

THE REPUBLIC OF SOUTH AFRICA



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

- | | |
|-----|--|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: |

Date: **30th November 2021** Signature:

CASE NO: 1422/2021

DATE: 30th NOVEMBER 2021

In the matter between:

SASFIN BANK LIMITED

Plaintiff

and

WALD EXPLORATION DRILLING (PTY) LIMITED

First Defendant

WALDECK, HENDRIK JACOBUS

Second Defendant

Coram: Adams JJ

Heard: 23 November 2021 – The ‘virtual hearing’ of the application was conducted as a videoconference on *Microsoft Teams*.

Delivered: 30 November 2021 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 16:00 on 30 November 2021.

Summary: Application for summary judgment – defences raised are bad in law – requirements for summary judgment and for defence based on denial of

certain facts alleged by plaintiff – the statement of material facts in affidavit resisting summary judgment required to be sufficiently full to constitute a defence to plaintiff's claim – summary judgment granted in part.

ORDER

Summary judgment is granted in favour of the plaintiff against the first and second defendants, jointly and severally, the one paying the other to be absolved: -

- (1) The return by the first defendant to the plaintiff of the following goods:
 - (a). 2 X UN-NVR301-16 CHANNEL NVR-UNV.H.265 NVR 16CH A SATA with serial numbers: 210235X05V318C000022 and 210235X05V318C000020;
 - (b). 2 X Hisense 32" LED TV;
 - (c). 2 X Segate 2 TRB Sky Hawk Drives;
 - (d). 3 X Tenda 8 Port Poe Switch;
 - (e). 2 X Universal Flat Panel TV Brackets;
 - (f). 2 X Tenda 5 Port Poe Switch;
 - (g). 2 X UNV-H.265 2 MP Fixed Vandal Resistant Dome Camera with serial numbers: 210235JF18C000651C2K and 210235C2KIF18C000585.
 - (h). 7 X UNV-H.265 2 MP Starlight Bullet Cameras with serial numbers: 210235C2IV318B000075; 210235C2IV318B000023; 210235C2IV318B000018; 210235C2JV318B000022; 210235c2iv318b000076; 210235c2iv318b000024 and 210235c2iv3181b000083;
 - (i). 4 X Ubiquiti Unifi 802.11AC Outdoor Access Point Mesh Cameras with Serial Numbers: 18E82956A99E; 18E829568AA0; 18E82956A83A; 18E829568CD4 and 788A208363AF;
 - (j). 11 X UNV.H265 - 2MP Starlight Mini Bullet Cameras with serial numbers: 210235C2JUF187000312; 210235C2JUF18T000315,

210235C2JUF187000345; 210235C2JUF187000632;
210235C2JUF187000487; 210235C2JUF187000318;
210235C2JUF187800610; 210235C2JUF187000476;
210235C2JUF187000493; 210235C2JUF187000351; and
210235C2JUF187000310.

- (2) The costs of the application for summary judgment.
- (3) The defendants are granted leave to further defend the plaintiff's claim for damages arising from their breach of the agreement.

JUDGMENT

Adams J:

[1] On or about 30 April 2019 a written 'Agreement of Hire' was entered into between Sunlyn (Pty) Limited ('Sunlyn') and the first defendant, Wald Exploration Drilling (Pty) Limited ('Wald Exploration'), in terms of which Sunlyn agreed to hire to Wald Exploration sixteen closed circuit TV security cameras and related and ancillary equipment, listed in a schedule. The agreement of hire was constituted by a written 'Master Agreement of Hire' and a written 'Schedule to Master Agreement of Hire'. Both of these written contracts were signed, on behalf of Wald Exploration, at Witbank on 18 April 2019 by the second defendant ('Waldeck'), and on 30 April 2019 at Waverley, Johannesburg, by two duly authorised representatives of Sunlyn. Also on 18 April 2019, Waldeck in writing bound himself as co-principal debtor and guarantor to Sunlyn for 'the proper and punctual payment' by Wald Exploration of the amounts due to Sunlyn in terms of and pursuant to the Agreement of Hire.

[2] The Agreement of Hire was ceded by Sunlyn to the plaintiff ('Sasfin'), which was the financier of the said agreement. Sasfin applies for summary judgment against Wald Exploration, who is alleged to have breached the hire agreement in that it failed to pay certain monthly hiring charges when it fell due.

Against Waldeck, Sasfin also applies for summary judgment on the basis of the written guarantee signed by him as aforesaid in favour of Sasfin.

