

# South African Securitisation Programme (Rf) Ltd v Mirjana (2022/6034) [2023] ZAGPJHC 787 (6 July 2023)

By **Michelle Ngcobo** (Candidate Attorney),  
**Michelle Venter** (Associate)  
and **Maike Gohl** (Partner)

25 July 2024

## INTRODUCTION

In the case of South Africa Securitisation Programme (Rf) Ltd v Mirjana (2022/ 6034) [2023] ZAGPJHC 787, the High Court in Johannesburg had to consider whether the Defendant had raised a bona fide defence in resisting summary judgment, that is good in law in accordance with the peremptory provisions of Rule 32(3) of the Uniform Rules of Court.

## BACKGROUND

In this case, the Plaintiff sought Summary Judgment against the Defendant arising from a master rental agreement concluded between the cedent, Sasfin Bank Limited ("Sasfin") and the Defendant on 28 August 2018 ("the agreement"). The agreement between Sasfin and the Defendant (a medical practitioner) was for the leasing of office telephonic equipment for a period of 60 months at an agreed cost, with a 15% annual escalation. Notably, the Defendant had not taken ownership of the telephonic equipment at the end of the agreement; the relevance of this is that this agreement was not considered a lease agreement as contemplated by the National Credit Act.

On or about 18 March 2019, a written sale and transfer agreement ("the sale and Transfer Agreement") was concluded between Sasfin and the Plaintiff, in terms of which the agreement was sold by Sasfin to the Plaintiff.

The Plaintiff contended that the Defendant had breached the agreement by failing to pay all rentals due to it in terms of the agreement and, as of 12 January 2022, the Defendant remained in arrears.

The Defendant admitted the agreement and admitted that she took possession of the telephonic equipment. She pleaded, however, that the plaintiff breached the agreement by increasing and decreasing the monthly instalments at various stages during the term of the agreement, and it failed to charge her in accordance with the terms of the agreement.

She expanded on this aspect in her Affidavit Resisting Summary Judgment, stating that she had communicated these complaints to Sasfin in November 2020, and in response to her complaints on 24 November 2020, she received a written response styled settlement quotation from a company called Telelink Opticomm (Pty) Ltd ("Telelink"), who quoted her an amount of R 141 146.64 to cancel the agreement. The Defendant was shocked at what she considered to be an exorbitant quote and elected to cancel the agreement.

## THE CANCELLATIONS:

In her plea, the Defendant alleged that on 30 November 2020, and in writing, she informed Sasfin that she would cancel the agreement. This correspondence was annexed to her plea, and the following is important:- the correspondence is addressed to Sasfin and Telelink, with the relevant reference to cancellation as follows "We want this contract terminated with immediate effect". In her Affidavit Resisting Summary Judgment, the Defendant baldly alleged that she cancelled the agreement with Sasfin on 16 December 2020, which decision she communicated to Sasfin. She did not allege whether this communication was in writing or whether she provided 20 days' notice. Lastly, the Defendant pleaded in her Affidavit Resisting Summary Judgment that on 16 February 2021, her attorney of record addressed written correspondence to Sunlyn and Telelink wherein the following was set out:

*"We hereby inform you that our client wishes to terminate her agreement with you. All payments made to you, in respect of the master agreement, will stop on 25 February 2021. We request you to immediately uplift the leased unit from our client's premises situated at Suit 16 Ground Floor, Parklane."*

The Defendant explained in her Affidavit Resisting Summary Judgment that Telelink is Sasfin's accounts department. She did not expressly set out how she arrived at this conclusion. She further did not explicitly explain her reason for addressing this correspondence to Sunlyn and Telelink or her failure to address this correspondence to Sasfin.

The Court found that upon perusal of the Defendant's affidavit, the Defendant had clearly concluded that Telelink is Sasfin's accounts department as a direct result of Telelink responding to the Defendant's requests to Sasfin to cancel the agreement, by way of providing a settlement quote. The Defendant further appeared to have addressed Sunlyn, because she alleged that when she concluded the master rental agreement, she signed two agreements; one bore Sunlyn's name, and the other bore Sasfin's name. She annexed to her Affidavit Resisting Summary Judgement a copy of the master rental agreement, which bore Sunlyn's name.

