

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

26/6/2013

CASE NUMBER: 28722/2012

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

In the matter between:

SAVANA PROPERTY (PTY) LTD

26 June 2013

DATE APPLICANT

SIGNATURE

AND

DINO GIDEON FRANCOIS BROWN

FIRST RESPONDENT

JOHAN STEYN

SECOND RESPONDENT

JUDGMENT

TLHAPI J

[1] In this application the applicant seeks an order in the following terms:

- "1. Directing that the first and second respondents make payment to the applicant in the amount of R371 115.27 being part of rental owed by the respondents to the Applicant at date hereof(the one paying the other to be absolved);

2. *Directing that the first respondent make payment of the amount of R1 218 982.28being the remainder of the rental owed by the respondents to the applicant;*
3. *Directing that the first respondent and second respondent make payment of the interest on the amount R371 115.27.....,calculated at the rate of 15.5% from 7 July 2011 to date of payment (the one paying the other to be absolved);*
4. *Directing that the first respondent make payment of the interest on the amount R1 218 982.28, calculated at the rate of 15.5% from 7 July 2011 to date of payment;*
5. *Confirmation that the lease agreement as defined in the founding affidavit and annexed thereto as FA2 has been validly cancelled;*
6. *To the extent necessary, ejecting the respondents together with all those persons who occupy through or under the respondents from the property known as Shop 19, Sandown Eye building,.....;*
7. *Alternatively to prayer 4 above and to the extent necessary, directing that the respondents together with all those persons who occupy through or under the respondents return to the applicant possession of its property being the premises Shop 30, Sandown Eye building.....;*

The application was opposed by the second respondent only. The first

respondent was the managing director of Humatech (Pty) Ltd ('Humatech').

BACKGROUND

- [2] On 1 October 2009 alternatively 13 January 2010, the applicant and Humatech concluded a lease agreement over property owned by the Applicant. The lease was to commence on 15 March 2010 to terminate on 30 April 2015, at a monthly rental of R61 869.00.
- [3] On 25 November 2009 the first and second respondents bound themselves as sureties and co-principal debtors, jointly and severally with Humatech, for the due performance by Humatech of its obligations under the lease. The first respondent bound himself with an unlimited liability while the second respondent limited himself to an amount of R371 115.27.
- [4] The applicant averred that Humatech breached the agreement by failing to pay rent as of June 2010 to date and as at 30 March 2012 when demand was made. An amount of R1 491 461.36 remained owing. Humatech failed to remedy the breach within the period stipulated by the applicant, consequently the applicant gave notice of the cancellation of the lease on 18 April 2012 and, as at that date the outstanding rentals amounted to R1 590 097.55.
- [5] Humatech remained in occupation of the premises despite cancellation of the lease agreement. The applicant contended that they were entitled to evict without giving notice in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 because the premises were used for commercial purposes.

- [6] On 23 April 2012 Humatech's attorneys notified the applicant that summons had been issued against it on 22 March 2012 under case number 1068/12 in the South Gauteng High Court. In that matter Humatech alleged that certain representations were intentionally and or fraudulently made to it by the applicant, which representations induced Humatech to enter into the lease agreement. The alleged misrepresentations in the particulars of claim annexed as 'FA12' were the following:

- “ 31.1 *the building had 5000 square meters of retail space, which would take up two floors of the building and would be known as Retail 1 and Retail 2*
- (b) *the entire 5000 square meters of retail space had been taken up by tenants (most of which were “well-known” tenants) who had concluded valid, binding and enforceable lease agreements with the applicant; and*
- (c) *the applicant had in particular, concluded valid and enforceable lease agreements with a restaurant known as ‘Crystal’ and a lounge known as ‘Soul Lounge’ both of which would commence trading at the same time as Humatech, alternatively, shortly thereafter;”*

- [7] Applicant averred that notification of the action had not been brought to its attention prior to Humatech's letter to them of 23 April 2012. Although the applicant had not pleaded to the action it contended that it denied the alleged representations or any not contained in the agreement and referred instead to paragraph 40 ('the WHOLE AGREEMENT clause') and paragraph 13 ('the

WARRANTIES clause') of the said lease agreement.

