



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

REPORTABLE

CASE NO: 20753/17

In the matter between:

RITZ PLAZA (PROPRIETARY) LIMITED

Applicant

and

RITZ HOTEL MANAGEMENT

COMPANY (PROPRIETARY) LIMITED

First Respondent

JUDGMENT DELIVERED ON MONDAY 28 MAY 2018

GAMBLE, J:

INTRODUCTION

[1] The skyline of Cape Town's Atlantic Seaboard is broken by a steel and glass edifice of more than 20 stories in height which glints at sunrise and glows in the setting sun. It houses a hotel colloquially known as "The Ritz" which is notorious for its revolving restaurant where patrons enjoy a panoramic view of Table Bay and its surrounds while dining in exclusive elegance. Some call the building "*iconic*" while others refer to it as intrusive.

[2] Be that as it may, The Ritz in Sea Point takes its name from similarly eponymous hotels in Europe, England, America and the Far East and is intended to reflect the epitome of luxury and opulence.¹ The original Hotel Ritz was opened by a Swiss waiter-turned-hotelier, Cesar Ritz, in Paris in 1898 and since then there have been any number of hotels opened in London, New York, Tokyo and Singapore by The Ritz-Carlton Hotel Group. Even Johannesburg sported a Ritz in its early days as a mining town.²

[3] Cape Town's Ritz is owned by the applicant company (*"The Ritz"*), a family owned entity formerly controlled by the late Dr Barney Hurwitz, a successful businessman and the doyen of privately managed medical care in South Africa³. On 11 October 2016 The Ritz concluded a written lease agreement (*"the lease"*) with the respondent (*"the management company"*) in terms whereof the hotel and the property on which it is located ⁴ were leased to it for a period of 20 years. Dr Hurwitz and the management company's Mr. Nicolaas van der Walt were the principal role-players in the conclusion of the lease agreement, more details whereof will appear hereunder.

[4] In terms of the lease the management company was deemed to have taken over the running of The Ritz in August 2016 but the venture ran into trouble

¹ Wiktionary defines *"ritzy"* as *"a display of ostentatious elegance"*.

² Wikipedia Online Encyclopedia *sv The Ritz*

³ Dr Hurwitz died in October 2017 aged 95 in the midst of this litigation. According to an obituary published in the SA Jewish Report at the time he was, *inter alia*, the former chairman and chief executive officer of Clinic Holdings Ltd, which later became the Netcare Group, a listed company which operates private hospitals throughout South Africa (see www.sajr.co.za/news-and-articles/2017/10/26/farewell-to-barney-hurwitz)

⁴ Erf 1419 Sea Point East

before the end of that year. It began defaulting on its monthly rental of R1,3m and other obligations towards The Ritz in November 2016 and it is common cause that since March 2017 it has not paid a cent to the applicant. By June 2017 the management company owed The Ritz almost R13m and on 26 June 2017 the latter's attorneys informed the management company's attorneys that their client had elected to cancel the lease.

[5] Notwithstanding the cancellation of the lease, the management company refused to quit the hotel. In the circumstances, The Ritz approached this court urgently on 30 November 2017 for an order of immediate ejectment of the management company from the hotel. That application eventually came before this court on 29 March 2018. Prior to launching the application for ejectment The Ritz took steps to apply for the provisional winding up of the management company but those proceedings ran into delays because a trade union representing certain of the employees of the management company had not been given notice of the application. When this happened the union sought leave to intervene in the proceedings. Those proceedings are partly heard before Papier J and have effectively been held in abeyance pending this application.

THE MANAGEMENT COMPANY'S RESPONSE TO THE APPLICATION TO EJECT

[6] Ordinarily, one would have thought that a tenant which had admittedly not paid its rental for a protracted period of time, had evinced an intention not to do so in the future, had been duly put to terms in accordance with the provisions of the lease to comply with its obligations and in circumstances where the landlord had thereupon cancelled the lease, would not have a leg to stand on when it faced an

application to eject it from the landlord's premises. The principle is so fundamental that it hardly needs restating. The tenant's primary obligation under an agreement of lease is the timeous payment of rental in the agreed commodity to the landlord. Failure to meet that obligation constitutes a fundamental breach and after it has been given contractual notice to remedy its default, the landlord is entitled, without more, to cancel the agreement and seek the ejectment of the tenant.⁵

[7] However, counsel for the management company, Mr. Miller (who appeared with Ms. Stansfield) advanced a number of arguments justifying the management company's apparent intransigence. In support of the main defence, it is said that The Ritz's cancellation of the lease was invalid in that the rental which would otherwise have been due and payable to it by the management company was in fact not so due and payable because The Ritz was the cause of the management company's failure (in truth its inability) to pay. Counsel relied in this regard on the decision in this Division in Academy of Learning ⁶

[8] Next, it was submitted that the application for ejectment ought to be stayed on the basis of *lis pendens*, the complaint being that there were other proceedings pending between the parties in this court based on the same facts that the underpin the ejectment application, in particular the liquidation application. Further, it is said that there is a pending action brought by the management company against The Ritz for substantial damages flowing from the latter's alleged breach of a so-called "*term sheet*" agreed to by the parties in September 2016. In addition, the

⁵ Goldberg v Buytendag Boerdery Beleggings (Edms) Bpk 1980 (4) SA 775 (A)

⁶ Academy of Learning (Pty) Ltd v Hancock and others 2001 (1) SA 941 (C)

management company claims that the current proceedings for ejectment constitute an abuse of process and that the application should be refused on that basis too.

