THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 519/2015

In the matter between:

ABSA TECHNOLOGY FINANCE SOLUTIONS (PTY) LTD **APPELLANT**

and

FULELA TRADE AND INVEST 21 (PTY) LTD t/a CALTEX THE DOWNS SERVICE STATION **FIRST RESPONDENT**

PATRICIA NONHLANHLA KHANYILE **SECOND RESPONDENT**

Neutral citation: *Absa Technology Finance Solutions v Fulela Trade and Invest* (519/2015) [2016] ZASCA 127 (26 September 2016)

Coram: Lewis, Shongwe, Swain, Dambuza and Mocumie JJA

Heard: 14 September 2016

Delivered: 26 September 2016

Summary: Absolution from the instance erroneously granted – no onus to prove admitted issue – matter remitted to trial court.

ORDER

On appeal from: Gauteng Local Division, Johannesburg (Satchwell J sitting as court of first instance).

1 The appeal is upheld with costs.
2 The order of absolution from the instance together with the costs order are set aside.
3 The matter is remitted to the trial court.
4 The appellant is ordered to pay the respondent's costs in respect of the application to supplement the record, such costs being limited to those documents of relevance to the issues contained in the respondent's amended plea.

JUDGMENT

Swain JA (Lewis, Shongwe, Dambuza and Mocumie JJA concurring):

[1] The hire of a generator by the first respondent, Fulela Trade and Invest 21 (Pty) Ltd, initially from the supplier, Easytech, and thereafter from the appellant, Absa Technology Finance Solutions (Pty) Ltd, in terms of a Master Rental Agreement (MRA), gave rise to a dispute which forms the subject matter of this appeal.

[2] The appellant instituted action in the Gauteng Local Division, Johannesburg against the first respondent, based upon an alleged failure by the first respondent to pay rentals when due. A failure by the second respondent, Dr Patricia Khanyile, in her capacity as surety and co-principal debtor with the first respondent, to make payment of the rentals when called upon to do so, was also relied upon. The

appellant sought payment of the amount of R296 422,94 in respect of the full amount outstanding, as well as the return of the generator and its retention by the appellant, pending payment by the first and / or second respondent.

[3] After hearing the evidence of the parties, the trial court (Satchwell J) stated that (paras 18 and 21):

'The MRA was signed on 14th April 2008. However, neither the documentation nor the pleadings nor the evidence of Maritz [who testified for the appellant] support acquisition by ABSA of any rights to the generator prior to the signing of the MRA. There is no evidence that ABSA was the owner of the generator and was entitled to conclude such an agreement on 14th April – which is the commencement date of the MRA.

. . .

In short, I am not satisfied that ABSA has shown that it was entitled to conclude this MRA since it has not even attempted to show any intervening agreement with Easytech which entitled ABSA (instead of Easytech) to hire out or rent the generator to defendants.'

Thereafter it was concluded (para 27):

'Accordingly, absent discharge of the onus by Plaintiff, I have decided to grant absolution from the instance.'

[4] The trial court held it was accordingly unnecessary to deal with any of the defences raised by the respondents. These defences included an allegation that the true nature of the MRA had been misrepresented to the second respondent, she had signed the MRA under duress and the respondents were accordingly entitled to be released from their obligations in terms of the MRA. In addition, it was alleged that the MRA had been cancelled, because the generator which had been delivered was not in accordance with the respondents' requirements. The present appeal is with the leave of the trial court.

[5] The trial court recognised that its finding that the appellant did not possess what it termed locus standi to conclude the MRA, had not been pleaded by the respondents. However, it decided that this issue was fully canvassed at trial and was a point of law which it was entitled, and indeed obliged, to deal with and decide.

[6] In this the trial court erred. The respondents in their plea admitted that on 14 April 2008 the first respondent entered into the MRA, which was signed by the second respondent personally and on behalf of the first respondent. The respondents then sought to be released from their obligations in terms of the MRA, on the basis of the defences set out above. It was accordingly common cause and no part of the dispute between the parties, as defined by the pleadings, that the appellant and the respondents had concluded a binding lease agreement in the form of the MRA. This was not a case where the respondents failed to plead an inability on the part of the appellant to conclude the MRA, but one where the respondents admitted its conclusion with the appellant. The trial court was not entitled to find that the appellant had failed to prove it was entitled to conclude the MRA, when its conclusion was common cause between the parties.