- [8] The applicant averred that it was acting *bona fide* when it informed Humatech during the conclusion of the lease agreement that certain lease agreements had been/were concluded with Crystal restaurant and Soul Lounge at the time of negotiating the lease with Humatech. Copies of the agreements with these entities concluded on 10 March 2010 and 8 March 2010 were annexed to the papers, 'FA13' and 'FA14'. The applicant also informed Humatech that a large portion of the retail space had been taken up by tenants and a list was annexed 'FA15'. The applicant contended that Humatech instituted action for the sole reason of preventing the applicant from recovering the rental.
- [9] The second respondent raised two points *in limine*. The first being one of *lis pendens* which related to the action instituted in the South Gauteng High Court. The second respondent averred that the lease agreement was induced by material misrepresentations and/or non-disclosures on the part of the representatives of the applicant and, that these constituted material tacit terms of the lease agreement.
- [10] The second respondent contended this court ought not to entertain this application because 'matters of fact and questions of law' in this matter, were the same as those which the South Gauteng High Court was called upon to adjudicate. The defence of *lis pendens* was meant to prevent the same parties approaching the court on the same issues and of avoiding the possibility of conflicting decisions by different courts. Furthermore, it would be improper in these proceedings to make a finding in a dispute where fraudulent misrepresentation was alleged in the conclusion of the lease agreement

[11] The second point in limine raised was that of non-joinder of Humatech in that Humatech had a direct and substantial interest in as far as prayer 5 of the notice of motion was concerned. The other possibility was that should this court find that the lease agreement was not induced by fraudulent misrepresentation, the applicant could raise a plea of estoppel in the action instituted in the South Gauteng High Court.

[12] In as far as the merits were concerned the second respondent admitted the material express terms as stated in the founding affidavit but amplified the material tacit terms it relied upon, which were also the representations which induced it to enter into the lease agreement, as the following:

- “
- 9.2.1 *two floors of Sandton Eye would consist of a retail shopping environment consisting of shops and restaurants aimed at attracting customers;*
 - 9.2.2 *5000 sq meters of retail space in Sandton Eye would be let to tenants in order to create an interactive shopping experience*
 - 9.2.3 *the premises let to Humatech (t/a Toni & Guy Hairdressin) would be beneficial to a newly-opened business relying on passing trade;*

[13] The second respondent contended that since the lease agreement imposed reciprocal obligations, the applicant having failed to comply with its part of the obligations under the lease, that is, the material tacit terms, the applicant was

not entitled to relief sought against him. The second respondent also disputed the amount owing by Humatech in view of the fact that applicant had called up a guarantee issued by Nedbank on behalf of Humatech for the sum of R237, 230.00. Furthermore, the second respondent contended that the purported cancellation of the lease agreement, '**FA8**' dated 18 April 2012, took place after service of the summons upon the applicant which took place on 22 March 2012 and, that at the time the application was launched, Humatech was no longer trading from the premises.

- [14] The second respondent denied that the lease agreement contained all the terms relied upon; the 'power point presentation' with extracts annexed as '**JS6**' and the 'Sandton Eye Tenant Criteria Document ' annexed as '**JS7**' were key representations made to Humatech that the premises would be in an environment which would 'attract customers by way of passing trade and on which basis the lease agreement was entered into.
- [15] In an e-mail dated 26 November 2009 the applicant informed Humatech that Crystal Restaurant, described as a flagship restaurant was seeking occupancy in a shop next to it's shop. Instead Crystal never opened, nor was its intended space occupied. In as far as Soul Lounge was concerned it conducted evening trade and had closed down by January 2011. The other shops on retail level 2 were not occupied by tenants for purpose of trading.
- [16] E-mails were sent to the applicant about the status of the occupancy of the retail centre and how this was impacting upon the business of Humatech:
 - '**JS11**' dated 8 June 2010 requested a waiver of rental for period

June July 2010, *"the leased premises were not the marketed environment which was promised to us to trade from";*

- **'JS12'** dated 9 July 2010 *"the businesses that were supposed to have been completed by the 20th of May are still not open...this is creating ...an atmosphere where people think the centre is under construction....a completed centre with open shops is the very least we can ask forwe have produced every client in the store, there has not been one walk in';,*
- **'JS13'** dated 10 March 2011 *" the decision to enter into the lease agreement with you was based upon the marketing material and representations made by you at the time. It is particularly important to note that all representations indicated that our hair salon would be in a strictly retail environment which is beneficial to a new business which will be relying on passing trade..... despite all the undertakings and representations you have failed to provide the retail environment as contracted. As a result we are suffering considerable losses and damages".*

[17] The second respondent contended that **'FA15'** confirmed that retail 'level 2' did not consist of a retail shopping environment that would appeal to attract

customers, and the second respondent went on to comment on the tenancies mentioned in 'FA15'.