[9] The Ritz's response to these defences is that they are baseless, contrived and run counter to various of the provisions of the lease itself. Indeed in the founding affidavit herein, Mr. Jarren Hurwitz ⁷ complains that "*the respondent has, through its conduct 'hijacked' the Property and has no intention of paying the rental.*"⁸ I shall revert to the relevant facts and circumstances which are to be considered in relation to the management company's defences shortly but first it is necessary to articulate the principal defence.

THE ACADEMY OF LEARNING ARGUMENT

[10] To properly deal with the management company's reliance on *Academy of Learning* it is necessary to refer briefly to the facts of that case. The matter involved a dispute between a franchisor and two of its franchisees in relation to the establishment of training colleges in Worcester and Somerset West under the name *Academy of Learning*, each such franchise being independently owned by the respondents. When the franchisor sued the franchisees for outstanding monies arising from a breach of their respective franchise agreements a number of defences were raised, one of which was that because the franchisees' failure to comply with

⁷ A director of The Ritz and evidently a grandson of the late Dr Hurwitz.

⁸ The reference to "building hijacking" is, no doubt, an allusion to the scenario described in City of Johannesburg v Changing Tides 74 (Pty) Ltd and others 2012 (6) SA 295 (SCA) at 300F. Given that this matter involves a contractual dispute between 2 companies, the principles enunciated in that case, however, have no application here.

their contractual obligations was the result of the franchisor's own wrongful conduct, the latter was precluded from relying on, and benefiting from, its own wrong.

[11] In support of that contention counsel for the franchisor sought to rely on a passage in the third edition of Christie *The Law of Contract* at pp 148-52 and 167-8, which is recited thus at 951I to 952B in [31] of the judgment of Brand J (as he then was) :

“This principle that a wrongdoer will not be allowed to profit from his own wrong has other applications in the field of breach of contract. As has been seen above, it underlies the doctrine of fictional fulfilment of conditions, which doctrine has been extended or adapted to so-called conditions that are more correctly described as terms of the contract, so that a party who has been prevented by the other from performing his contractual duties will be permitted to enforce his rights dependent on those duties exactly as if he had performed them. Conversely, the party who has caused the other's breach by making it impossible or nugatory to perform or by failing to carry out the necessary preliminaries which rest upon him cannot found any claim on the breach he has thus precipitated, and may himself be liable for breach of an implied term that he would ‘do nothing of his own motion to put an end to that state of circumstances under which alone the arrangement can be operative’ or a similar implied term appropriate to the nature of the contract”.

[12] Brand J rejected the reliance by counsel on this passage *simpliciter*.

“[32] I do not believe, however, that these statements by Christie are support for the wide proposition contended for by ... [counsel for the franchisee]. I do not understand the learned author to say that an impecunious debtor will as a general principle be excused from payment if he can show some causal connection between his impecuniosity and some wrongful act of commission or omission by the creditor. The logical consequence of such general proposition would be that the question whether a counterclaim for liquidated damages constitutes a defence to a claim for cancellation on the basis of non-payment in any particular case will depend on the financial situation of the particular debtor. If despite his/her damages resulting from the creditor’s conduct, the debtor is still financially able to perform, the creditor’s conduct will not constitute a defence to the claim for cancellation. If as a result of such damages the debtor is financially unable to perform, the creditor’s conduct will constitute a defence. I find these propositions untenable.”

[13] The learned judge then went on to consider three discreet categories in which the approach espoused by Prof Christie might find application.

“[33] As I see the legal position - and I do not understand the learned author Christie to differ fundamentally - a debtor can rely on the creditor’s wrongful conduct as an excuse for his/her failure to perform if the facts of the case fall within the ambit of one or more of the following three broad categories:

- (a) *Where the wrongful conduct of the creditor made performance by the debtor impossible (see, for example, National Bank of South Africa Ltd v Leon Levson Studios Ltd 1913 AD 213; De Wet and Yeats,*

Kontrakte en Handelsreg 5th ed at 175). I believe, however, that this situation constitutes the defence of supervening impossibility. In order to succeed with this defence, the debtor must prove that his/her performance became objectively, and not merely subjectively, impossible. (See, for example, Hersman v Shapiro & Co 1926 TPD 367; Yodaiken v Angehrn and Piel 1914 TPD 254 and Lubbe and Murray Farlam and Hathaway Contracts: Cases, Materials and Commentary 3rd ed at 770)

- (b) *Where the creditor's wrongful conduct can be ascribed to a **deliberate intention** on his/her part to prevent performance by the debtor. This is the type of situation which is analogous to fictional fulfilment of a condition. (See, for example Koenig v Johnson & Co Ltd 1935 AD 262 at 273; Scott and another v Poupard and another 1971 (2) SA 373 (A); Design and Planning Services v Kruger 1974(1) SA 689 (T) at 699-700.)*
- (c) *Where the creditor's conduct complained of by the debtor in itself constituted a breach of an express or implied term of the agreement. This is the type of situation where the creditor expressly or impliedly bound him/herself 'to carry out the necessary preliminaries which rest upon him' (Christie op cit at 550); see also, for example, Design and Planning Services (supra at 695C-E) or to do 'nothing of his own motion to put an end to that state of circumstances under which alone the arrangement can be operative' (Christie op cit at 550).*

[14] The learned judge went on to explain the limited ambit of the application of Prof Christie's proposition.

“(c)...The latter example given by the learned author Christie must, however, be understood in the context of the quotation where it comes from, namely from the dictum by Cockburn CJ in the case of William Sterling the Younger v Boyd and Maitland 5 Best and Smith 840, which was referred to with approval by Searle JP in the case relied upon by Christie, namely Truter v Hanke 1923 CPD 43 at 50. This dictum by Cockburn CJ reads as follows:

*‘If a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he should do nothing of his own motion to put an end to that state of circumstances under which alone the arrangement can be operative.’*⁹

[15] In argument, Mr. Miller relied exclusively on the application of category (c) above as forming the basis for the management company's alleged entitlement not to pay rental and related costs to The Ritz. In so doing, counsel accepted that the management company bore the onus of establishing a tacit term upon which it was permitted to so rely. That takes me then to the material facts which are relevant to this defence.