[3] Sasfin pleaded that the Agreement to Hire was to endure for a period of thirty-six months from 1 May 2019 to 30 April 2022 and the monthly rental agreed upon was R2 712.85 per month. As and at 23 November 2020, the amount overdue in respect of hiring charges was the sum of R40 833.95. The agreement annexed to the particulars of claim indicates, however, that the period of the agreement was sixty months.

[4] In the main action and in the application for summary judgment, Sasfin claims, as expressly provided for in the written Agreement to Hire, the return of the cameras and the other hired equipment, as well as an amount of R152 053.83 and interest thereon. The sum of R152 053.83 represents the total of the balance of the monthly hiring charges, which would have been earned by Sasfin in terms of and pursuant to the said agreement.

[5] Wald Exploration and Waldeck oppose the application for summary judgment on the basis of a point *in limine*, relating to this Court's lack of jurisdiction to adjudicate this matter, and on other grounds directed at the merits of the claim. Importantly, the defendants deny that Wald Exploration concluded the hire agreement with Sunlyn and/or Sasfin and they allege that the said agreement was in fact entered into between Wald Exploration and an entity by the name of Formulated IT Group, represented at the time by a Mr Anthony Kinnear ('Kinnear') and his assistant, a Ms De Sousa. I will return to this ground of opposition later on in the judgment. Suffice at this stage to say that the denial by Waldeck that Wald Exploration concluded any agreements with either Sunlyn or Sasfin flies in the face of the written documents, which clearly indicate that the Agreement of Hire, constituted by the master agreement and the schedule thereto, was concluded between and signed by and on behalf of Wald Exploration and Sunlyn. There can be no doubt about the fact that the agreement was between Sunlyn and Wald Exploration.

[6] Wald Exploration also claims that defective goods were delivered to it pursuant to the agreement, which entitled them to cancel the agreement and

tender return of the goods, which, so the defendants aver, they did. As for Waldeck and his liability under the guarantee, he alleges that he was completely unaware of the fact that he was signing a guarantee and therefore, so it was submitted on his behalf, he should not be held liable on the basis of the guarantee.

[7] I will firstly deal with the claim by Waldeck and Wald Exploration that, on or about 16 January 2020, they lawfully cancelled any agreements which may or may not have been in existence for the hiring of the equipment. They did that, so it is alleged, because in terms of the agreement with Kinnear he agreed that the equipment would be in proper working order. This was not the case, so Waldeck avers, because shortly after installation, six of the cameras installed at their premises were not working and remained non-functional despite numerous requests by them to Kinnear to remedy the situation by repairing and fixing the defective equipment. For this reason, so the defendants contend, they cancelled the agreement, as they were entitled to do, and tendered return of the all of the equipment. As already indicated, the cancellation happened as early as 16 January 2020.

[8] As correctly contended by Mr Botha, Counsel for Sasfin, the hire agreement expressly provided that Sunlyn and Sasfin are merely the financiers of the equipment and that they are not the suppliers thereof. Moreover, any dispute regarding the equipment would not entitle Waldo Exploration to withhold payment of any amounts due to Sasfin in terms of the agreement. Furthermore, the agreement (clause 17 of the Terms of Business) expressly recorded that the defendants acknowledged and agreed that they had selected and inspected the goods prior to signing the agreement and that they were satisfied with the goods.

[9] For all these reasons, so Sasfin contended, there is no merit in the defence that the defendants were entitled to lawfully cancel the hire agreement. I find myself in agreement with these submissions. Given the clear and unequivocal express terms of the agreement, Sasfin cannot possibly be held liable for any complaint in relation to the equipment and the quality thereof. On

a proper construction and interpretation of the agreement, liability for defects in the goods remained with the supplier thereof and not with Sasfin.

[10] As regards the jurisdiction point, the case of the defendants is simply that this Court does not have jurisdiction to adjudicate this dispute, because, so they submit, the whole cause of action did not arise within the geographical area of jurisdiction of this Court. In my view, this is factually correct. It has to be accepted that Waldo Exploration and Waldeck do not reside within the geographical area of jurisdiction of this court. They both 'reside' in Witbank, which means that the Mpumalanga High Court has jurisdiction over their persons. The cameras and the equipment were supplied and delivered to the defendants in Witbank. Performance of and pursuant to the agreement therefore clearly occurred outside of the jurisdiction of this Court. This then means, as already indicated, that the whole cause of action did not arise within the geographical area of jurisdiction of this Court.

[11] The agreement was however concluded in Waverley, which is the place at which the offer made by Wald Exploration to Sunlyn, was signed and accepted by Sunlyn. The first page of the agreement plainly reflects that it was signed on Sunlyn's behalf at Waverly on 30 April 2019. It is trite that the place where a contract is concluded is where the offer is received and from where acceptance is dispatched. In that regard see: *Cape Explosive Works Ltd v SA Oil and Fat Industries Ltd*¹; *Kergeulen Sealing & Whaling Co Ltd v CIR*².

