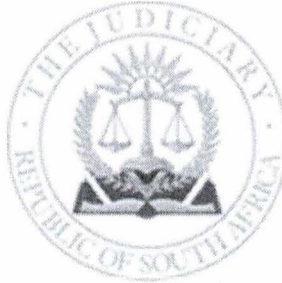


REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NUMBER: 31674/18

DELETE WHICHEVER IS NOT APPLICABLE

1.REPORTABLE: NO

2.OF INTEREST TO OTHER JUDGES: NO

3.REVISED: NO

A handwritten signature in black ink, appearing to read "W. Dippenaar", is written over the printed name.

Judge Dippenaar

In the matter between:

GREG CURTIS

PLAINTIFF

AND

JUSTIN SPENCER PATRICK DOWDLE

DEFENDANT

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 11h30 on the 09th of January 2023.

DIPPENAAR J:

[1] This is an action in which the genesis of the dispute between the parties is a written fixed term lease agreement (the "lease agreement") concluded during July 2010 between the plaintiff, through the agency of Pam Golding Properties ("PGP") and High Orbit (Pty) Ltd, later known as Fundi CRM (Pty) Ltd (the "company"), represented by the defendant. The lease agreement related to an apartment owned by the plaintiff in Cape Town, which was occupied by a Mr Greg Daus from August 2010 until August 2015.

[2] The plaintiff instituted three claims against the defendant. A primary claim, claim A, aimed at obtaining payment of an amount of R282 106 as specific performance of a written agreement concluded between the plaintiff and the defendant on 12 and 13 March 2015. In the alternative, if that claim was dismissed, 2 additional claims. Claim B, based on s 424 of the Companies Act, 1973 alternatively the common law, seeking an order holding the defendant liable for the rental debt incurred by the company and claim C, declaring the defendant a delinquent director in terms of s 162(2) of the Companies Act, 2008, together with ancillary relief.

[3] Two witnesses testified at the trial, to wit the plaintiff and the defendant. Neither party called Mr Daus as a witness. The principles pertaining to the evaluation of factual disputes where there are two irreconcilable versions are well established and articulated in cases such as *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie*

*and Others*¹ and it is not necessary to repeat them. Probabilities are established by drawing inferences which are consistent with the proven facts.² Whilst I agree with the plaintiff that the defendant's evidence was in certain respects unsatisfactory and unreliable, consideration must be had to the facts in order to determine the probabilities. The probabilities contended for by the plaintiff in various respects relied on assumptions and inferences rather than primary facts, which were proffered as support the conclusions sought to be drawn.

[4] The background facts are not contentious. The lease agreement was signed by the defendant, the sole director of the company. The initial period of the written lease agreement was 12 months, commencing on 1 August 2010 and terminating on 31 July 2011. The lease agreement was not formally extended in writing. The last rental payment received by the plaintiff was during October 2012. The plaintiff during late 2014 became aware that rental for the apartment had only been paid until October 2012.

[5] During April 2016, the plaintiff instituted action proceedings against the company based on the lease agreement and in September 2016 obtained a default judgment in an amount of R507 106 pertaining to arrear rentals during Mr Daus' occupation of the apartment. Pursuant to enquiry proceedings in terms of s 65A of the Magistrates Court Act held during September 2017, the plaintiff discovered that the company had not traded since 2012 and had no assets or income to levy execution against and no financial means to pay the judgment debt. The present action was instituted against the defendant during August 2018.

[6] Against this backdrop I turn to consider the various claims. Claim A is aimed at enforcement of an agreement concluded between the plaintiff and the defendant personally, constituted by email correspondence between them on 12 March 2015 and 13

¹ 2003 (1) SA 11 (SCA) para [5] 14I-15E

² *Gorven v Skidmore* 1952 (1) SA 732 (N) at 734C-D

March 2015 and the plaintiff's acceptance of an offer made by the defendant to settle the arrear rentals at the rate of R45 000 per month.

[7] The plaintiff's case as pleaded was predicated on an acknowledged liability of the company for the outstanding rental of R438 106 which the defendant personally undertook to repay at R45 000 per month from 1 April 2015 in his email of 12 March 2015. It was further averred that the plaintiff terminated the lease agreement with effect from 31 August 2015. Reliance was placed on a schedule of payments due which the defendant should have repaid by March 2016. It was averred that the defendant breached the agreement and payment was claimed of an amount of R282 106, due by the defendant as at 1 September 2015.