[7] The trial court also concluded that there was no evidence that the appellant was the owner of the generator and therefore entitled to conclude the MRA. Clause 2 of the MRA, however, provides that ownership of the goods vests in the appellant. Clause 4.4 stipulates that the goods have been acquired by the 'hirer' (being the appellant) at the 'user's' request (being the first respondent) for the purposes of renting the goods to the first respondent. It was therefore agreed between the parties that the appellant was the owner of the goods. In any event, property belonging to a third party may lawfully be let to another. The lessor is only obliged to give the use and enjoyment of the property let to the lessee, and once this obligation is fulfilled the lessee is not entitled to question the lessor's lack of title.[1] The trial court consequently erred in concluding that the appellant lacked locus standi to conclude the MRA, because it had not proved it was the owner of the generator.

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[1] *Hillock & another v Hilsage Investments (Pty) Ltd* 1975 (1) SA 508 (A) at 516E; *Boompret Investments (Pty) Ltd & another v Paardekraal Concession Store (Pty) Ltd* 1990 (1) SA 347 (A) at 351H-I.

[8] It is unfortunate that the parties have been subjected to the expense and delay of these appeal proceedings, which will not result in a resolution of the dispute between them. It will be necessary for the matter to be remitted to the trial court for determination of the issues between the parties. In the absence of any findings by the trial court as to the merits or demerits of the witnesses which it had the advantage of seeing and hearing, this court is not in a position to fairly and properly evaluate the evidence.

[9] As regards the costs of the appeal, there is no reason why the appellant should not be entitled to its costs. Although the misdirection by the trial court was obvious, the appeal was opposed by the respondents. The record placed before this court by the appellant was however incomplete and despite the respondents' best endeavours was not rectified by the appellant. This resulted in the respondents applying for the record to be supplemented, by the inclusion of a further volume which was granted without opposition by the appellant. In so far as the costs of this application are concerned, the respondents should be entitled to their costs, but only in so far as the documents they sought to introduce into the record, were of relevance to the issues contained in their amended plea. In addition, the Taxing Master, in taxing the appellant's costs of the appeal, should have regard to the incomplete state of the record filed by the appellant.

[10] Regrettably, it is also necessary to comment upon the manner in which the trial court dealt with counsel during the hearing. The following extracts from the record are illustrative:

'COURT: That is not what I asked. I do not think you and I speak the same language. So, I tell you what, I am not going to ask you anymore questions but it means you do not solve my problems. I will ask this question once more. Okay, and if you do not understand, ask your attorney to translate, okay.'

and

'COURT: I am going to take the adjournment, because otherwise Mr Du Randt I am going to be very rude to you. Think about it, perhaps ask your attorney, the word is manners,

m-a-n-n-e-r-s. Do you actually finish somebody's sentence for them when they are speaking and the answer is no. So I am going to take an adjournment. You can think about yourself.'

A reading of these passages in context reveals that the remarks directed at counsel were intemperate and unjustified. Although robust questioning of counsel by a judicial officer may be justified, gratuitous insults are not.

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

1 The appeal is upheld with costs.

2 The order of absolution from the instance together with the costs order are set aside.

3 The matter is remitted to the trial court.

4 The appellant is ordered to pay the respondent's costs in respect of the application to supplement the record, such costs being limited to those documents of relevance to the issues contained in the respondent's amended plea.

K G B Swain
Judge of Appeal

Appearances:

For the Appellant:	F Bezuidenhout (with I Tshoma) (Heads of argument prepared by F Bezuidenhout) Instructed by: Jay Mothobi Inc, Johannesburg E G Cooper Majiedt Inc, Bloemfontein
For the Respondent:	W H Pocock Instructed by: Fluxmans Inc, Johannesburg Lovius Block, Bloemfontein