⁹ In the most recent 7th edition of Christie (by GB Bradfield), the original passage referred to by Brand J is retained and the author cites Academy of Learning with approval.

RELEVANT FACTUAL BACKGROUND

[16] Prior to the conclusion of the lease with the management company, the hotel business at The Ritz was run by an entity known as GK Hospitality CC (“GK”) whose driving force was Mr. Gustav Krampe. In addition to being the tenant, GK was also a debtor of The Ritz which had advanced to it a loan facility of R60m, and which GK drew down as it attended to the refurbishment of the hotel. That facility had been sourced by The Ritz from Nedbank under a so-called “back-to-back” loan agreement in terms whereof the funds were advanced to GK on identical terms to the Nedbank loan to The Ritz.

[17] The papers reveal that the original intention was that there was to be a joint venture between GK and an entity known as G5 Investments (Pty) Ltd (“G5”) - an entity in which Mr. van der Walt also had an interest - to refurbish and run the hotel, with a different management company being the vehicle through which that joint venture would be conducted. However the joint venture did not materialise and the management company (in which Mr. van der Walt was a key participant) took over the refurbishment and running of the hotel with GK falling out of the picture. In the result, the management company effectively stepped into the shoes of GK, with effect from 1 August 2016, as the lease provided.

[18] To facilitate this change of tenancy, the parties to these proceedings together with GK and Mr. Krampe agreed, on 15 September 2016, to be bound by a so-called “*term sheet*”¹⁰. It is apparent from the terms thereof that the term sheet was

¹⁰ According to Wikipedia Online Encyclopaedia, a term sheet “*is a bullet-point document outlining the*

intended to be a binding document the duration whereof was indefinite until the occurrence of certain defined events. I shall revert to this later. Suffice it to say at this stage that the term sheet provided for the conclusion of a new lease agreement in relation to the management of the hotel and the anticipated capital expenditure associated therewith.

[19] The hotel closed its doors to the public on 1 September 2016 in order to permit the refurbishment already being undertaken by GK to be completed speedily, it being contemplated by the management company that the hotel would re-open on 1 December 2016 in time to attract guests during the lucrative summer season in the Cape. The management company considered that the existing Nedbank facility of R60m was insufficient to meet its needs for the style and extent of refurbishment it desired. Accordingly, it sought a further R30m which it initially attempted to source from Nedbank via a further back-to-back loan: since the management company was unable to put up the hotel premises as collateral for any facility, it was obliged to co-operate with The Ritz (which could offer adequate security) to procure the capital to finance the refurbishment.

[20] The parties first recorded in the term sheet the status of the existing facility with Nedbank.

material terms and conditions of a business agreement. After a term sheet has been 'executed', it guides legal counsel in the preparation of a proposed 'final agreement'. It then guides, but is not necessarily binding, as the signatories negotiate, usually with legal counsel, the final terms of the agreement.... A term sheet implies the conditions of a business transaction, as proposed by a party. It may be either binding or non-binding."

*“2.4 The Landlord has entered into a loan agreement with Nedbank Ltd for the advancement by Nedbank Limited of a capital amount of R 60 million, the proceeds of which the Landlord has agreed to contribute exclusively to the Hotel for the utilisation of the Current Tenant (“**Nedbank loan**”). Part of the Nedbank Loan has been drawn down by the Landlord and the Current Tenant has agreed to repay the monthly amounts under the Nedbank Loan, which it has been repaying on a monthly basis.”*

[21] Then they further stipulated the following as regards the envisaged additional facility of R30m.

*“2.5 The Parties have agreed that the Landlord shall obtain a further facility from Nedbank Limited of R30m (“**Further Facility**”) and the New Tenant¹¹, Shimmy Luxury Collection (Proprietary) Limited (registration number 2016/319165/07) (“**SLC**”) ¹² and the Current Tenant¹³ will grant suretyships jointly and severally for the Further Facility to Nedbank Limited.”*

[22] Finally, they dealt comprehensively with the future obligations of the parties in regard to both the existing and future facility.

“5.1 The Current Tenant, the New Tenant and SLC hereby jointly and severally guarantee the Landlord’s future repayment obligations contained in the Nedbank Loan and the Further Facility provided that-

¹¹ The respondent herein.

¹² Evidently another entity controlled by Mr van der Walt.

¹³ Then still GK.

5.1.1 the Landlord shall drawdown the proceeds of the Nedbank Loan and Further Facility for use by the New Tenant in respect of the Hotel and account or pay over any previous drawdowns to the New Tenant which have not yet been received by the Current Tenant;

5.1.2 the Landlord shall not amend the terms of either the Nedbank Loan or Further Facility (including the repayment terms) without the written consent of the New Tenant and the relevant sureties (including with regard to any refinancing); and

5.1.3 there shall be a straightforward pass through of the repayment costs under the Nedbank Loan and Further Facility to the New Tenant which the New Tenant shall repay by monthly instalments and the Landlord shall not charge to the New Tenant any additional commission or charges over and above those charged by Nedbank Ltd to the Landlord.

*5.2 The New Tenant and the Landlord have agreed to enter into a back to back loan agreement in respect of the Nedbank Loan and the Further Facility (**"Ancillary Nedbank Agreement"**).*

[23] Implementation of the term agreement thereafter took place incrementally through the conclusion of a series of agreements and/or documents during the last quarter of 2016.