[8] In his plea, the defendant raised prescription, denied conclusion of the agreement and any acknowledgment of liability by the company and disputed that he had any intention of creating any contractual obligations for himself in terms of the correspondence exchanged and averred that he was acting as a conduit between the plaintiff and Mr Daus and relayed Mr Daus' sentiments to the plaintiff. He further denied the extension of the lease agreement and pleaded that Mr Daus in his personal capacity concluded a lease agreement with the plaintiff subsequent to the expiry of the fixed term lease agreement and remained in occupation of the apartment in his personal capacity.

[9] In his evidence in chief and during cross examination, the plaintiff conceded that the agreement relied on was not concluded between himself and the defendant personally. His evidence was that at the time he understood and appreciated that the defendant was not accepting personal liability and that he believed the offer was made on behalf of the company.

[10] That concession is fortified by the email correspondence between the parties emanating from the plaintiff on 26 April 2015, 18 May 2015 and 30 June 2015, which evidenced that the plaintiff expected to receive payment from the company rather than from the defendant. It is further fortified by the fact that the plaintiff first instituted an action

against the company, rather than the defendant. In those proceedings, the plaintiff's case was based on the lease agreement between the plaintiff and the company and not on the alleged agreement concluded during March 2015.

[11] In argument, it was accepted that the plaintiff's concession was dispositive of this claim, which must fail as it became common cause that no agreement was concluded with the defendant personally. In light of the plaintiff's concession, it is not necessary to make any other findings in relation to this claim. Insofar as the agreement and the said email correspondence are relevant to claim B, I return thereto later.

[12] In claim B, the plaintiff sought an order that the defendant is liable to him for the rental liability of the company under s 424 of the Companies Act, 1973 and the common law. His case as pleaded was predicated on the lease agreement, which the plaintiff averred was extended explicitly and in the alternative tacitly or impliedly, by agreement between him and the company, represented by Mr Daus, during August 2011, August 2012 and August 2013 respectively. Reliance was placed on email correspondence emanating from Mr Daus dated 1 August 2011 and 19 August 2013 and an oral agreement with Mr Daus during August 2012.

[13] Reliance was placed on the defendant: (i) failing to inform the plaintiff in 2012 or thereafter that the company had ceased trading, (ii) allowing Mr Daus to remain in occupation, (iii) giving the plaintiff the impression that the company was still conducting business and (iv) negotiating and agreeing the March 2015 agreement knowing that the company had been deregistered on 16 January 2015 and would not be able to comply with the March 2015 agreement and make the payments as they fell due.

[14] On this basis it was alleged that the defendant's actions were reckless or grossly negligent, were fraudulent, constituted an unconscionable abuse of the company's separate legal personality, were to the prejudice of the plaintiff and caused the plaintiff to suffer damages in the amount of R507 106.

[15] The defendant's defence was that the lease agreement was a fixed term lease agreement which was never extended or renewed by the company as required by the express terms of the lease agreement. Whilst it was not disputed that the plaintiff may have believed that Mr Daus was acting on behalf of the company in extending the lease agreement, the defendant disputed that Mr Daus had the authority to do so. He further disputed that the plaintiff was a creditor of the company and that his conduct was reckless or grossly negligent.

[16] In response to the challenge to Mr Daus' authority, the plaintiff raised an estoppel aimed at preventing the defendant from disputing the authority of Mr Daus.

[17] Pursuant to a special plea of prescription raised by the defendant, the plaintiff in argument contended for a lower amount of R282 106, rather than the R507 106 claimed in the particulars of claim.

[18] An apposite starting point is s 424 of the Companies Act, 1973, which in relevant part provides:

"(1) When it appears, whether it be in winding up judicial management or otherwise, that any business of the company was or is being carried on recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the court may, on the application of the Master, the liquidator, the judicial manager, any creditor or member or contributory of the company declare that any person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct."

[19] The primary issues which must be determined are thus first, whether the plaintiff is a creditor of the company and second, whether the defendant conducted the business of the company, or abused its separate legal personality in such a manner that he should be held liable for its debts.

(i) Is the plaintiff a creditor of the company?

[20] The plaintiff relied on the default judgment obtained against the company, the alleged extensions of the lease agreement and the alleged acknowledgment of liability on the part of the company in the defendant's email of 12 March 2015.

[21] I agree with the defendant that the plaintiff cannot rely on the default judgment obtained by him against the company during September 2016 to establish that he is a creditor of the company. That judgment is null and void, given that the company was finally deregistered in August 2016, putting an end to its existence³.

[22] It must thus be considered whether the plaintiff had a contract with the company based on his dealings with Mr Daus. Given the defendant's denial of Mr Daus' authority to bind the company, it must be determined whether Mr Daus had such authority and, if not, whether the defendant should be estopped from denying his authority.