The Defendant conceded that her last payment to the Plaintiff was on 25 February 2021, however, she denied that she had breached the agreement or that the Plaintiff was entitled to charge her rental after 25 February 2021. The Defendant's reasoning for this was her allegation that the Consumer Protection Act 68 of 2008 ("CPA") applied to the agreement and that she had exercised her right under Section 14(b)(bb) of the CPA, and validly cancelled the agreement, on twenty business days' notice, effective 16 March 2021. She reasoned further that after the alleged cancellation, the Plaintiff would not be entitled to receive or bill for further monthly instalments, which would mean that the Defendant cannot be found to be in breach of the agreement or in arrears. The Plaintiff argued that the CPA does not find application to this agreement on the basis that firstly, Sasfin is not a supplier but rather a financier of the telephonic office equipment and secondly, that Sasfin as a bank is exempted from the provisions of the CPA. The Court noted that from a perusal of the definitions in Section 1 of the CPA, it is patent that the definition of a "supplier" is given a broader meaning than a party who manufactures and sells goods. A supplier is defined as "a person who markets any goods or services". "Services", in turn, is defined as including but also not limited to "any banking services, or related or similar financial services". Accordingly, the Plaintiff as a financier in the agreement fell within the purview of the definition of supplier under the CPA. It followed that the CPA was indeed found to be applicable to the agreement.

Accordingly, the issue for determination by the Court was whether the Defendant had disclosed a bona fide defence, that is good in law, in accordance with the peremptory provisions of Rule 32(3) of the Uniform Rules of Court to succeed with the Application for Summary Judgment. To canvass this, the Court was further required to consider whether the Defendant had indeed validly cancelled the agreement, i.e. whether section 14(b)(bb) indeed required:

- (a) the consumer to expressly provide in its notice of cancellation that 20 business days will be afforded to the supplier; and
- (b) the consumer to expressly assert that she is exercising her right in terms of Section 14(2)(b)(bb) of the CPA.

## THE LAW

### Summary Judgment

Summary Judgment is described as an extraordinary and drastic remedy in that if granted, it closes the door to a Defendant and permits a judgment without a trial. And yet, in reality, as the Supreme Court of Appeal pointed out in *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture 2009 (5) SA 1 (SCA)*,

"having regard to its purpose and its proper application, summary judgment proceedings only hold terrors and are "drastic" for a defendant who has no defence." The court went on to say that "The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court..."

The purpose of the Summary Judgment procedure is to afford an innocent Plaintiff who has an unanswerable case against an elusive Defendant a much speedier remedy than that of waiting for the conclusion of an action. However, it must be noted that if there are triable issues of fact in any cause of action or if it is unclear whether there are such triable issues, Summary Judgment must be refused as to that cause of action.

### Cancellations of the Agreement

Section 14(2) of the CPA (which was found to be applicable to this case) sets out as follows:

*"(2) If a consumer agreement is for a fixed term-  
(b) despite any provision of the consumer agreement to the contrary-  
(i) The consumer may cancel that agreement-  
(bb) at any other time, by giving the supplier 20 business days' notice in writing or other recorded manner and form, subject to subsection (3) (a) and (b)."*

### Court's Interpretation

Section 14(2)(b)(bb) of the CPA makes it plain that a consumer can cancel a fixed-term agreement for any reason but must do so in writing to the supplier and on 20 business days' notice.

It is trite that statutory provisions must be interpreted purposively and in context. That context includes the legislative background and the purpose for establishing the Act.

The interpretative process involves ascertaining the intention of the legislature but considers the words used in the light of all relevant and admissible context, including the circumstances in which the legislation came into being.

It has further been held in the Natal Joint Municipal Pension Fund V Endumeni Municipality (920/2010 ) 2012 ZA SCA 13 decision that “a sensible meaning is preferred to one that leads to insensible or unbusinesslike results”.

The Supreme Court of Appeal in Eskom Holdings Ltd V Halstead-Cleak 2017 (1) SA 333 (SCA) interpreted the CPA with reference specifically to Section 61 of the CPA. Its exposé of the CPA, and the CPA’s purpose is instructive where it was held:-

“In terms of the provisions of s 2(1), the Act must be interpreted in a manner that gives effect to the purpose of the Act as set out in s 3. That purpose is to promote and advance the social and economic welfare of consumers, in particular vulnerable consumers, in South Africa. If there is an inconsistency between the Act and any other legislation, both Acts, to the extent that it is possible. If it is not possible, the provisions that extend the greater protection to a consumer prevail over the alternative provisions... From the definitions, the preamble and purpose of the Act, it is clear that the whole tenor of the Act is to protect consumers.... The Act must therefore be interpreted keeping in mind that its focus is the protection of consumers.”