23.1 On 7 October 2016 GK acknowledged its indebtedness to The Ritz as at 24 August 2016 in the amount of R10, 73m.

23.2 On 11 October 2016 The Ritz and the management company concluded the written lease agreement in respect of the hotel for 20 years. The lease is a hefty document and only the clauses which are relevant to this dispute will be referred to hereunder.

23.3 On 30 November 2016 The Ritz and the management company completed a further written agreement recording that GK had assigned to the management company the R60m loan from The Ritz and that The Ritz had consented to that assignment.

23.4 On 30 November 2016 and pursuant to a sale of business agreement between GK and the management company (in terms of which, *inter alia*, the management company agreed to take over GK's obligations under the acknowledgement of debt agreement referred to above), The Ritz and the management company concluded a written agreement in terms whereof The Ritz consented to the substitution of the management company for GK under that acknowledgement of debt.

[24] Provision of the additional R30m facility (which the parties had initially agreed in the term sheet was going to be procured by The Ritz through a further back-to-back loan from Nedbank) was in fact handled differently. In the run-up to the conclusion of the term sheet Dr Hurwitz and Mr van der Walt had discussed the provision of additional finance by The Ritz in principle and Nedbank's Mr Calmeyer

was included in certain of those discussions. Shortly after 19 September 2016, Mr van der Walt enquired of Mr Calmeyer when that additional finance would be available and was informed that the loan had been approved in principle but was subject to The Ritz's representatives signing a facility letter and providing the required security.

[25] Nedbank formally approved the facility on 7 November 2016 and required, as part of its security, the registration of a second bond over the hotel. This was only effected in February 2017 but in the meantime the management company needed money to complete the refurbishment. Accordingly, on 30 November 2016 The Ritz and the management company agreed orally that, to this end, The Ritz would advance an amount of R15m to its new tenant.

[26] That amount was procured by The Ritz via another back-to-back loan from a related family entity known as Hurwitz Farming and paid to the management company on 1 December 2016. Repayment of the loan was guaranteed by a number of entities and individuals, including Mr van der Walt. Practically speaking, the R15m loan from The Ritz was bridging finance pending payment of the second tranche of the R30m Nedbank facility which could only be accessed by The Ritz once all the necessary securities were in place.

[27] In terms of the lease, the management company was required to pay rental in advance by the 7th of each month in the following amounts –

- From 1 August to 31 December 2016 - R1,302m per month;
- From 1 January to 31 August 2017 - R1,5m per month; and

- From 1 September 2017 to 31 August 2018 - R1,75m per month.

It was also required to pay for municipal services (water, electricity, sewerage etc.).¹⁴

[28] As stated earlier, it is common cause that the management company did not pay rent for the periods November – December 2016 and February to June 2017. On 10 March 2017 The Ritz, relying on clause 17.1.1 of the lease¹⁵, called for the payment of outstanding rentals for December 2016 and March 2017 within 14 days as a precursor to the intended cancellation of the lease. However, this precondition fell away on 7 April 2017 when the management company was in arrears with three months' rental and it fell foul of the further provisions of that clause. In the result, The Ritz's attorneys wrote to the management company on 26th June 2017 cancelling the lease.

[29] The Ritz did not immediately move for the ejectment of its tenant. Rather, it launched an urgent application for the winding up of the management company on 10 July 2017, alleging an inability on the part of the company to pay its debts in terms of s345(1)(c) of the Companies Act, 61 of 1973. That application was

¹⁴ While The Ritz initially relied on the non-payment of these services in addition to its tenant's rent default, the payment of municipal services was accepted by The Ritz after an affidavit had been handed up to this effect during the hearing of the matter.

¹⁵ The remedies in the event of breach contained generally in clause 17 of the lease provide, inter alia, in clause 17.1.1 thereof that if "*the tenant fails to pay any rent or any other amounts due by it to the landlord in terms of this lease on due date and continues that failure for more than 14 (fourteen) days after receipt of a notice requiring payment (but no such notice shall be necessary in the case of a third or subsequent failure occurring within any continuous period of 12 (twelve) months)*", the non-defaulting party shall be entitled to cancel the agreement.

brought in the motion court during recess and became opposed. By agreement it was postponed for hearing on 30 October 2017 on the semi-urgent roll.

[30] But there were further developments in the interim. Firstly, a group of 23 subcontractors (who had been appointed to complete the refurbishment project) applied for leave to intervene in the winding up proceedings, seemingly with a view to putting the management company into business rescue. On 13 October 2017, leave to intervene was granted (by agreement between the parties) by Langa AJ. When the winding up application came before Papier AJ (as he then was) on 30 October 2017 it was further postponed to 13 December 2017 for consideration of the business rescue proceedings and to allow the parties to get their papers in order.

[31] In the interim the concerns of the sub-contractors were taken care of and their claims were settled. Accordingly, by the time the matter came before Papier J again on 13 December 2017, those intervening parties had fallen out of the picture. However, there was a further development.

[32] When the matter came before court on 30 October 2017, it transpired that the applicant in the winding up had failed to give notice to any interested trade union, as it was required to do. Accordingly, when the application was postponed to 13 December 2017, Papier AJ directed that such notice be given. On the resumption of the application on that day the South African Commercial Catering and Allied Workers' Union (SACCAWU) sought, and was granted, leave to intervene on behalf of its members who were employed at the hotel. Evidently, SACCAWU wished to consider its position and to that end Papier J postponed the matter to 4 May 2018, cognisant of the fact that the ejectment application was enrolled for hearing on 29

March 2018. And on 4 May 2018, having been informed by the parties that judgment in this application for ejectment had been reserved, the learned judge once again postponed the winding up application to Friday 25 May 2018. On that day the management company sought a further postponement of the winding up application pending determination of this application and the matter has been postponed to 28 June 2018.

