

RENTAL AGREEMENT

CONSTRUCTION & ENGINEERING

The Need to Plead Properly – Patel vs South African Securitisation Programme (RF) LTD & Others (790/2024) [2025] SASCA 186

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by Jennifer Smit, Director

- On 8 December 2025, the SCA handed down a decision in the above matter which draws into sharp focus the need to plead one's case properly from inception.
- Ezindaleni Power Solutions CC ("**Ezindaleni**") concluded a master rental agreement with Centrafin (Pty) Ltd on 9 May 2019 (the "**Agreement**"). The Agreement was for the rental of certain office equipment with a monthly rental fee payable. In terms of the Agreement, Ezindaleni's existing three members, Mr Patel, Mrs Kilfoil and Mr Kilfoil ("the **members**") undertook to be liable as co-principle debtors in favour of the landlord for Ezindaleni's obligations in the event of cancellation thereof. The Agreement was ceded several times, and ultimately landed with South African Securitisation Programme (RF) Ltd ("**SA Securitization**") as the substituted landlord.
- On 5 February 2021 SA Securitization issued summons against the members of Ezindaleni, seeking payment as against them on the basis of Ezindaleni's failure to make payment under the Agreement. Ezindaleni was not cited.

- The Agreement contained an acceleration clause which gave rise to liability on the part of Ezindaleni and the members for additional sums, however those sums were only claimable as against the members in the event that the Agreement had been cancelled.
- Notably, in its particulars of claim SA Securitization averred that *"pursuant to the provisions of the agreement, [SA Securitization] cancelled the agreement, alternatively hereby cancels same."*
- It is common cause that prior to the issue of the summons, no notice of termination of the contract had been sent to Ezindaleni or the members, at the domicilium address contained in the Agreement.
- One of the primary defences raised by the members was that cancellation had not occurred and that the act of cancellation was, in terms of the Agreement, a prerequisite for a claim for accelerated payments and pre-estimated liquidated damages.
- At the trial, the evidence of SA Securitization's sole witness, Ms Moloi, was that SA Securitization conceded that an entitlement to claim payment of accelerated rentals could only arise in the event of cancellation of the Agreement, and that notice of cancellation had only been provided on service of the summons – of course, Ezindaleni had not been cited in those proceedings.
- What is more, in the course of cross-examination, it emerged that:
 - Ezindaleni had in fact been placed into liquidation the middle of 2020;
 - SA Securitization had directed correspondence to the liquidators of Ezindaleni shortly thereafter enquiring whether in terms of section 37 of the Insolvency Act, 24 of 1936 the liquidators would elect to continue with the Agreement; and
 - no response had been received despite the passage of months, and the liquidators made no such election.
- On hearing this and the remaining evidence in the trial, the High Court ruled that service of the summons on the defendants did constitute cancellation of the Agreement, thereby entitling SA Securitization to payment.
- Mr Patel took the ruling of the court *a quo* on appeal, Mr and Mrs Kilfoil elected not to do so.
- SA Securitization defended the appeal but altered its position, abandoning reliance on alleged cancellation and instead relying on the operation of section 37 of the Insolvency Act which had emerged under cross examination, asserting that the agreement was deemed to have been terminated as a result of the liquidators not having responded to the enquiry. They also, somewhat opportunistically raised a further argument that if it was found that the Agreement had not been cancelled and the evidence regarding the liquidators' election was not accepted, then the Agreement was still extant, thereby entitling SA Securitization to all amounts due under the rental agreement up to that point in time.
- On consideration of the appeal, the appeal was upheld by the SCA on the basis that section 37 was not relied upon by SA Securitization in the formulation of its pleaded case in the summons. Similarly, reliance on an alternative framework for the claiming of monies in the event that cancellation had not occurred, had also not been pleaded.
- The fact of the matter is that the act of cancellation of the rental agreement was never communicated to the controlling mind of Ezindaleni who at all relevant times after mid-2020, had been the liquidators of that entity.
- It seems in this matter that material facts have been overlooked in the formulation of the pleaded case. So that even though matters had emerged in evidence, this did not give rise to an ex post facto entitlement to reformulate the case before the SCA on different grounds to those contained in the pleadings.
- The judgment of the SCA stated (at para 23) *"If we accept, as we must, that the liquidators did not elect to continue with the rental agreement, then SA Securitisation could not, many months after the lapse of the three month period provided by section 37(2) of the Insolvency Act, purport to cancel the agreement. It had already been terminated by law. Ms Moloi, on her own evidence, was aware of this fact. The High Court failed to appreciate the consequence of its finding that the agreement was deemed to have been terminated in terms of section 37(2), when it confirmed the cancellation of the agreement by SA Securitisation. It strikes me as bizarre that SA Securitisation's claim was not premised on the fact that Ezindaleni had been liquidated, as specifically provided by clause 8 of the rental agreement. Instead, it was formulated without reference to the liquidation of Ezindaleni"*.
- In conclusion, the SCA stated *"The purpose of requiring parties to set out their case in the pleadings is to allow the other party to know what case it must meet and to answer that case appropriately. In this instance, the operation of s37 raises issues which have not been addressed at all on the record before us. This is therefore not the sort of case where we can accept that those issues are fully ventilated and that no prejudice would flow from adjudicating the matter upon the newly advanced basis. It follows that the appeal must succeed."*
- Because Mr Patel was the only party challenging the ruling, the court *a quo*'s ruling in relation to the other two defendants was not replaced.

- This being a salient reminder to all practitioners to properly plumb the depths of their clients’ cases before running a trial, if needs be amending pleadings at suitable junctures so as to allow the proper ventilation of all issues.



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