[23] It was common cause between the parties that there was no communication between them during the alleged extension periods and the defendant was not involved in any extension of the lease agreement and that all communications on this issue were between the plaintiff and Mr Daus.

[24] It was further undisputed that the lease agreement was not extended in terms of the express provisions of the written lease agreement, including clauses 1.1, 1.2, which required the company to timeously exercise an option in writing and any extension to be in writing and signed by both parties.

³ Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd 2015 (4) SA 34 (SCA) para [15]

[25] In his pleadings, the plaintiff expressly relied on a renewal or extension of the lease agreement. If the plaintiff is held strictly to his pleadings, given that the pleadings delineate the issues and the nature of the dispute between the parties⁴, that is the end of the issue.

[26] However, even if a benevolent interpretation of the plaintiff's pleadings were to be adopted and it is accepted that the plaintiff is relying on a tacit relocation of the lease, there are certain requirements which must be met and it must be unequivocally inferred from the conduct of the lessor and the lessee that a renewed or a new lease validly came into existence⁵. The plaintiff would further have to establish that Mr Daus had the necessary authority to act on behalf of the company or succeed in the estoppel pleaded.

[27] The plaintiff contended that Mr Daus had actual authority to extend the lease during August 2011 and ostensible authority to do so thereafter. Reliance was placed on the fact that Mr Daus was a senior employee of the company, was left to deal with the plaintiff in relation to issues pertaining to the lease and remained in occupation of the apartment after the expiry of the fixed term lease. Reliance was further placed on the fact that the company continued to pay the rentals, electronic payment having been made by the defendant, after the expiry of the initial lease period.

[28] According to the plaintiff's banking records and the schedule prepared by him from those records, payments were made from the company's account until November 2011 whereafter payments were made notated "direct debit" up to October 2012, whereafter no further payments were received. The plaintiff could not establish that the items notated 'direct debits' originated from the company. On the defendant's version, those payments were not made by the company.

[29] Significantly, those records were not available to the plaintiff at the time. According to the plaintiff, he had administrative issues with his banker and only during late 2014

⁴ *Damons v City of Cape Town* (CCT 278/20) [2022] ZACC 13; 2022 (10) BCLR1202 (CC) paras [117]-[118]

⁵ *Nedcor Bank Ltd v Withinshaw Properties (Pty) Ltd* 2002 (6) SA 236 (C)

received statements and became aware that the rental of the apartment had not been paid from November 2012. On his own version, he took no steps to resolve these administrative issues before then as he was focused on more pressing matters. I agree with the defendant that in failing to resolve the administrative issues with his bankers timeously, the plaintiff did not act as a rational prudent landlord would do in the circumstances. Moreover, no evidence was led by the plaintiff pertaining to PGP's involvement or lack thereof relating to the lease agreement after the termination of the fixed term period of the lease agreement.

[30] For purposes of the estoppel, the representation pleaded by plaintiff was that as the defendant did not inform him that Mr Daus was no longer employed by the company or entitled to occupy the apartment through the company, Mr Daus was still the authorised agent of the company and was still occupying it on behalf of the company. His case was that the defendant on behalf of the company represented that Mr Daus was the company's chief information architect and any reasonable person would have believed Mr Daus to be a senior member of company. Mr Daus would be the person occupying the apartment on behalf of company and after conclusion of the lease agreement, Mr Daus had the authority to deal with the plaintiff on other aspects of the lease.

[31] It was argued that any reasonable person would have foreseen that the plaintiff may believe that Mr Daus had the necessary authority to conclude an agreement to renew the lease with the plaintiff. It was argued that even accepting the defendant's evidence that the company's relationship with Mr Daus terminated in 2012, the defendant should be estopped from denying the further extensions of the lease negotiated by Mr Daus for the same reasons including that Mr Daus had actual authority when he concluded the first extension of the lease in August 2011.

[32] The objective evidence however does not support the plaintiff's case. On the plaintiff's own version, PGP, his duly appointed agent was mandated to establish issues such as who had the authority to sign the lease agreement on behalf of the company. The plaintiff relied on the application to conclude the lease agreement. That document

reflected that an employee, Mr Daus, the chief information architect, was to occupy the apartment. In the lease agreement, it was however stated as a special condition that one Tamara Joubert would be occupying the apartment. The said application did not in its terms reflect that Mr Daus had any authority to bind the company.

[33] Part of the documentation accompanying the said application, was a letter on the letterhead of the company reflecting that the defendant was the person who had the authority to conclude the lease agreement. Mr Daus was not mentioned in the document. Company records were further provided, reflecting that the defendant was the sole director of the company.