[33] Undeterred by all that which was happening around it, the management company went on the offensive and on 16 October 2017 issued summons out of this court against The Ritz for an order declaring that the purported cancellation of the lease was invalid and claiming damages in excess of R20m for losses allegedly suffered as a consequence of it being unable to open the hotel on time and enjoy the benefits of a good December 2016 season and beyond. It is common cause that this is a claim for unliquidated damages and that there has been an exception noted to the particulars of claim therein which is due to be heard on 18 June 2018. I shall revert to this step later.

[34] The application for intervention in the winding up application by the subcontractors suggests that the refurbishment work was on-going for a large part of 2017 and it is common cause that the hotel only reopened to the public in December 2017. The Ritz upped the ante on 13 November 2017 when it launched the present application for ejectment. These various proceedings are opposed and unresolved but all the while, the management company continues to run the hotel under the name "The Ritz" claiming that it was "*An Iconic Landmark Reinvented*" with the by-line that it

was “*Design Driven. Accessible Luxury*”¹⁶. It has also enjoyed the benefits of the additional Nedbank facility, the repayment costs whereof must be borne by The Ritz, and it pays no rent.

RELIANCE ON THE ACADEMY OF LEARNING DEFENCE.

[35] In the heads of argument Mr Miller articulated the basis of the management company’s reliance on the *Academy of Learning* defence as follows.

“The sums which would otherwise be due, owing and payable to [The Ritz] in terms of clause 17.2 are not due, owing and payable. This is because, as will be more fully explained below, [The Ritz] was the cause of [the management company’s] failure to make these payments.”

[36] Clause 17.2 of the lease is the holding-over clause and is to the following effect –

“17.2 While for any reason or on any grounds the tenant occupies the leased premises and the landlord disputes its right to do so, then, until the dispute is resolved whether by settlement, arbitration litigation, the tenant shall (notwithstanding that the landlord may contend that this lease is no longer in force) continued to pay (without prejudice to its rights) an amount equivalent to the rent provided for in this lease monthly in advance on the first day of each month, and the landlord shall be entitled to accept and recover such payments, and such payments and the acceptance thereof shall be without prejudice to

¹⁶ See www.theritz.co.za

and shall not in any way whatsoever affect the landlord's claim then in dispute. If the dispute is resolved in favour of the landlord, the payments made and received in terms of this clause shall be deemed to be amounts paid by the tenant on account of damages suffered by the landlord by reason of the unlawful occupation or holding over by the tenant."

[37] Later on in the heads of argument this defence is further amplified as follows-

"[The management company] contends that [its] main defence is a complete answer on the merits of this application as to why the lease has not been validly cancelled for the alleged repudiation of the breach of clause 17.2."

[38] In those heads, counsel readily accepted that in order to succeed with the main defence the management company was required to establish the following –

- (i) *"That it was a term of the September 2016 term sheet that [The Ritz] was obliged to make the R 30 million Nedbank Ltd loan available to [the management company] timeously";*
- (ii) *"That [The Ritz] breached the September 2016 term sheet by failing to make the R 30 million Nedbank Ltd loan available to [the management company] timeously";*
- (iii) *"That [The Ritz's] breach of the September 2016 term sheet was causally connected to [the management company's] failure to*

make payment of the sums which would otherwise be due to [The Ritz] in terms of the lease (i.e. rental between November 2016 and June 2017 and in terms of clause 17.2 after the purported cancellation of the lease by The Ritz);” and finally

(iv) *“That [the management company’s] main defence is valid in law.”*

Counsel did not say, however, which term of the term sheet had been breached.

[39] I have quoted in full from counsels’ heads of argument because this is the first time in these proceedings that the *Academy of Learning* defence has been fully pleaded by the management company. A reader of its answering affidavit in these proceedings is referred to the answer in the winding up application and is required to hunt back and forth through reams of paper to fully comprehend the position taken. That this is so is confirmed by the heads of argument filed on behalf of The Ritz herein by Mr C.M. Eloff SC (who appeared with Messer’s G.W.Woodland SC and A.H.Morrissey) in which the reliance upon *Academy of Learning* was anticipated in broad terms only.

[40] I should add at this juncture that The Ritz’s opposition in its heads of argument to the main argument advanced by the management company is that, firstly, the principle does not apply where the inability to perform flows from the impecuniosity of the defaulting party. Secondly, it is submitted that the principle derived from *Academy of Learning* only has application where the breach that allegedly caused the inability to perform is a breach of the same agreement under which the opposing party is seeking to be excused from performing. It will be noted

further that there is no reference in the heads to the nature of the term relied upon (whether express, tacit or implied) by the management company for the defence.

RELIANCE ON A TACIT TERM

[41] In argument Mr Miller was pressed to explain exactly which term of the term sheet was relied on by the management company in respect of the submission made in (i) above. In the result, Mr Miller was driven to submit that the term sheet contained a tacit term that there was an obligation on The Ritz to make available to the management company the proceeds of the additional facility of R30m which The Ritz was obliged to procure from Nedbank, and further that it was obliged to make those funds available by no later than the final drawdown date of the R60m facility or shortly thereafter. Given that it is common cause that the final drawdown date was 23 September 2016, it was submitted the entire additional facility of R30m (which was going to be borrowed by The Ritz from Nedbank and immediately on-lent to the management company) was to be made available to the latter about a week after the term sheet was concluded on 16 September 2016.

