**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

Reportable

Case no**: 212/2012**

In the matter between:

**ABSA TECHNOLOGY FINANCE SOLUTIONS**

**(PTY) LIMITED** **Appellant**

and

**MICHAEL'S BID A HOUSE CC** **First Respondent**

**MICHAEL CHARLES ROSE** **Second Respondent**

**Neutral citation:** **Absa Technology v Michael's Bid a House** (212/2012) [2013] ZASCA 10 (26 February 2013)

**Coram:** Lewis, Theron and Petse JJA and Plasket and Swain AJJA

**Heard:** **26 February 2013**

**Delivered:** **15 March 2013**

**Summary:** Parol evidence is not admissible to alter the terms of a written agreement in the absence of a plea of rectification, fraud or simulation. A lease that does not provide for the passing of ownership at the end of its term is not one that falls under the definition of s 8(4) of the National Credit Act 34 of 2005.

## ORDER

On appeal from South Gauteng High Court, Johannesburg (Beasley AJ sitting as court of first instance).

1 The appeal is upheld. The order of the high court is set aside and is substituted with the following order:

'Judgment is granted against the first and second defendants, jointly and severally, the one paying the other to be absolved, for payment in the amount of R111 533.98 together with interest a tempore morae at the rate of six per cent above the prime rate prevailing from time to time until date of payment.'

## JUDGMENT

LEWIS JA ( THERON and PETSE JJA AND PLASKET and SWAIN JJA concurring)

[1] The question to be decided in this matter is whether a lease of movable property was governed by the provisions of the National Credit Act 34 of 2005. The high court held that the agreement in question was a lease because the representative of the lessee believed that ownership of the machine hired would somehow pass to the lessee on termination of the lease, and that the provisions of the Act regulating notice to the defaulting lessee were thus operative. In effect, it held that the particular lease was not a lease. This may sound like a fragment of Alice in Wonderland. If that is so, it is because the Act itself could have been written by Lewis Carroll so peculiar are some of its provisions.

[2] These are, in summary, the facts giving rise to the litigation. The second respondent, Michael Rose, was an estate agent who conducted business through the first respondent, Michael's Bid a House CC (the CC). He wished to acquire a sophisticated colour printing machine for the CC and also to print pamphlets and other material for other estate agents in the area in which the business operated – Randfontein, Gauteng. He discussed his requirements with a Mr Vosloo of Westrand Office Equipment (Westrand), who suggested two ways of financing the transaction since the CC could not afford to purchase the machine required. Rose chose the second option: he would pay a monthly amount of some R2 878

which would, in the words of Vosloo, ‘finance this machine with full maintenance and service and toner supplied for the full 36 month contract’. Vosloo added, in the written quotation, that Westrand could arrange ‘finance’ through Sapor Rentals (Pty) Ltd (Sapor).

[3] On 3 July 2008 Rose, on behalf of the CC, signed a ‘master rental agreement’ with Sapor, undertaking to pay the sum of R 2 878 per month for a period of three years. Rose signed as surety for the obligations of the CC. The contract commenced on the date of signature and the machine was delivered to the CC and installed.

[4] The CC paid the first amount of R2 787 to Sapor on 9 July 2008. The day before that, however, Sapor ceded its rights under the rental agreement to Absa Technology Finance Solutions (Pty) Ltd (Absa Technology). On 28 July 2008 Rose received a copy of the agreement that he had signed from Sapor. On the same day he wrote to Sapor expressing his dissatisfaction with the printer and with the failure to supply toner. He claimed that he had been misled into entering into the rental agreement and that he was cancelling it. He made the second and last payment on 8 August 2008.

[5] Absa Technology instituted action for payment of arrear and future rentals against the CC, and against Rose as surety, in November 2008 in the South Gauteng High Court. It claimed the sum of R111 533 (astronomical in the circumstances), interest at a rate of six per cent per annum above the prime rate, a tempore morae, and costs on the attorney and client scale. It also claimed return of the printing machine.

[6] Rose and the CC raised a number of defences in their plea, some of which were traversed in evidence. They did not plead rectification, or that the rental agreement was simulated, or that the contract had been induced by fraud. They did plead that Sapor was in breach of the contract because of Westrand’s failure to deliver toner for the machine or to maintain it, but did not show that Sapor was Westrand’s agent in this respect. Unfortunately for the CC and Rose, Westrand was liquidated. Their remedy against it, if any, was thus of no use.

