ‘It is a sound principle of law that a man, when he signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear over his signature’.”

[25] In the present matter the defendants deny that at the time of signing the Agreement, “all relevant details” had been filled already. Apart from that, there is an averment of a misrepresentation on the part of the agent of Square One Capital. In brief, the defendants’ case is that when Lakhi appended her signature on the Agreement, nothing had been filled with a pen but all that was there on the form was printed information.

[26] Let me deal with the defence of misrepresentation first. In this regard, *Christie*⁵ expressed the following view:

“In **National and Grindlays Bank Ltd v Yelverton** 1972 (4) SA 114 (R) Davies J applied the *caveat subscriptor* principle to a contract signed in blank, that is, a printed form containing blank spaces allegedly not filled in before signature, holding that the signatory could escape liability only by raising one of the defences that would have been available if the blank spaces had been filled in – the normal defences available to any signatory. What are these defences? Misrepresentation, fraud, illegality, duress, undue influence and mistake (*iustus error*) are universally recognised, . . .”

[27] All defences in litigation must be pleaded so that the other party (the opponent) may be in a position to know the nature of the case he/she/it is going to meet. The defendants did not plead the defence of misrepresentation or any of the recognised defences.⁶ The defendants had at least three opportunities to disclose that one of their defences was misrepresentation. Firstly, it was at plea stage, secondly, during the pre-trial conference and thirdly, when they resisted an application for summary judgment.

⁵ *Christie: The Law of Contract in South Africa, 2nd Ed. Page 204*

⁶ *Feinstein v Niggli* 1981 (2) SA 684 (A); *Aldeia v Coutinho* 1997 (4) SA 295 (O)

- [28] This defence (of misrepresentation) should in my view, fail on at least two grounds; it was not pleaded and was introduced as a trump card only during Lakhi's evidence, and, it strikes the court to be nothing more than an afterthought.
- [29] The second defence is that material parts (terms) of the Agreement were not completed at signature thereof. Lakhi is not a *novus* to business, she is an experienced business person who has branches in Mafikeng, Bloemfontein and Upington. She should have entered into contracts before. She signed the face of the Agreement several times. She further signed the terms and conditions overleaf. She did so with her eyes wide open. In my view, she is, so to speak, in the same position as that lady in Langeveld's case. Her explanation that she would have signed this document blindly is unthinkable, to say the least.
- [30] When one looks at the Agreement it is clear that different types of pens – in terms of colour, were used to complete the particulars and the signatures of the parties. Mr Scholtz submitted that this is yet another confirmation that the document was not completed when Lakhi signed it. My view is that the use of different pens in completing the Agreement does not, in itself, justify an adverse inference against the plaintiff. There could be many reasons why pens of different colours were used; for example it could be that the sales representative used his pen whilst Lakhi used her own pen or that a witness to the transaction used his/her own pen also. We do not have the evidence of the plaintiff in this regard. At any rate, such evidence (from the plaintiff) was not necessary.
- [31] Her behaviour after she "stopped the debit order" is not consistent with that of a business person who was prepared, at least, to pay for rental for the equipment which, according to her, she was using. She therefore reaped the benefits of using that copier without paying rental or anything. She wrote no letter of

complaint to ABSA. Only in August 2008 (some seven months later) did she inadvertently write a note to her supposed creditor. Had it not been for ABSA to send an inquiry to her (Lakhi's) landlord about the equipment, no one knows when she would address her complaint in writing to ABSA. This is not the behaviour of a prudent business person. In my view therefore, the defendants have failed to convince the court that by signing the agreement, Lakhi did not have the intention to enter into the agreement.

The National Credit Act

[32] The final issue is whether the NCA applies to the rental agreement. In their written heads of argument, the defendants have conceded, correctly in my view, that the NCA is not applicable in this matter. That question was laid to rest in two fairly recent decisions.⁷

[33] In the result, the following order is made:

Judgment against the defendants, jointly and severally, the one paying the other to be absolved, as follows:

- a) Payment of the sum of R123, 762.89;
- b) Interest on the aforesaid amount at the rate of prime plus 6% per annum from date of Summons to date of final payment;
- c) Confirmation of cancellation of the agreement;
- d) The defendant be ordered to forthwith return the following goods (i) 1

⁷ ABSA Technology Finance Solutions (Pty) Ltd v Viljoen, JS t/a Wenderhoek Enterprises (Unreported judgment of 2 March 2010) NGHC, Case No. 2008/28978; ABSA Technology Finance Solutions (Pty) Limited v Pabi's Guest House CC and Others 2011 (6) SA 606 (FSHC)

Brother MFC 8460 Copier with Serial number F7J453316 and (ii) 1 HP 530 Laptop with serial number CMD737124Q failing which, the Sheriff or his deputy is authorised to attach, seize and hand over to the plaintiff the goods aforesaid;

e) Costs of suit on the attorney and client scale.

SAMKELO GURA
JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING:
DATE OF JUDGMENT:

08 FEBRUARY 2012
18 MAY 2012

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