[12] This fact, so Sasfin contends, bestows on this Court the requisite jurisdiction. The conclusion of the agreement at Johannesburg is a cause of action arising within its jurisdiction as contemplated by section 21(1) of the Superior Courts Act, Act 10 of 2013. For his submission in that regard, Mr Botha also relied on the decisions in *Cape Explosive Works* and *Kergeulen Sealing & Whaling*. I agree. This principle was firmly established in these old cases. Therefore, if a contract was concluded between parties within the area of jurisdiction of this Court, it would have jurisdiction to adjudicate any dispute

¹ *Cape Explosive Works Ltd v SA Oil and Fat Industries Ltd* 1921 CPD 244 at 266.

² *Kergeulen Sealing & Whaling Co Ltd v CIR* 1939 AD 487 at 503-5.

between the parties arising from that contract. Accordingly, the special plea of lack of jurisdiction stands to be dismissed.

[13] That brings me back to the point raised by the defendants that no agreement was concluded with Sunlyn or Sasfin. As already indicated, this ground of objection is squarely contradicted by the documentary evidence and should be rejected on that basis alone.

[14] Furthermore, the defendants' bald and evasive manner of denying the conclusion of the agreement is contradicted by several other aspects, which carry with it the implied admission of a conclusion of the agreement. Moreover, as argued by Mr Botha, the allegation that Waldeck dealt with Kinneer and his assistant only, both of whom are referred to in the agreement, is corroboration for the fact that the agreement was entered into between Sunlyn and Wald Exploration, as evidenced by the agreements themselves. That then, in my view, spells the end of the bald denial by the defendants of the existence of the agreement.

[15] As regards Waldeck's contention that he is not liable under the guarantee because its import had not been explained to him, Sasfin submits that there is no merit in this defence. I agree. It is trite that a unilateral mistake is not material (and therefore does not exclude consensus between the parties). It is required, in addition, that the mistake must be *justus error*. An error is *iustus* when it is reasonable or excusable in all the circumstances of the case – that is when a reasonable person would have been misled.

[16] The decisive question in a case such as the present was laid down in *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis*³ as follows:

' . . . [D]id the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention? . . . To answer this question, a three-fold enquiry is usually necessary, namely, firstly, was there a misrepresentation as to one party's intention; secondly, who made that representation; and thirdly, was the last

³ *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (A) at 119.

party misled thereby? . . . The last question postulates two possibilities: Was he actually misled and would a reasonable man have been misled? *Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd* 1983 (1) SA 978 (A) at 984D - H, 985G - H.'

[17] Applying these principles *in casu*, I am not persuaded that Waldeck made out a case on the basis of *iustus error*. In my view, there is nothing inconspicuous about the guarantee, which is a separate and distinct document from the other agreements. There is no evidence before me or an assertion that pressure was exerted upon the Waldeck to sign. There is also no evidence to suggest that he was required to sign the document in haste and under duress. He probably had ample opportunity to study the concise document and could not have overlooked the guarantee clause.

[18] Whether Sunlyn or Sasfin brought the guarantee to the attention of Waldeck or not is of no consequence regard being had to the fact that he signed it. In my view, the duty to inform him did not arise. In *Slip Knot Investments 777 (Pty) Ltd v Du Toit*⁴ it was held:

'A contracting party is generally not bound to inform the other party of the terms of the proposed agreement. He must do so, however, where there are terms that could not reasonably have been expected in the contract. The court below came to the conclusion that the suretyship was "hidden" in the bundle, and held that the respondent was in the circumstances entitled to assume that he was not personally implicated. I can find nothing objectionable in the set of documents sent to the respondent. Even a cursory glance at them would have alerted the respondent that he was signing a deed of suretyship . . . Slip Knot was entitled to rely on the respondent's signature as a surety just as it was entitled to rely on his signature as a trustee. The respondent relied entirely on what was conveyed to him by his nephew through Altro Potgieter. Slip Knot made no misrepresentation to him, and there is no suggestion on the respondent's papers that Slip Knot knew or ought, as a reasonable person, to have known of his mistake.'

[19] In my view, the Waldeck has not demonstrated that Sasfin or Sunlyn knew or ought to have reasonably known of his mistake, if there was one. Sasfin was entitled to rely on the Waldeck's signature as guarantor as it did on

⁴ *Slip Knot Investments 777 (Pty) Ltd v Du Toit* [2011] ZASCA 34; 2011 (4) SA 72 (SCA) para 12.

his signature as the representatives of the Wald Exploration. He signed the guarantee as a manifestation of his assent to it. He is therefore bound as such. His *iustus error* defence is not sustainable.