[34] Although Mr Daus had selected the apartment, the lease agreement was sent to the defendant for signature and it was the defendant who signed the lease agreement. The available documentation thus clearly indicated that it was the defendant who had the authority to represent the company.

[35] The plaintiff's version was that he never had any contact with the defendant during the existence of the lease between 2010 and 2011 and had obtained Mr Daus' details from PGP. There was no evidence that the defendant represented to the plaintiff or instructed the plaintiff that Mr Daus was to be contacted regarding formal issues pertaining to the lease agreement. The plaintiff in evidence conceded that he and Mr Daus discussed mundane issues pertaining to the lease such as water damage and the like. On his version, the plaintiff at all times believed that Mr Daus was authorised to represent the company.

[36] It is trite that the mere fact that a lessee remains in occupation of the leased premises after the expiration of the terms of the lease does not mean that there is a tacit renewal of the lease. Similarly, the impression of one of the parties that there has been a

tacit relocation is not sufficient to bring a new lease into existence and there must be compliance with the requirements for an implied or tacit agreement.⁶

[37] It is further well established that where one party to a contract purports to act in a representative capacity, but in fact has no authority to do so, the person whom such party purports to represent is not bound by the contract simply because the unauthorised party claimed to be authorised. The principal will however be bound by the contract if its own conduct justified the other party's belief that authority existed⁷.

[38] Considering the facts, it cannot be concluded that Mr Daus either had actual or ostensible authority to bind the company. The available documentation clearly indicated that it was the defendant and not Mr Daus, who had authority to bind the company in relation to the lease. Given that there was no contact between the plaintiff and the defendant between July 2010 and March 2015, it cannot be concluded that the defendant's conduct justified any belief on the part of the plaintiff that Mr Daus had authority.

[39] The fact that certain payments were made by the company after the termination of the initial lease agreement, does not assist the plaintiff, given that at the time of the alleged extension or tacit relocation of the lease, the plaintiff did not have his bank statements and was not aware of who was making the payments or what the circumstances were.

[40] The inference sought to be drawn by the plaintiff that as the defendant only advised Mr Daus that he would have to pay for his own accommodation late in 2011, it must be accepted that Mr Daus had actual authority at the time he allegedly extended the lease in August 2011, does not bear scrutiny and is not supported by the primary facts.

⁶ Muller v Pam Snyman Eiendomsconsultante (Edms) Bpk [2000] 4 All SA 412 (C) at 417g-j

⁷ South African Eagle Insurance Co Ltd v NBS Bank Ltd 2002 (1) SA 560 (SCA) para [27]

[41] Considering the facts, the plaintiff should have made enquiries into whether Mr Daus had authority to bind the company. There was no evidence presented that he did so. In those circumstances, the plaintiff cannot hold the company bound on the basis of actual or ostensible authority⁸.

[42] The requirements for estoppel by representation are well established.⁹ In sum, they are: a representation made by a principal, not an agent, by words or conduct, including silence or inaction in such a way that the principal would expect someone to rely on it; reasonable reliance on the representation by the party relying on the representation and consequent prejudice to that party. The representation must be one of an existing fact¹⁰. Negligence is usually a requirement¹¹. The onus is on the plaintiff who raised the estoppel¹².

[43] The test in relation to a representation made by conduct is whether the representor should reasonably have expected that the representee might be misled by his conduct and if the representee acted reasonably in construing the representation in the sense in which the representee did¹³.

[44] It is apposite to refer to *Africast v Pangbourne Properties Ltd*¹⁴, wherein the relevant principles were enunciated thus:

" [44] Thus, so it is argued on defendant's behalf there was no "deception" that misled the plaintiff, and without a deception and reasonableness in the estoppel asserter's reliance on the deception, there can be no room for estoppel to be invoked (see *Pangbourne Properties Ltd v Basinview Properties (Pty) Ltd* (*supra*) at paragraphs [16]–[17]; and *Rabie & Sonnekus The Law of Estoppel in South Africa, Butterworths* (2 ed, 2000) at 63 paragraph 5.1, where the authors state: "In general, the premise applicable in all circumstances

⁸ *Leites v Contemporary Refrigeration (Pty) Ltd and Sonpoll Investments (Pty) Ltd* 1968 (1) SA 58 (AD)

⁹ *RAF v Mothupi* 2000 (4) SA 38 (SCA); *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) para [49], *Pangbourne Properties Limited v Basinview* (381/10) [2011] ZASCA 20 (17 March 2011) para [15]