[42] The first question that springs to mind in relation to that argument is why such a provision (which is seemingly at odds with what a prudent businessperson like Dr Hurwitz or a reasonable banker like Mr Calmeyer might expect) was not included in the term sheet. Surely, it must further be asked, would such an important term not have come to the mind of the parties and have merited express mention, for instance, by stipulating a date or time period in clause 2.5 thereof, which is set out above? But, I am running ahead of myself and need to revert to basics.

[43] As the judgment of Corbett AJA in Alfred McAlpine¹⁷ reminds us, reference to implied and tacit terms might on the one hand suggest synonymy or on the other, ambiguity. The potential distinction between the two is accordingly of some importance. In this case, counsel expressly chose to rely in argument on a tacit term.

[44] However, before one gets to a discussion of such a term, there is the concluding sub-clause of the term sheet where the parties themselves referred to the nature of the agreement set forth in the term sheet. In clause 16.3 they expressly recorded that –

“This Term Sheet constitutes the sole record of the agreement between the Parties in relation to the subject matter hereof. No Party shall be bound by any express, tacit or implied term, representation, warranty, promise or the like not recorded herein.”

[45] Applying the approach of Rumpff JA in Pan American¹⁸ it is not open to the management company to rely on the importation of the tacit term contended for into the term sheet where the express terms of the term sheet preclude such an importation, particularly in light of the fact that the subject matter of the term sheet expressly included reference in clause 2.5 thereof to the provision of the “Further

¹⁷ Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1974 (3) SA 506 (A) at 531D – 533B

¹⁸ Pan American World Airways Incorporated v SA Fire and Accident Insurance Co. Ltd 1965 (3) SA 150 (A) at 175C. See also Rouwkoop Caterers (Pty) Ltd v Incorporated General Insurance Ltd 1977 (3) SA 941 (C) at 945G; First National Bank of SA Ltd v Transvaal Rugby Union 1997 (3) SA 851 (W) at 864J – 865A; Cash Converters Southern Africa (Pty) Ltd v Rosebud Western Province Franchise (Pty) Ltd 2002 (5) SA 494 (SCA) at [46]; GB Bradfield Christie's Law of Contract in South Africa (7th ed) at 197.

Facility”. That, in my view, is the simple answer to Mr Miller’s argument and any reliance on category (c) of *Academy of Learning* falls down at the first hurdle.

[46] In the event that I am wrong on that point, there is more. Category (c) of *Academy of Learning* requires that the wrongful conduct complained of on the part of The Ritz must be in breach of an express or implied (or tacit) term of the lease agreement itself. It does not help the management company to complain of a breach of the term sheet, which is a separate agreement. To the extent that it was suggested by Mr Miller that we are essentially dealing here with linked agreements, as was the case in *Cash Converters supra*, it is important to note, as Brand JA suggested at [61] of that judgment, that there are in fact two separate agreements which are at play.

[47] In any event, the lease has its own express provisions which preclude the importation of a tacit term therein. As Mr Eloff so succinctly put it, any breach of clause 2.5 of the term sheet was effectively immunized by clauses 30.1 and 30.4 of the lease which was concluded pursuant to the term sheet just a fortnight later.

“30.1 This agreement constitutes the whole agreement between the parties relating to the subject matter hereof.....

30.4 To the extent permissible by law no party shall be bound by any express or implied term, representation, warranty, promise or the like not recorded during, whether it introduced the contract and all within it was negligent or not.”

[48] Turning to the alleged tacit term, it is well established that such a term is not readily inferred by the court¹⁹ and a party seeking to rely thereon draws an *onus* to establish it. That party must plead the term specifically and set out the facts and circumstances upon which it relies for the conclusion of the importation of the term into the agreement²⁰. In motion proceedings such as these a party's affidavits constitute both its pleadings and its evidence and it must plead its cause of action lucidly, logically and intelligently so that its opponent is sufficiently alerted thereto and, importantly, so that the opponent can respond to the evidential basis relied upon by the other side.²¹

[49] In this matter there is not a word in any of the correspondence exchanged prior to litigation commencing nor in the management company's affidavits in either these proceedings or the winding up application, of the existence of or reliance on a tacit term. In fact, in a letter dated 17 March 2017 the management company wrote to The Ritz unambiguously acknowledging its liability for arrear rental in the sum of R3, 95m while stating that its shareholders needed "*sufficient time to make the necessary arrangements for funding*".

[50] It is only in the heads of argument filed on 23 March 2018 that an attempt is made by counsel for the management company to dress up the allegations made by Mr van der Walt in para's 65 to 73 of the answering affidavit in these

¹⁹ Alfred McAlpine, *supra*, at 532H

²⁰ Wilson NO v Voges 1994 (3) SA 130 (A) at 136H – 137D; City of Cape Town (CMC Administration) v Bourbon-Leftly and another NNO 2006 (3) SA 488 (SCA) at [19]

²¹ National Director of Public Prosecutions v Phillips and others 2002 (4) SA 60 (W) at [36]

proceedings in the guise of a tacit term. It is apposite, in the circumstances, to refer to the remarks of Nienaber JA in Wilkins NO ²²:

“Nowhere in the correspondence or in the affidavits filed during the application which preceded the trial is there even a hint of reliance on a tacit term. What was raised was the plaintiff’s alleged fraud. Mention of the alleged tacit term was first made in the plea. The very fact that a term, supposedly so obvious as to speak for itself, escaped the attention of the defendant at the earlier stages of the proceedings is an indication, in my view a strong one, that it was nothing more than an afterthought when it was eventually mooted during the later stages of the proceedings.”

In my considered view it is not open to the management company to rely, in these proceedings, on the tacit term contended for.