- [18] The second respondent contended that there were material disputes of fact which could not be resolved on paper and that in as far as these were foreseeable by the applicant, the application had to be dismissed with costs .
- [19] In its reply the applicant averred that it had abandoned the relief sought in prayers 5, 6 and 7 of the notice of motion because Humatech had vacated the premises in June 2012 after the launching of the present application. Prior to that, Humatech was still in occupation, it also was in possession of the keys to the premises and that its movable property was still stored on such premises. The applicant contended that this application was against the respondents in their capacities as sureties and did not relate to the dispute in the South Gauteng High Court, which was a dispute between Humatech and the Applicant and, that matter could be adjudicated independently of each other. Furthermore, that the claim by Humatech was based on an alleged fraudulent misrepresentation which induced it to enter into the lease agreement.
- [20] The applicant contended that, based on such allegations, which were denied, Humatech had to make an election to either rescind or abide by the lease agreement within a reasonable period of time and, that remaining in occupation for the period that it did, constituted an election to abide by the lease agreement thereby precluding it ('Humatech') from obtaining any relief

against the applicant. Furthermore, that this court was not called upon to make any finding on the action instituted by Humatech.

[21] The applicant contended that the lease agreement precluded Humatech from withholding rent. It had 'actively traded' from the premises and enjoyed two years of occupation without paying 'a cent of rental' and that only when it was threatened with legal action did it issue summons and tender to return the premises. In reply to annexures 'JS 11', 'JS12' and 'JS13', the applicant stated that there were no tacit terms alleged; there was no threat to resile from the agreement; there were 'allegations of alleged breaches, which were opposed to allegations that it was induced by fraudulent misrepresentations. While the applicant was given time frames within which to rectify the breach complained about no action as threatened followed.

[22] According to the applicant Humatech was required to pay a deposit on signature of the lease and the guarantee was recalled in accordance with clause 10 of the lease agreement and that the amount claimed as owing were amounts after the guarantee had been called up.

POINTS IN LIMINE

[23] In order to succeed the party raising the defence of *lis pendens* bears the onus to establish the following requirements:

- (i) that there was a pending litigation;
- (ii) between the same parties or their privies;
- (iii) based on the same cause of action;
- (iv) was in respect of the same subject matter;

The requirements of the defence *lis pendens* overlap with those of *res judicata* as was aptly stated in **Nestle (South Africa) (Pty) Ltd v**

Mars Incorporated 2001 (4) SA 315 (SCA):

“[16] *The defence of lis pendens shares features in common with the defence of res judicata because they have a common underlying principle which is that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it, the suit must generally be brought to its conclusion before that tribunal and should not be replicated (lis alibi pendens). By the same token the suit will not be permitted to be revived once it has been brought to its proper conclusion (res judicata). The same suit between the same parties should be brought only once and finally.*

[17] *There is room for the application of that principle only where the same dispute between the same parties is sought to be placed before the same tribunal (or two tribunals with equal competence to end the dispute authoritatively). In the absence of any of those elements there is no potential of duplication of actions.”*

[24] It is in the courts discretion to stay the proceedings pending determination of the matter in the other court. In **Friedrich Kling Gmbh v Continental Jewellery Manufacturers; Guthmann and Wittenauer Gmbh v Continental Jewellery Manufacturers 1993 (3) SA 76 (C)** it was held that:

"Where the defence of lis pendens is raised, the onus is on the plaintiff to satisfy the Court that the second proceedings are not vexatious. The defendant, however, has no right to a stay of action. The Court has a discretion to stay the second proceedings or to allow them to continue. The exercise of this discretion will depend on grounds of convenience and fairness. (my underlining)

- [25] It was submitted for the second respondent that with reference to the facts of this case that the requirements for res judicata, which overlap with those of lis pendens could be relaxed, **Janse van Rensburg & Others N.N.O. v Steenkamp & Another; Janse van Rensburg & Others N.N.O. v Myburg & Others 2010 (1) SA 649 (SCA)** where Heher JA dealt with the issue with reference to the dictum by Botha JA in **Kommissaris van Binnelandse Inkomste v Absa Bank Bpk 1995 (1) SA 653 (A)**)

The relaxation of the requirements came up where the 'application of the principles of *res judicata* in the form of issue estoppel' were being dealt with in **Boshoff v Union Government 1932 TPD 345**, where it was held that the cause of action need not necessarily be the same in both actions. Heher JA referring Botha JA in **Janse van Rensburg** supra at 676 B stated:

"The common law requirements of res judicata were strictly circumscribed, precisely to avoid injustices.....Consideration of fairness are also of decisive importance in the application of issue estoppel in the English case law.....Consequently

the possibility of extending the principles of res judicata to any particular case of issue estoppel must be approached with great circumspection. (my translation)”

In **Smit v Porrit 2008 (6) SA 303 at 307** J Scott JA summarized the position as stated by Botha JA follows:

“.....Where the circumstances justify the relaxation of these requirements, those that remain must be the same (idem actor) and the same issue (aedem quastio) must arise. Broadly stated, the latter involves an enquiry whether an issue of fact or law was an essential element of the judgment on which reliance is placed.....The recognition of the defence in such cases will however require careful scrutiny.....any extension of the defence will be on a case by case basis... Relevant consideration will include questions of equity and fairness, not only to the parties themselves but also to others.”