¹⁰ *Alfred Mc Alpine & Son (Pty) Ltd v Tvl Provincial Administration* 1977 (4) SA 310 (T) 335A-B

¹¹ *Stellenbosch Farmers Winery Ltd v Vlachos t/a Liquor Den* 2001 (3) SA 597 (SCA)

¹² *Blackie Swart Argitekte v Van Heerden* 1986 (1) SA 249 (A) at 260

¹³ *B7B Hardware Distributors (Pty) Ltd v Administrator, Cape* 1989 (1) SA 957 (A)

¹⁴ *Africast v Pangbourne Properties Ltd* [2013] 2 All SA 574 (GSJ)

is that the estoppel assertor can only successfully rely on estoppel if the reasonable person in the street, in the position of the estoppel assertor would also have been misled by the conduct on which the estoppel is founded. To determine whether the reasonable person would have been misled, it might be helpful to answer the applicable question in the negative: The reasonable person would have been misled if it can be ascertained that the circumstances were such that they would have put the reasonable person on his guard and compelled him to ask more questions before accepting the allegations or representations of the representor at face value. If in reality the estoppel assertor had under the same circumstances neglected to ask for further explanation or had not been on his guard due to the fact that he tends to be more gullible than reasonable person would have been, then the conduct of the representor is not to objectively be classified as unreasonable or wrongful, and the reliance on estoppel must fail. It has already been emphasised that the doctrine of estoppel cannot be misused to protect the naïve or gullible against his own stupidity. Even the man in the street must take cognisance of facts that may have a bearing on his legal position. Formulated otherwise, this qualification is also referred to when it is said that the reliance on representation must be reasonable. The person who bases an estoppel on a representation made to him, must establish that he reasonably understood the representation in the sense contended for by him. It follows that he has to prove that his reliance on the representation was reasonable. He will therefore have to show that he did not know that the representation was untrue or incorrect, that he did not have information which put him upon enquiry, or, if he did, that he exercised reasonable care and diligence to learn the truth, and, generally that he was not misled by a lack of reasonable care on his part" (see too LAWSA, Volume 9 (2 ed) (2005); Estoppel (Rabie & Daniels) at paragraph 657).

[45] Moreover, in my view, it seems plain that a "misrepresentation" that qualifies to be a misrepresentation for the purposes of an estoppel must be a misrepresentation of a fact, ie the estoppel denier must be shown to have initially told or insinuated by conduct, a falsehood or induced a reasonable belief in a falsehood. In this case, no misrepresentation of a fact is relied upon, ie that the suspensive condition was met. The defendant's "belief" that it had a binding agreement, as evidenced by its common cause conduct, is invoked as the "misrepresentation". This, in my view, is not good enough. An estoppel cannot be raised against a party who says that it thought it had a contract but, it turns out that, in law, it was wrong to think so. In *Hauptfleisch v Caledon Divisional Council* 1963 (4) SA 53 (C) at 56H–57D it was held: "...The following statement of the doctrine of estoppel by Spencer Bower Estoppel by Representation para. 15, was cited, apparently with approval, by WATERMEYER, J.A. (as he then was) in *Union Government v Vianini Ferro Concrete Pipes (Pty.) Ltd.*, supra at p. 49: 'Where one person (the representor) has made a representation to another person (the representee) in words, or by acts and conduct, or (being under a duty to the representee to speak or act) by silence or inaction, with the intention (actual or presumptive), and with the result, of inducing the representee on the faith of such representation to alter his position to his detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence,

any averment substantially at variance with his former representation, if the representee at the proper time and in the proper manner objects thereto.'

In amplification of this statement it may be emphasized that the representation must relate to a statement of an existing fact (see Baumann v Thomas, supra at p. 436; Spencer Bower, pp. 39–48; Halsbury, 3rd ed. vol. 15 pp. 224–5) and that a mere statement as to, for instance, a future intention will not found an estoppel (see Kelsen v Imperial Tobacco Co. Ltd., 1957 (1) A.E.R. 343). The representation may be made expressly or by conduct. It must be made with the intention that it should be acted upon in the manner in which it was acted upon or the conduct of the representor must be such as to lead a reasonable man to take the representation to be true and believe that it was meant that he should act upon it in that manner (see Halsbury, 3rd ed., vol. 15 p. 228; Service Motor Supplies (1946) (Pty) Ltd v Hyper Investments (Pty) Ltd., 1961 (4) SA 842 (AD) at p. 849). ... If he knows, or believes, that the real facts are not as stated in the representation, he cannot be heard to say that he was induced to act to his prejudice on the faith of the representation. (Spencer Bower, paras. 137, 138, 199; Halsbury, 3rd ed. vol. 15 pp. 229–30; cf. Angehrn & Piel v Federal Cold Storage Co. Ltd., 1908 T.S. 761)" (also see Simpson v Selfmed Medical Scheme 1992 (1) SA 855 (C) at 866D)".