[7] The South Gauteng High Court (Beasley AJ) correctly found, in my view, that any prior discussions between Rose and Westrand were inadmissible in the face of the written agreement. The parol evidence rule was in fact reinforced by a clause in the rental agreement recording that no representations, undertakings or warranties not contained in the agreement were binding on the hirer, Sapor. The CC acknowledged that it was referred to Sapor by Westrand, the supplier, which had bought the machine at its request.

[8] But the high court held that the agreement in issue was not a true lease, and, implicitly, that despite its written provisions to the contrary, the real agreement between the parties was in effect a sale on credit and thus a credit agreement for the purposes of the Act. Thus Absa Technology, as the lessor, was required to give notice and to proceed against the first respondent as lessee, and the second respondent as surety, under ss 129 and 130 of the Act before attempting to enforce the agreement. I shall deal in due course with other arguments that would bring the contract within the meaning of a credit agreement.

[9] Before turning to the issue for decision, it should be noted that the high court made a legal finding (that Absa Technology had to give notice and proceed under the Act) but did not give judgment on the merits. The order read (in part):

'1 Judgment is postponed *sine die*.

2 The plaintiff may not set the matter down until:

2.1 it has complied with the provisions of Section 129(1)(*a*) of the National Credit Act . . . . In particular it must draw the default to the notice of the Defendants by delivering a notice which complies with the provisions of Section 129(1)(*a*) . . . .

2.2 the provisions of Section 130 have been complied with.

3 The plaintiff is to pay the costs of the action.'

The high court gave leave to appeal against its decision to this court.

[10] As a rule, this court will not entertain an appeal against part of an order even if it is dispositive of a point of law. The authorities in this regard are discussed in *Health Professions Council of South Africa v Emergency Medical Supplies and Trading CC t/a EMS*.[1] The lis between the parties would not be disposed of until Absa Technology proceeds in terms of ss 129 and 130 of the Act, and there might be yet a further appeal on other aspects. But counsel for Absa Technology argued that in effect there is nothing further that the high court can adjudicate upon: if the appeal is heard and is successful, that is the end of the matter. If the appeal is dismissed then once Absa Technology has complied with ss 129 and 130, judgment will be entered against the respondents. Absa Technology argued also that the principle is subject to the exception that where the balance of convenience requires it the order should be appealed in order to avoid prejudice to the appellant: *National Director of Public Prosecutions v King*.[2]

[11] In this matter the finding of the high court that lease agreements of the kind in issue are subject to the Act does affect many financial institutions, including Absa Technology. It is not a finding that is case specific but affects a class of contracts in respect of which the applicability of the Act requires clarification. Moreover, if this court declined to hear the appeal before Absa Technology complied with ss 129 and 130 of the Act, and then on appeal after judgment had been given, decided that such compliance was not necessary, time and costs would be wasted. In the circumstances I consider that the appeal should be entertained.

[12] Having rejected the defence on the merits – that Sapor was in breach of the agreement, entitling the CC to cancel it – the high court had only to determine whether the rental agreement constituted a lease, or other credit agreement as defined in the Act, such that Absa Technology, as cessionary of Sapor's rights, was obliged to give notice of default to the CC and Rose in terms of s 129 of the Act, and to satisfy the requirements of s 130. There were three bases upon which the rental agreement could notionally have amounted to a credit agreement under s 8(4) of the Act.

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[1] *Health Professions Council of South Africa v Emergency Medical Supplies and Trading CC* 2010 (6) SA 469 (SCA).
[2] *National Director of Public Prosecutions v King* 2010 (2) SACR 146 (SCA).

Section 8(4) of the Act

[13] Section 8 of the Act determines which contracts constitute credit agreements. Subsection 8(4) provides:

'An agreement, *irrespective of its form* but not including an agreement contemplated in subsection (2), constitutes a credit transaction if it is-

*(a)* a pawn transaction or discount transaction;

*(b)* an incidental credit agreement, subject to section 5(2);

*(c)* an instalment agreement;

*(d)* a mortgage agreement or secured loan;

*(e)* *a lease;* or

*(f)* any other agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of-

(i) the agreement; or

(ii) the amount that has been deferred.' (My emphasis.)

[14] The principal argument for the respondents in so far as the agreement in dispute in this matter was concerned was that the 'rental agreement' between the parties was a lease. Indeed rental agreements generally are leases. But a lease as defined in the Act is the very antithesis of a lease.[3]

The definition (in s 1) reads:

'"lease" means an agreement in terms of which-

*(a)* temporary possession of any movable property is delivered to or at the direction of the consumer, or the right to use any such property is granted to or at the direction of the consumer;

*(b)* payment for the possession or use of that property is-

(i) made on an agreed or determined periodic basis during the life of the agreement; or

[3] See J M Otto and R-L Otto *The National Credit Act Explained* 2 ed (2010) at 23-24.