I do not find reasons to justify the relaxation of the requirements of *res judicata*. Ordinarily the court, in the exercise of its discretion must fully scrutinize the facts and the law in order to determine whether a successful plea of *lis pendens* is justified. A stay of proceedings shall be justified if I find that at any time, one of the parties was vexatious in approaching the court.

- [26] The matter before the South Gauteng High Court is between Humatech (Pty) Limited ('Plaintiff and tenant') and Savana Property (Pty) Ltd ('Defendant and landlord'). This application is between the applicant (Savana (Pty) Ltd) as creditor and Dino Gideon Francois Brown and the second respondent

(Johann Steyn) as sureties. It was submitted by Mr Gouws for the second respondent that the judgement against the principal is binding upon the suretyship because of the accessory obligation created by the suretyship agreement. This in my view loses sight of the true relationship between the landlord, the surety and the tenant. The relationship between the applicant and the respondents is based purely on the surety agreement and in this regard the respondents were not privies/ principals/agents to the lease agreement. In *Firststrand Bank Ltd v Carl Beck Estates (Pty) Ltd* 2009 (3) SA 384 (T) Satchwell J stated:

"[22]...A surety who has bound himself as a surety and co-principal debtor remains a surety whose liability arises wholly from the contract of suretyship. Signing as a suretyship and co-principal debtor does not render a surety liable in any capacity other than a surety who has renounced the benefits of excussion and division. As De Villiers CJ stated "the use of the words does not transform the contract into any other than Suretyship; Maasdorp v Graaf-Reinet Board of Executors (1906 – 1909) 3 Buch A.C 482 at 490; Duplessis v Estate Teich Brothers 1914 CPD 48 at 50; Neon and Cold Cathosde Illuminations (Pty) Ltd v Ephron 1978 (1) SA 463 (A) at 471

- [27] The cause of action in the South Gauteng High Court is based on 'fraudulent alternatively negligent misrepresentations,' which allegedly induced Humatech

to enter into the lease agreement and as a result suffered damages in the sum of R2 228 746.07. This application concerns rentals owed by the respondents in their capacities as sureties to the lease agreement, because, Humatech took occupation of the premises and traded therein for almost two two years without paying a 'single cent of rental'. In this application the court is not called upon to decide the merits of the action by Humatech. However, the allegations of the fraudulent misrepresentations, will be examined in as far as they have relevance to determine whether the action in the South Gauteng High Court was vexatious, having regard to the terms of the lease agreement and the obligations of the respondents arising out of the surety agreement. It is my view therefore that the defence of *lis pendens* should fail.

- [28] In as far as the non-joinder is concerned, applicant has abandoned prayers 5,6 and 7 of the notice of motion for reasons in the replying affidavit. In as far as pursuance thereof is relevant to the defence of *lis pendens*, I have already given reasons why such defence should fail. There is therefore no point in addressing this issue any further.

FRAUDULENT MISREPRESENTATION

- [29] It was common cause that the lease agreement was concluded during October 2009 alternatively January 2010 and that Humatech remained in occupation of the premises till June 2012. It was only in the action issued in March 2012, where it raised in its particulars of claim '*fraudulent, alternatively negligent misrepresentation and non-disclosures*' intended to induce it to conclude the lease agreement.

- [30] The following clauses are relevant to the determination of liability under the lease agreement:

Clause 13:

“WARRRANTIES

The Lessor does not warrant:

13.1 that the premises are or will be fit for the purpose for which they are let; or

13.2

Clause 40 :

“The lease agreement incorporates the entire agreement between the Lessor and the Lessee and no warranties or representations, whether express or implied not recorded herein have been given by the Lessor or any servant or agent of the Lessor to the Lessee or any servant or agent of the Lessee.”

- [31] It was argued for the second respondent that the applicant could not benefit by hiding behind a ‘no representation’ clause where fraud was alleged as having induced the contract. Furthermore, that reliance on the warranty clause was misplaced because it was not the leased premises that constituted the offending issue but the representations prior to the conclusion of the agreement.