[45] It is further well established that if a person has knowledge of the true facts, he cannot be said to have been misled by the representation¹⁵. In this context it was undisputed that the plaintiff was aware of the documentation which evidenced that it was the defendant who was authorised to conclude the lease.

[46] The defendant argued that the doctrine of estoppel does not avail the plaintiff because there was no legally recognisable representation made and even if there was, the plaintiff's reliance thereon was not reasonable or justified in the circumstances. He further argued that the representation was not the proximate cause of the plaintiff's loss but rather that it was his own negligence. There is merit in this argument.

[47] Considering all the facts, it cannot be concluded that there was any misrepresentation made at the time of the alleged extensions by the defendant that Mr

¹⁵ Hauptfleisch v Caledon Divisional Council 1963 (4) SA 53 (C)

Daus had authority to bind the company. Whatever representations may have been made by Mr Daus, if there were any, would be irrelevant.

[48] The express terms of the lease agreement further militate against any representations of authority¹⁶. The fact that the documentation created the impression that Mr Daus was a senior employee of the company, rather than an independent contractor as testified by the defendant, takes the matter no further. It was further undisputed that there was no contact between the plaintiff and the defendant during the existence of the lease and until March 2015, well after the alleged extensions occurred.

[49] In relation to reasonable reliance on the representation, plaintiff must illustrate that he was not misled by a lack of general care on his part¹⁷. In my view, the plaintiff has failed to do so and has not illustrated that his reliance on the belief that Mr Daus had the requisite authority was reasonable.

[50] Moreover, the alleged representations were not shown to be the proximate cause of the plaintiff's loss. Rather the evidence illustrated that the proximate cause was the plaintiff's own negligence in not considering the available documentation, failing to establish whether Mr Daus had any authority and or the failure to receive rental payments timeously and in not pursuing any remedies against Mr Daus¹⁸.

[51] The plaintiff's argument is in material respects predicated on inferential reasoning unsupported by primary facts. The primary facts fall far short of the mark in proving the requirements of estoppel. I conclude that the plaintiff has failed to establish the requirements of estoppel.

[52] It follows that the plaintiff has not established any authority on the part of Mr Daus to extend the lease agreement and has not established a tacit relocation of the lease with

¹⁶ Clauses 12.1 and 12.13

¹⁷ PJ Rabie, *The Law of Estoppel in SA* p54

¹⁸ *Big Dutchman (South Africa) v Barclays National Bank* 1979 (3) SA 267 (WLD)

the company. In addition, the plaintiff has not established that there was a valid extension of the lease agreement.

[53] On the facts, it cannot be concluded that there was any valid extension or renewal of the lease and no written and signed extension was produced.

[54] A failure by the company to exercise its right of renewal within the requisite notice period in terms of the lease agreement, resulted in its termination due to effluxion of time in terms of the clear terms of the lease agreement ¹⁹.

[55] It must next be considered whether the alleged agreement entered into with the defendant in March 2015, relied on by the plaintiff in claim A, established a contract with the company and thus the plaintiff's *locus standi* as creditor of the company.

[56] It was common cause that pursuant to certain discussions between the plaintiff and the defendant in March 2015 the defendant wrote to the plaintiff from a company email address and offered to pay him R45 000 per month until the arrears owing on the apartment was extinguished. The plaintiff accepted the offer. There is a dispute as the plaintiff believed that he was contracting with the company whereas the defendant contended that he was making the offer on behalf of Mr Daus.

[57] On a contextual, purposive and grammatical²⁰ reading of the email from the defendant to the plaintiff dated 12 March 2015, in context of the email correspondence between the parties, it cannot be concluded that the defendant acknowledged responsibility for the rentals due on behalf of either himself or the company.

¹⁹ Baedica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others 2020 (5) SA 247 (CC) para

²⁰ Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) paras [18]-[19] at 603E-605B

[58] It was not disputed that the defendant was not aware of any arrears when the plaintiff contacted him regarding the issue. The defendant's email records that according to the company's records, the lease agreement was a fixed term contract which was never extended and there was no automatic renewal in the agreement. The email further stated that at the end of the rental period Mr Daus stayed in his personal capacity and the plaintiff was requested to confirm whether that understanding is correct or not. The email further drew a distinction between company obligations and private obligations.