(ii) deferred in whole or in part for any period during the life of the agreement;

*(c)* interest, fees or other charges are payable to the credit provider in respect of the

agreement, or the amount that has been deferred; and

*(d) at the end of the term of the agreement, ownership of that property either-*

*(i) passes to the consumer absolutely; or*
*(ii) passes to the consumer upon satisfaction of specific conditions set out in the agreement' (*my emphasis);

A true lease, one that obliges the lessee to return the thing hired at the end of the contract, is thus not covered by the definition of a credit agreement and the relationship between the lessor and the lessee is not, if one has regard only to this definition, governed by the provisions of the Act.

Was the rental agreement governed by s 8(4)(*e)* of the Act: was it a 'lease'?

[15] The basis on which the high court found that the agreement between the parties was a credit agreement was that it was a lease as defined in the Act. In order to reach that conclusion, the high court relied on the evidence of Rose and Absa Technology's witnesses as to whether ownership of the machine would pass to the CC on termination of the agreement at the end of its term. The high court found that it was 'relevant' to the issue whether or not the rental agreement was a lease. Beasley AJ thus admitted the evidence, despite Absa Technology objecting at the outset to it being led. He gave leave to appeal against his finding that the agreement fell within the ambit of the Act to this court because of the many judgments in the high courts dealing with the question, and its importance in the commercial world.

*The terms of the agreement*

[16] The first question that arises from this implicit admission of parol evidence is whether it was permissible given the terms of the agreement. These included the following:

'Hirer [first Sapor and then by virtue of the cession Absa Technology] shall at all times be and remain the owner of the goods and neither User [the CC] nor any other person on his behalf shall at any stage before or after the expiry of this agreement or after termination thereof acquire ownership of the goods.'

'Notwithstanding the provisions of this agreement should User in breach of its obligations fail to return the goods on termination of this agreement then in addition to any other claims that Hirer may have against User pursuant thereto, User shall be liable to continue to pay rentals to Hirer as if the agreement had not been so terminated.'

'User shall, on termination of this agreement, return the goods together with all applicable documents to Hirer at User's cost and expense.'

[17] These terms are absolutely clear. Absa Technology remained the owner of the goods. The requirement embodied in the definition of a lease under the Act that ownership of the goods must pass *in terms of the agreement* to the lessee at the end of the lease was not met. One must then ask on what basis the high court admitted extrinsic evidence that contradicted the terms of the agreement.

*The admissibility of evidence as to the consequences of the agreement*

[18] The learned judge had regard to decisions of other courts that seem to suggest that if evidence was available as to the true intention of the parties, which may not have been reflected in the written agreement between them, then it was permissible to vary the terms of the agreement to bring it within the ambit of the Act. In particular he examined *Absa Technology Finance Solutions Ltd v Pabi's Guest House CC*[4] and *Absa Technology Finance Solutions Ltd v Viljoen t/a Wonderhoek Enterprises*[5] in which the courts appeared to consider that if extrinsic evidence as to what the lessees had intended had been available to them they would have taken it into account in determining the nature of the transaction in issue.

[4] *Absa Technology Finance Solutions Ltd v Pabi's Guest House CC* 2011 (6) SA 606 (FB).
[5] *Absa Technology Finance Solutions Ltd v Viljoen t/a Wonderhoek Enterprises* 2012 (3) SA 149 (GNP) para 26.

[19] In *Pabi's*, an application for default judgment, Kruger J said that in the absence of evidence as to the content of the contract, he could not go beyond the terms of the contract. But, he said, s 8(4)(*f*) of the Act 'applies in accordance with the content of the contract and not by virtue of its name'. The court, the judge said, 'must have regard to the substance of the contract, not merely its form (or outward appearance)'.[6] He referred in this regard to *Tucker v Ginsberg*,[7] cited also in *Bridgeway Ltd v Markam*,[8] the latter also determining whether a contract fell within the ambit of s 8(4) of the Act. In *Bridgeway* the court apparently took the view that a court, in determining the nature of a contract, 'must scrutinize the whole course of the parties' dealings'.

[20] In my view, the reliance in *Pabi's* and *Bridgeway* on *Tucker* is misplaced. In that case Trollip J said:[9]

'As each party has given the transactions a different label, I think it is appropriate to add here that the label used here is not decisive. Despite the label, the court must look at the nature of the transaction and not its object because . . . the object is the same in both cases . . . . and in ascertaining its nature the Court must have regard mainly to its substance and not merely its form.'