- [32] As I see it, the contents of 'JS11', 'JS12' and 'JS13' which were relied upon by the second respondent, do not make mention of any fraudulent misrepresentation made prior to the conclusion of the lease agreement and what is communicated is precisely what is covered by the warranty clause. In 'JS13' dated 10 March 2011, Humatech registered its dissatisfaction with the applicant's undertakings and representations and this relates to the issues raised in 'JS 11' and 'JS12' and concludes by saying: (my underlining)

"We have, therefore, no alternative but to provide you with written notice to rectify the breach within 14 days of the date of this letter failing which we will have no alternative but to consider formal action.

In the event that you have any alternate suggestions or recommendations and would like to convene a meeting, please urgently let us know"

- [33] It does not appear from the papers, that Humatech followed through with the threat to institute proceedings to enforce its rights. Consequently, it is my view that in as far as Humatech was concerned, the 'WHOLE AGREEMENT' and 'WARRANTIES' clauses should find applicability in this matter. In **Hyprop Investments Limited and Another v NSC Carriers and Forwarding CC and Another (2009/12568, 2009/47543) (2010) ZAGPJHC 20 (12 April 2010)**, the court considered the fact that none of the communications between the parties alleged fraudulent misrepresentation that induced conclusion of the lease agreement. At paragraph 27 thereof, the Court went further to determine whether in the light of the circumstances the 'purported rescission' (in this instance it would be the cancellation of the lease agreement) was

legally valid.

[34] At paragraph 33 of **Hyprop supra** Mokgoatlheng J stated:

“It is patent that prior representations, warranty, promises, or the like do not and cannot bind the applicants, consequently, whatever representations applicants representatives made the second respondent as alleged, such are extraneous the lease agreement, and are not binding on the applicants, consequently, same cannot entitle the first respondent to lawfully rescind the lease agreement”

[35] In responding to the allegations in the summons the applicant contended that its representations on tenancy and the calibre thereof was supported by 'FA13' 'FA14' and 'FA15' and that such representations when made, were *bona fide*. The second respondent failed on the papers to elaborate why the representations in as far as the presentation documents 'JS6' and 'JS7' were concerned, were incorrect, fraudulent or negligent in nature, and made to mislead Humatech to conclude the lease agreement. In my view more than just a bold statement was required regarding Crystal Restaurant to show that representations about the flagship restaurant made in a letter of 26 November 2009 were fraudulent. A concluded lease agreement was annexed and in my view, there could have been other reasons not related to Humatech's allegations why it never took occupancy, the same can be said about Soul Lounge and no confirmatory affidavit from these entities was attached, at least to confirm the fraudulent misrepresentation allegation complained about. The most important factor is that despite problems experienced by Humatech,

which were communicated to the applicant, Humatech took occupation, remained on the premises and traded for a period of approximately two years without paying rent and without instituting the threatened legal proceedings. Furthermore there is in my view no reason why the applicant should be required to file a counterclaim in the action to obtain payment that was due in terms of the surety agreement.

- [36] I agree with the submission by Mr Nowitz for the applicant that on the papers there was no justification why Humatech should have enjoyed use of trading from the premises without paying rent and no reason why the sureties should as a result have been absolved of their obligation towards the applicant, specifically so because the lease agreement provided that rentals may not be withheld as provided in clause 27. Furthermore, that there was no justification in Humatech continuing to occupy the premises and trading from them, while the applicant suffered loss of income and consequential damages from failure to pay monthly rentals; **Port Wild Props 12 (Pty) Ltd v Real Time Investments 384 CC South Gauteng High Court case number A504/108); Hyprop** supra paragraphs 52, 53 and 54.

In my view, by not availing themselves to the remedies available to address any of the complaints, and by not instituting action Humatech made an election to abide by the contract.

- [37] Having regard to the above I am of the view that no *bona fide* factual disputes have arisen justifying dismissal of the application or a referral thereof to oral

evidence.

[38] In the result the following order is given:

1. The first and second respondent are directed to make payment to the applicant in the amount of R371 115.27 (three hundred and seventy one thousand one hundred and fifteen rand and twenty seven cents) being part of the rental owed by the Respondents to the Applicant at date hereof, the one paying the other to be absolved;
2. The first and second respondent are directed to make payment of interest on the amount of R371 115.27 (three hundred and seventy one thousand one hundred and fifteen rand and twenty seven cents) calculated at the rate of 15.5% from 7 July 2011 to date of payment, the one paying the other to be absolved;
3. The second respondent is ordered to pay costs of this application;



TLHAPI V. V

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON : 11 FEBRUARY 2013
JUDGMENT RESERVED : 13 FEBRUARY 2013
ATTORNEYS FOR THE APPLICANT : SCHINDLERS ATT.
c/o FRIEDLAND HART
SOLOMON & NICOLSON