A further decision which is apposite to consider is that of Transcend Residential Property Fund (Pty) Ltd V Mati and others 2018(4) SA 515 (WCC), which dealt with the interpretation of Section 14 2(a)(ii) of the CPA wherein the Holderness AJ found as follows:-

*“To my mind, this reads too much into what is required in terms of the CPA. There is no requirement, express or implied, that the consumer must be expressly notified of the fact that he has twenty business days to remedy his defect. The fact of the matter is that the letter of cancellation was only delivered after the full 20 business days had elapsed, and he, therefore, had the full statutory prescribed period within to remedy his defect .... To my mind, the applicant was therefore entitled, in terms of section 14 of the CPA, to cancel the agreement, and the cancellation was accordingly valid.”*

As discussed above, section 14(2)(b)(bb) of the CPA provides that a consumer must give the supplier written notice of cancellation, giving the supplier 20 business days’ notice of the consumer’s intention to cancel the agreement. The Court, in this case, was of the view that it is not a requirement for the cancellation notice to specifically state that the consumer is relying on section 14(2)(b)(bb) of the CPA; therefore, if the consumer gives written notification of the cancellation and gives the supplier 20 days’ notice prior to the consumer acting on the cancellation, the cancellation would be in force under the CPA’s Section 14(2)(b)(bb).

Following the 20-day notice period, the cancellation binds the supplier. Consequently, this interpretation cannot be used against the provider in violation of Section 14(2)(b)(ii) of the CPA, which mandates that the supplier give the customer 20 working days to correct any defaults before the cancellation takes effect. As mandated by the CPA, courts must adopt this interpretation, which offers the consumer more protection.

The Court held that because the Defendant had informed Sasfin of her desire to terminate the agreement in a clear and unambiguous manner in the 30 November 2020 cancellation notice, this was a valid cancellation in that,

*“... she clearly and unequivocally notified Sasfin of her intention to cancel the agreement. Whilst it expressly set out that the cancellation would be of immediate effect, the defendant did not act on the cancellation immediately and only ceased making payments to the plaintiff on 25 March 2021 (her last payment being on 25 February 2021), more than 20 business days from date of notification. Whilst the defendant did not tender the return of the telephonic office equipment in the 30 November 2020 cancellation notice, the defendant is not required to have done so.”*

The Court was in agreement with Plaintiff’s counsel, that a cancellation must be communicated to the supplier to be effective. This is also patent from the provisions of Section 14(2)(b)(bb) of the CPA. The Defendant could not provide, with sufficient clarity, what the third parties’ roles were in the transaction and whether or not they were agents of Sasfin or the Plaintiff; however, this information would have peculiarly been in the knowledge of the Plaintiff, and the Court was of the view that the Defendant could not be criticised for failing to deal with this in greater particularity. Telmlink’s involvement in providing a settlement quote to the Defendant and Sunlyn’s participation in its name appearing on a master rental agreement created a triable issue regarding the nature of their involvement in the transaction, and only through evidence would it have been determined whether they were agents of Sasfin and/or the Plaintiff.

On these defences as raised by the Defendant, the Court held that that the Plaintiff had a bona fide defence and a reasonable possibility that the defence could succeed at trial. Accordingly, Summary judgment was dismissed, with costs to be in the cause of the main action.

## CONCLUSION

In conclusion, this case provides an overview of the interpretation of section 14 of the CPA as a whole, by demonstrating how an agreement with a supplier may be cancelled by a consumer by giving twenty business

days' notice, in writing, of such intended cancellation, notwithstanding the existence of any provisions in the agreement to the contrary. Additionally, it highlights the significance of section 14 (2)(b)(bb) which deals specifically with the consumers' right to the early cancellation of fixed-term agreements.



**Maike Gohl**  
(Partner)



**Michelle Venter**  
(Associate)



**Michelle Ngcobo**  
(Candidate Attorney)