[51] Lastly on this point, and for the sake of completeness, I turn to consider the substance of the tacit term relied upon. The point of departure in this regard is to be found in [19] of Bourbon-Leftly ²³.

“It follows that a term cannot be inferred because it would, on the application of the well-known ‘officious bystander’ test have been unreasonable of one of the parties not to agree to it upon the bystander’s suggestion. Nor can it be inferred because it would be convenient and might therefore very well have been incorporated in the

²² At 143C-D

²³ At 494I-495B

*contract if the parties had thought about it at that time. A proposed tacit term can only be imported into a contract if the court is satisfied that the parties would **necessarily** have agreed upon such a term if it had been suggested to them at the time (see eg Alfred Mc Alpine (supra) at 532H-533B...). If the inference is that the response by one of the parties to the bystander's question might have been that he would first like to discuss and consider the suggested term, the importation of the term would not be justified."*

[52] I consider that it would have been highly unlikely that an astute and experienced businessman like Dr Hurwitz would have agreed to advance the additional R60m required by the management company to complete the refurbishment almost immediately after the conclusion of the term sheet. He knew that the money had to be borrowed from Nedbank and he would have known only too well that the bank would require that adequate security be put in place before an advance of that magnitude could be made. It is reasonable to assume a similar level of business acumen on the part of Mr van der Walt. But even if Dr Hurwitz had first needed to discuss the conditions of the facility (and in particular the bank's requirements for security), the term contended for by the management company cannot be tacitly imported into the term sheet.

[53] In the circumstances I conclude that the management company is not entitled to rely on the defence articulated in category (c) of *Academy of Learning*. It has not shown that any conduct on the part of The Ritz constituted a breach of the lease, nor of the term sheet, to the extent that there may have been any residual

obligations therein which were not subsumed in the lease. In the result, I am satisfied that the management company was in default of its obligations to pay the rental due in terms of the lease and The Ritz was entitled to cancel on the basis that it alleged.

LIS PENDENS AND ABUSE OF PROCESS

[54] It is convenient to deal with these special defences jointly given that they are interlinked. The management company further asks this court to dismiss the ejectment application on the basis that the substance thereof is similar, if not identical to, the issues raised in the winding up application. It further alleges that in the action proceedings which it has initiated part of the relief sought is aimed at determining the validity or not of The Ritz's right to cancel the lease. It says further that the application for ejectment, coming as it did so late in the piece, is tantamount to '*forum shopping*', is an abuse of process and should be dismissed on that basis alone.

[55] In argument Mr Miller referred to the judgment in Caesarstone²⁴ in which the principles applicable to a plea of *lis pendens* were restated.

"As the name indicates, a plea of lis alibi pendens is based on the proposition that the dispute (lis) between the parties is being litigated elsewhere and therefore it is inappropriate for it to be litigated in the court in which the plea is raised. The policy underpinning it is that there should be a limit to the extent to which the same issue is litigated between the same parties and that it is desirable that there be finality in litigation. The courts are also concerned to

²⁴ Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC and others 2013 (3) SA 499 (SCA) at [2]

avoid a situation where different courts pronounce on the same issue with the risk that they may reach differing conclusions. It is a plea that has been recognised by our courts for over 100 years.”

[56] Determination of such a dilatory plea by the management company potentially involves a two phase process. Firstly, the court must decide whether it is dealing with a situation in which *“the same plaintiff has instituted action against the same defendant for the same thing arising out of the same cause”*²⁵. Then, if it is persuaded of such similarity, it exercises discretion as to whether to stay the proceedings before it or not. In so doing the court exercises a wide discretion considering questions of convenience and fairness.²⁶

[57] In the particulars of claim in the action the plaintiff asserts that it has suffered damages on two distinct bases. The first is a claim for damages in the amount of R20,498m allegedly arising from The Ritz’s breach of its obligations under the term sheet. The claim in that regard is one for loss of profits and other amounts accruing due to the late opening of the hotel. The second claim, which is brought in the alternative, is for damages for lost profits in the sum of R17,65m. That claim is brought on the assumption that the lease was validly cancelled. The third claim is for a declaratory order that the cancellation of the lease was invalid and that it remains *extant*.

[58] While The Ritz has not yet pleaded or advanced any claim in reconvention in the action, it has noted an exception to the particulars of claim in

²⁵ Hassan and another v Berrange NO 2012 (6) SA 329 (SCA) at [19]

²⁶ Van As v Appollus en andere 1993 (1) SA 606 (C) at 610F

which the legal soundness of the term relied upon by the management company in advancing the *Academy of Learning* argument is challenged, firstly on the basis that the pleading is vague and embarrassing and secondly, that it does not disclose a cause of action. After notice to cure had been given on 13 December 2017 in terms of Rule 23(1) and the pleading remained unamended, The Ritz filed its exception on 16 January 2018. In that pleading it attacked *inter alia* the fact that the management company had not pleaded the nature of the breach allegedly committed by The Ritz which had resulted in the management company's inability to pay rental.²⁷

[59] The first point which emerges from a reading of the particulars of claim is that the management company makes mention therein of what it alleges were the "*material express, alternatively implied, further alternatively tacit terms of the...term sheet*"²⁸. But when it pleads the breach of the term sheet by The Ritz it does so in broad and non-specific terms by alleging that The Ritz breached the term sheet by failing to make the additional finance secured through the further Nedbank loan available to it by no later than the final drawdown date of 23 September 2016. It does not specifically allege, as was argued in these proceedings, that there was a breach of a tacit term in the term sheet.

²⁷ "2. [Paragraph 41 of the particulars of claim] is impermissibly vague inasmuch as the plaintiff does not satisfactorily lead how the defendant's alleged breach caused the plaintiff's failure to pay.