This proposition is well entrenched in the law. As Trollip J himself said, it is 'virtually trite law'. But it deals with the characterization of a contract, not with evidence that will have the effect of altering the terms of the written contract, in breach of the parol evidence rule. It does not give a licence to admit evidence as to one party's alleged intention where the written contract clearly does not reflect that. Of course if the parties call their agreement a sale and in fact the terms show that it is a barter, or they call it a lease (as understood at common law) when in fact it is a sale on instalments, then a court must look to the terms to determine the correct label or characterization. But a court may not admit evidence as to what the parties intended it to mean if that has the effect of changing the terms on which they clearly agreed.

[21] The correct approach to the admissibility of parol evidence is that stated in this court by Harms DP in *KPMG Chartered Accountants SA v Securefin Ltd:*[10]

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[6] Para 22.
[7] *Tucker v Ginsberg* 1962 (2) SA 58 (W) at 62F-H.
[8] *Bridgeway Ltd v Markam* 2008 (6) SA 123 (W) para 15.
[9] At 62F-G.

'First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning (*Johnson v Leal* 1980 (3) SA 927 (A) at 943B). Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses (or, as said in common-law jurisprudence, it is not a jury question: Hodge M Malek (ed) *Phipson on Evidence* (16 ed 2005) paras 33 - 64). Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent (*Johnson & Johnson (Pty) Ltd v Kimberly-Clark Corporation and Kimberly-Clark of South Africa (Pty) Ltd* 1985 BP 126 (A) ([1985] ZASCA 132 (at www.saflii.org.za)). Fourth, to the extent that evidence may be admissible to contextualise the document (since "context is everything") to establish its factual matrix or purpose or for purposes of identification, "one must use it as conservatively as possible" (*Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 (A)at 455B - C). The time has arrived for us to accept that there is no merit in trying to distinguish between "background circumstances" and "surrounding circumstances". The distinction is artificial and, in addition, both terms are vague and confusing. Consequently, everything tends to be admitted. The terms "context" or "factual matrix" ought to suffice. (See *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA) ([2002] 4 All SA 331) paras 22 and 23, and *Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd and Another* 2008 (6) SA 654 (SCA) para 7.)'

[22] There is no reason to consider that any of the provisions of the Act change the common law as to the exclusion of parol evidence. Although each of the classes of contract referred to in s 8(4) is prefaced with the words 'irrespective of its form' this means no more, in my view, than that the label given to the type of contract, or its format, does not determine its nature and substance. The terms of an agreement determine its nature, and those cannot be disregarded.

[23] Accordingly, the high court should not have had regard to the evidence that was led as to the parties' understanding of the rental agreement, especially as to the passing of ownership of the machine, by the witnesses for Absa Technology or by Rose. It should all have been ruled inadmissible. There is thus no need for me to consider that evidence or whether it gave rise to the conclusion that on the probabilities the parties intended their agreement to be a lease within the definition of the Act. The written rental agreement signed by Rose on behalf of the CC and on behalf of Sapor is a lease as it is understood at

[10] *KPMG Chartered Accountants SA v Securefin Ltd* 2009 (4) SA 399 (SCA) para 39.

common law, but not a lease for the purposes of s 8(4) of the Act. The appeal against the finding of the high court in this regard must accordingly succeed.

Was the rental agreement governed by s 8(4)(*f*)?

[24] In the high court the CC and Rose argued, secondly, that the agreement constituted a credit agreement under this subsection which provides that an agreement, 'irrespective of its form', is a credit agreement if 'payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of' the agreement or the amount that has been deferred. The argument was that payment of the rental in this case was 'deferred'. The high court rejected the argument, accepting the correctness of the approach followed in *Viljoen.*[11] Tuchten AJ held in that case that in this type of rental agreement there was no question of deferral of the obligation to pay monthly rental because payment was not postponed. The court said:[12]

'The Agreement is simply not one in terms of which any payment of an amount owed is deferred. The defendant was obliged to pay the monthly rentals in advance. There can in my view be no question of the deferral of an obligation to pay in this context, because there could be no deferral unless there was a prior obligation to pay, which, for monetary consideration, was postponed to a later date.

Furthermore, to qualify under s8(4)(*f*) there must, in terms of the relevant agreement, be a fee, charge or interest payable to the plaintiff in respect of the agreement or the amount that has been deferred. There is no such fee, charge or interest payable under the Agreement.'

And

'The defendant is neither obliged nor entitled under the terms of the Agreement to defer any such payment (or, to put it another way, he does not owe any amount eg for month 2 until the last day of month 1) and incurs no obligation to pay any fee, charge or interest if he chooses to wait until the day before the month in question before he pays the instalment for that month.'