[59] The plaintiff's version that he believed the defendant was making the offer on behalf of the company is supported by the fact that action was initially instituted against the company. The plaintiff did not however seek to clarify the issue with the defendant but simply made an assumption. The plaintiff further never disputed the defendant's averment in the email that after the expiry of the fixed term lease, Mr Daus occupied the apartment in his personal capacity.

[60] In the plaintiff's email correspondence dated 26 July 2015, 18 August 2015 and 25 August 2015, he addressed both the defendant and Mr Daus, requesting proposals on a settlement or a repayment plan. That correspondence does not evidence any attempt by the plaintiff to enforce what he alleges was agreed pursuant to the correspondence of 12 and 13 March 2015. Rather, it evidences attempts to elicit further proposals to settle the disputes. The plaintiff's subsequent conduct as evidenced by the email correspondence exchanged between the parties, belied his purported belief that an agreement had been concluded, given his repeated requests for proposals as to how the indebtedness would be settled. From the evidence and the plaintiff's conduct it appears that he accepted that the email correspondence of 12 and 13 March 2015 did not constitute "a settlement agreement" as alleged and did not resolve the disputes between the parties.

[61] It cannot be concluded on the facts that there was any actual agreement concluded or that there was any admission of the company's liability to the plaintiff. The plaintiff's evidence is characterised by assumption rather than fact. I am further not

persuaded that the plaintiff has established the necessary *animus contrahendi* to conclude a settlement agreement on the part of the defendant or the company.

[62] In argument, reliance was further placed by the plaintiff on the doctrine of quasi mutual assent on the basis that the contract is binding on the person denying the contract if the other party was reasonably misled. Reliance was further placed on the doctrine of an undisclosed principle, based on the defendant failing to disclose that he was acting as agent of Daus. In my view, these arguments do not bear scrutiny and the plaintiff has failed to establish the necessary requirements.

[63] Seen objectively, it cannot be concluded that the plaintiff was misled by any failure on the part of the defendant to disclose that he was acting as agent of Mr Daus in making the offer. The defendant's email was cast in broad terms and it was incumbent on a prudent businessman in the position of the plaintiff, to seek clarification as to who was offering to make the payments. The uncertainty contained in the said email is best illustrated by the plaintiff's change of stance in relation to claim A.

[64] I conclude that the plaintiff has failed to establish any lease agreement between him and the company after the expiry of the fixed term lease agreement and has similarly failed to establish any agreement during March 2015 in terms of which the company's liability to the plaintiff was acknowledged.

[65] It follows that the plaintiff has failed to establish a debt by the company and that he is a creditor of the company.

[66] That is dispositive of the plaintiff's claim under s 424 of the Companies Act, 1973, which must fail.

(ii) Has the defendant conducted the business of the company or abuse its separate legal personality in such a manner that he should be held liable for its debts?

[67] For the sake of completeness, I shall consider this issue as it also has a bearing on the delinquency relief sought in claim C. The plaintiff in argument conceded that he did not establish any fraudulent trading and focused on gross negligence and recklessness.

[68] The plaintiff's case in sum was predicated on the contentions that the defendant should have notified him in 2012 that Mr Daus was going to occupy the apartment in his personal capacity and that the defendant acted in bad faith in relation to the March 2015 agreement and should have advised him that the company had stopped trading in 2012, whilst fully aware of the fact that the company was unable to pay its liabilities.

[69] It was argued that the defendant's conduct fell far short of what was expected of a reasonable person in the circumstances, who would have foreseen that the plaintiff would have relied on the defendant's undertaking to pay and continued to allow Mr Daus to occupy the apartment on the strength of it, whilst aware of the risk that Mr Daus would remain in occupation whilst not paying rent and was grossly negligent or reckless. It was argued that this conduct would also amount to an unconscionable abuse of the company's separate legal personality under the common law. The plaintiff further argued that the defendant was only interested in the company's business whilst it made a profit whereafter he abandoned it without considering the liability already incurred, as evidenced by the way in which he wound down the company's business. Reliance was placed on the facts already dealt with, in relation to the estoppel and the email correspondence during March 2015.