3. In the event, it is unclear whether the plaintiff contends that the defendant's alleged breach caused the plaintiff financial impecuniosity which in turn rendered it unable to pay monies owing under the Lease Agreement, or whenever the plaintiff's failure to pay was caused in some other way."

²⁸ See para 19 of the particulars of claim.

[60] It is said that one of the ways to assess the integrity of the defence of *lis pendens* is to consider whether a plea of *res judicata* might subsequently succeed.²⁹ On that approach I cannot say that disposal of this application in favour of The Ritz will mean the end of the action for damages. Not only has the management company alleged a breach of material and implied terms by The Ritz (as opposed to the breach of a tacit term), it has also alleged that it suffered damages in the event that it is found that The Ritz was entitled to cancel. In the result, I cannot find that we are dealing here with the same plaintiff, the same defendant and the same cause of action. While there is certainly some overlap in respect of the alleged breach of the alleged tacit term, success for The Ritz in this matter will certainly not preclude the management company from proceeding with its claim for damages in the action.

[61] But what of the application to wind up the management company, where the parties are the same? Is the cause of action there the same? In Hassan Zulman JA observed as follows in an analogous context.

“[19]... An order of sequestration is not an ordinary judgment of the court, but is rather a species of arrest or execution, affecting not only the rights of the two litigants but also third parties, and involves the distribution of the insolvent’s property to various creditors, while restricting those creditors’ ordinary remedies and imposing disabilities on the insolvent.”

²⁹ Caesarstone *supra* at [3]

[62] An application for ejectment, on the other hand, is designed to put the landlord back in possession of its property upon termination of the contract of lease to enable it deal therewith as it is entitled to do. It is a claim for specific performance under the contract which is vindictory in nature. The notice of motion in these proceedings is directed only at prosecuting this claim and has nothing to do with the recovery of outstanding rental, as would be an incident of the winding up of the management company.

[63] Applying the *res judicata* test, I am of the view that success for The Ritz in this application for ejectment will not necessarily bring the winding up proceedings to an end. The Ritz, as the petitioning creditor, will still be entitled to pursue its claim for outstanding rental in that matter. In the circumstances, I am of the view that the plea of *lis pendens*, both in respect of the liquidation and the action, falls to be dismissed.

[64] However, if I am wrong in this regard, and the causes of action are considered, broadly speaking, to be the same, I would nevertheless exercise my discretion in favour of The Ritz and refuse to stay these proceedings: it is a relatively simple helping of convenience combined with a large portion of fairness on the side. The landlord has lawfully cancelled its lease with the tenant and is entitled to have its property back, whether contractually or at common law. It has on-going obligations to Nedbank which it must service without the benefit of any income from its hotel premises. Further, it has been kept out of the premises for almost a year while the tenant continues to use them for its own commercial interests without paying any rental (or even a part thereof) to the landlord, while it is essentially saying "*I will only*

move when you pay my damages.” The late Dr Hurwitz (who according to the obituary referred to above was a devout member of the Jewish faith born in Eastern Europe) might well have termed such a stance *chutzpah*³⁰ of the first order.

[65] Moreover, as pointed out above, the refusal of a stay of the ejectment proceedings will not compromise the management company in its claim for damages against The Ritz. Mr Miller readily conceded in argument that that claim was one for unliquidated damages and that no set off could apply in regard thereto and counsel did not seek to suggest that there would be any prejudice to the management company in the pursuit of that claim in the event of it being ejected from the hotel.

[66] Having found that there is no merit in the *lis pendens* argument, there remains little to be said on the abuse of process point. The Ritz has lawfully taken the steps which it is entitled to under the contract (and for that matter at common law) to regain control of its premises. That it did so at a time when the winding up proceedings became mired in applications to intervene (which proceedings are as yet still unresolved) was not unreasonable on its part. Nor can it be criticised for seeking ejectment of its defaulting tenant when it was confronted by a claim for damages which it considered fundamentally flawed in law. Importantly, too, those proceedings will be controlled, not by it but by the management company which will set the pace of the litigation.

[67] The Ritz owns a valuable asset with which it can generate an income and it is being frustrated in that regard by an obstinate tenant whose conduct has the

³⁰ According to the Concise Oxford English Dictionary, Yiddish for “*shameless audacity*”

hall mark of *mala fides*. Finally, success in the liquidation proceedings will not necessarily enable The Ritz to regain occupation of the premises. It will have to deal with a liquidator who might wish to continue with the running of the business. In the circumstances am not persuaded that The Ritz has abused any court process in bringing this application.

CONCLUSION

[68] In the result I am satisfied that the management company falls to be ejected from the premises. The notice of motion does not fix any date or time period for the ejectment. In argument, Mr Eloff accepted that it would be fair to give the management company a month's grace to take account of the fact that it may have guest bookings which would need to be dealt with. I shall accordingly fashion an order which takes account thereof and which is in accordance with the customary practice in this Division. In the event that the parties wish the order to be varied in accordance with their own agreed terms, they may approach the court within one week of this order to that end.

ORDER OF COURT

- A. The Respondent and all persons occupying the premises at Erf 1419, Sea Point East, Cape Town ("the premises"), and the improvements thereon, also known as The Ritz Hotel, are ejected from the premises with effect from midnight on Friday 22 June 2018.

- B. In the event that the Respondent and all persons occupying under it refuse to vacate the premises voluntarily as aforesaid, the Sheriff of this court is hereby authorised to enter the premises on Friday 29 June 2018 and to take all reasonable and necessary steps to eject the occupants therefrom.
- C. The Respondent is to pay the Applicant's costs of this application, including the costs of 2 counsel where so employed.

GAMBLE, J