[11] Above, para 20.
[12] Paras 20, 21 and 23.

[25] The court did not accept the view of Professor J M Otto[13] that the obligations to pay for months two to 60 were deferred until those months arrived. Otto's view was premised on the assumption that a flat rental would in reality include interest.

[26] As I have already held, however, extrinsic evidence is not admissible to prove that rental is calculated in such a way as to include interest in the face of the terms of the agreement which state otherwise. To do that, as Tuchten AJ said, would require a plea and proof of simulation. In that case no evidence was led to that effect and in this case the CC and Rose did not plead or demonstrate any simulation.

[27] As Tuchten AJ said in *Viljoen*:[14]

'The legislature was at pains to exclude both the common-law lease of goods simpliciter and the lease of immovable property, irrespective of its form – as to which see s 8(2)(*b*) – from the ambit of the NCA. The type of lease under discussion, where the lessor acquires the goods for the purpose of leasing them to the lessee, has been part of our commercial life for generations. If the legislature had wished to bring such a lease within the NCA as a credit transaction, it could easily have done so by the use of plain and unambiguous language to that effect. After pointedly excluding the common-law lease simpliciter from the reach of the statute in s 8(4)(*e*), it is most unlikely that the legislature intended to bring a subset of the common-law lease within the statute under s 8(4)(*f*).'

[28] The judge pointed out also that the common-law lease, which is in issue in this case, does not afford credit – the opportunity to defer payment of what is owed – to the lessee: a lessor who buys goods for the purpose of letting them to a specific lessee does not extend credit.[15] It charges rent, just as the lessor of immovable property charges rent for the use by the lessee of premises. It is important to note also that common-law leases of movable property are indeed regulated, but by the Consumer Protection Act 68 of 2008.[16]

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[13] In J W Scholz et al *Guide to the National Credit Act* (looseleaf) 8-10.
[14] Para 32.
[15] Para 33.
[16] See s 5 which determines the application of that Act, and s 5(2)(*d*) which excludes from its ambit any agreement governed by the National Credit Act. Professor Otto, in a note on the *Pabi's* and *Viljoen* decisions, is critical of this reasoning: 75 (2012) *THRHR* 492 at 499-500. The note does not, however, examine the problem of disregarding the terms of an agreement without pleading and proving simulation or fraud.

[29] Finally on this argument, and as pointed out by Absa Technology, the rental agreement actually made provision for interest payable on late payment of rentals. It stated that if the user failed to effect payment of rental on due date the overdue amount would bear interest at the rate of six per cent per annum above the prime rate. The argument that the rental agreement was a credit agreement in terms of s 8(4)(*f*) must thus also fail.

Was the rental agreement an incidental credit agreement as defined in the Act?

[30] The third argument raised in the high court by the CC and Rose was that the agreement was an incidental credit agreement, defined in the Act as one, irrespective of its form, in terms of which an account is rendered for goods or services rendered, or to be provided, over a period where either a fee, charge or interest becomes payable when the account has not been paid, or two prices have been quoted for settlement of the account, the lower price being payable if the account is paid by a determined date and the higher price being payable if not paid by that date.

[31] The latter provision is clearly not applicable. And the rental agreement does not meet the test in the former case because no account was rendered, or required, for services rendered. Rental had to be paid in terms of the agreement and no account was necessary. And just as it would be strange for the Act to exclude common-law leases from its ambit but bring them in under s 8(4)(*f*) so too it would be strange if the Act were interpreted to mean that a common-law lease was an incidental credit agreement. The third argument must thus also fail.

[32] The rental agreement is thus not governed by the Act and Absa Technology is not required to give notice, or comply with, the provisions of ss 129 and 130 of the Act before instituting action.

Costs

[33] The respondents were not represented in the appeal. Absa Technology offered to waive its costs on appeal in view of the fact that this case was a ‘test case for the industry’, of importance to entities in similar positions. It also offered to forego the costs of the application in the high court, also on the basis that the decision was important for financial institutions that fund this type of transaction.

Order

[34] In the result the following order is made:

1 The appeal is upheld. The order of the high court is set aside and is substituted with the following order:

‘Judgment is granted against the first and second defendants, jointly and severally, the one paying the other to be absolved, for payment in the amount of R111 533.98 together with interest a tempore morae at the rate of six per cent above the prime rate prevailing from time to time until date of payment.’

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C H Lewis

Judge of Appeal

APPEARANCES:

For appellant: A R Gautschi SC (with him J J du Randt),

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Randburg,
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