[20] I reiterate that the form of the guarantee dispels any notion that a reasonable person signing it could have been misled as to the nature of the document he was signing. It was headed in capital letters: 'GUARANTEE'. Significantly, Waldeck's full names, surname, address and identity number were inserted on the guarantee in manuscript, and he affixed his signature on the document.

[21] The defendants have also raised other grounds of opposition to the claim by Sasfin relating to *locus standi* and the fact that the deponent allegedly did not have the requisite knowledge to depose to the affidavit in support of summary judgment. There is no merit in any of the further defences raised by the defendants.

[47] It is clear that the defendants' affidavit opposing summary judgment does not disclose a *bona fide* defence. The defences raised by the defendants in the said affidavit are bad in law and without merit.

[48] There is however a difficulty relating to the amount claimed as liquidated damages as a result of the defendants' breach of the agreement. And that relates to the manner in which Sasfin has pleaded its case. In particular, the allegation is made in the particulars of plaintiff's claim that the agreement was to endure for a period of thirty-six months. If one accepts this and the monthly hiring charges of R2 712.85, then Sasfin could not possibly have suffered a loss of about R150 000. In any event, I do not believe that Sasfin has made out a case, for purposes of the application for summary, for the damages as prayed for in the summons. Not enough evidence was placed before the Court to enable it properly quantify the damages claim.

[49] Summary judgment should therefore be granted in favour of Sasfin against Wald Exploration and Waldeck in respect of the return of the goods. The defendants should however be granted leave to further defend the application for an award of damages for breach of contract.

Costs

[50] The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so. See: *Myers v Abramson*⁵.

[51] I can think of no reason why I should deviate from this general rule. The defendants should therefore pay Sasfin's costs of the application for summary judgment.

Order

[52] In the result, summary judgment is granted in favour of the plaintiff against the first and second defendants, jointly and severally, the one paying the other to be absolved, for: -

- (1) The return by the first defendant to the plaintiff of the following goods:
 - (a). 2 X UN-NVR301-16 CHANNEL NVR-UNV.H.265 NVR 16CH A SATA with serial numbers: 210235X05V318C000022 and 210235X05V318C000020;
 - (b). 2 X Hisense 32" LED TV;
 - (c). 2 X Segate 2 TRB Sky Hawk Drives;
 - (d). 3 X Tenda 8 Port Poe Switch;
 - (e). 2 X Universal Flat Panel TV Brackets;
 - (f). 2 X Tenda 5 Port Poe Switch;
 - (g). 2 X UNV-H.265 2 MP Fixed Vandal Resistant Dome Camera with serial numbers: 210235JF18C000651C2K and 210235C2KIF18C000585.
 - (h). 7 X UNV-H.265 2 MP Starlight Bullet Cameras with serial numbers: 210235C2IV318B000075; 210235C2IV318B000023; 210235C2IV318B000018; 210235C2JV318B000022; 210235c2iv318b000076; 210235c2iv318b000024 and 210235c2iv3181b000083;

⁵ *Myers v Abramson*, 1951(3) SA 438 (C) at 455

- (i). 4 X Ubiquiti Unifi 802.11AC Outdoor Access Point Mesh Cameras with Serial Numbers: 18E82956A99E; 18E829568AA0; 18E82956A83A; 18E829568CD4 and 788A208363AF;
- (j). 11 X UNV.H265 - 2MP Starlight Mini Bullet Cameras with serial numbers: 210235C2JUF187000312; 210235C2JUF18T000315, 210235C2JUF187000345; 210235C2JUF187000632; 210235C2JUF187000487; 210235C2JUF187000318; 210235C2JUF187800610; 210235C2JUF187000476; 210235C2JUF187000493; 210235C2JUF187000351; and 210235C2JUF187000310.
- (2) The costs of the application for summary judgment.
- (3) The first and second defendants are granted leave to further defend the plaintiff's claim for damages arising from their breach the agreement.

L R ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	23 rd November 2021 – in a ‘virtual hearing’ during a videoconference on <i>Microsoft Teams</i> .
JUDGMENT DATE:	30 th November 2021 – judgment handed down electronically
FOR THE APPLICANT:	Advocate J G Botha
INSTRUCTED BY:	Oosthuizen Du Toit Berg & Boon Attorneys, Sandton
FOR THE FIRST AND SECOND DEFENDANTS:	Advocate Madelize Coetzee
INSTRUCTED BY:	Neuhoff Khoza Attorneys, Witbank