[70] It is trite that "reckless" must bear its ordinary meaning and not does connote mere negligence but at the very least gross negligence²¹. The plaintiff bears the onus to

²¹ Fisheries Development Corporation of SA Limited v Jorgensen 1980 (4) SA 156 (W) at 54A-E

establish recklessness and the necessary facts and must establish this on a balance of probabilities. Risk consciousness in the realm of recklessness does not amount to or include that foresight of the consequences which is necessary for *dolus eventualis*.²²

[71] In relation to gross negligence, the test is essentially an objective one that postulates the standard of normal notional reasonable person although it is subjective insofar as the said notional person is envisaged in moving in the same spheres and having the same access to knowledge as the party in question.²³

[72] The plaintiff must prove on a balance of probabilities that the defendant had knowledge of the facts, and not imputed knowledge²⁴, from which the conclusion can be properly drawn that the business of the company was or is being carried on recklessly or in a grossly negligent manner²⁵. *"It is not possible to attempt to draw the line between negligence and recklessness more exactly. Each case turn on its own facts and involve a value judgment on those facts"*²⁶.

[73] In my view, the plaintiff falls short of the mark required by the authorities²⁷, given the findings already made on the facts. Whilst the conduct of the defendant may have illustrated errors of judgment²⁸ and a degree of negligence, it cannot be concluded that the defendant's conduct was grossly negligent or reckless, more so given that the plaintiff has not established that he is a creditor of the company. The plaintiff has further in my view not established that there is any proper case made out at common law for the relief claimed.

²² Philotex v Snyman 1998 (2) SA 136 (SCA) at 142G-J, 143G-J

²³ Philotex supra

²⁴ Fourie v Braude and Others 1996 (1) SA 610 (T) at 614G-H

²⁵ Howard v Herrigel and Another NNO 1991 (2) SA 660 (AD)

²⁶ Philotex supra 147C-D

²⁷ Ebrahim and Another v Airport Cold Storage (Pty) Ltd 2008 (6) SA 585 (SCA) para [15]

²⁸ Mafikeng Mall (Pty) Ltd v Centner (No 2) 1995 (4) SA 507 (W) at 613G-H

[74] It follows that claim B must fail.

[75] In claim C, the plaintiff's case was that the defendant's conduct was at the very least grossly negligent, and a gross abuse of his position as a director of the company. Alleging that it is in the public interest, the plaintiff sought leave to bring delinquency proceedings under s 157(1)(d) of the Companies Act, 2008 and an order that the defendant be declared a delinquent director under s 162 of that act. It was argued a finding that defendant conducted the business of the company in a grossly negligent manner was sufficient to justify a finding of delinquency in terms of s 162(5)(c)(iv) of the Companies Act 2008.

[76] It was argued if a finding of gross negligence was made an order under s162(5)(c)(iv) should follow automatically. The plaintiff argued that the evidence established that the defendant conducted the business of the company in a grossly negligent manner by misleading the plaintiff in March 2015 that the company would make good on the unpaid rental and in not winding down the company properly.

[77] This claim must fail for two reasons. First, no case was made out that the plaintiff is acting in the public interest as opposed to his own interest as envisaged by s 157(1)(d) of the Companies Act, 2008 and that the plaintiff has *locus standi* to seek the relief claimed²⁹. Other than a bald averment, no facts were presented to substantiate this contention. It was common cause that the plaintiff is not one of the category of persons referred to in s 162. The evidence if nothing else established that the plaintiff was acting in his own commercial interest.

[78] Second, I have already concluded that the plaintiff has not established that the defendant's conduct was grossly negligent or constituted an abuse of his position as director of the company. The plaintiff has further failed to meet the requirements for a

²⁹ Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs 2019 (3) SA 251(SCA) para [132]-[136]

delinquency order or that the defendant was dishonest, wilful misconduct or gross negligence³⁰.

[79] I conclude that this claim too must fail.

[80] The normal principle is that costs follow the result. There is no reason to deviate from this principle. The defendant sought a costs order on the scale as between attorney and client, including the reserved costs of an absolution application, launched by the defendant after the close of the plaintiff's case on 18 October 2022. That application was refused and costs were reserved.

[81] As the absolution application was unsuccessful, costs must follow the result and there is no reason to deviate from the normal principle.

[82] The defendant argued that a punitive costs order was justified as claim A was conceded during the trial and claims B and C were used by the plaintiff as a form of commercial coercion. Considering all the facts, I am not persuaded that such a costs order is warranted or that it is in the interests of justice to do so.

[83] I grant the following order:

[1] The defendant is to pay the costs pertaining to the absolution application.

[2] The plaintiff's claims A, B and C are dismissed with costs.

³⁰ Lewis Group Ltd v Woolfam and Others 2017 (2) SA 547 (WCC) para [18]



**EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG**

APPEARANCES

DATE OF HEARING	: 17, 18, 19 and 21 October 2022
DATE OF JUDGMENT	: 09 January 2023
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