IN THE SOUTH GAUTENG HIGH COURT

(JOHANNESBURG)

REPORTABLE

CASE NUMBERS: 2009/12568 and 2009/47543

In the matters between:-

HYPROP INVESTMENTS LIMITED	**First Applicant**
ABLAND (PTY) LTD	**Second Applicant**

and

NSC CARRIERS AND FORWARDING CC	**First Respondent**
NORBERTO JOSE SANTOS COSTA	**Second Respondent**

JUDGMENT

MOKGOATLHENG J

1) In these two matters, the applicants seek an order confirming the cancellation of two lease agreements, payment of arrear rentals, ancillary charges, and the ejectment of the first respondent from

premises situate at Stoneridge Centre, Stoneridge Drive, Modderfontein.

2) At the inception of these proceedings, the parties agreed that as applicants in ***case no: 2009/12568*** are identical to those in ***case no: 2009/47543,*** and seek similar relief against identical respondents in both matters, the judgment in the former matter should be applicable to the latter matter as the issues arising therefrom are identical.

FACTUAL MATRIX

3) In both matters it is common cause that during August 2008 the applicants and the first respondent concluded identical lease agreements the terms whereof, entitled the latter to conduct a niche restaurant and a tobacconist respectively at Shops Nos. 14 and 44 situate at Stoneridge Centre, Stoneridge Drive, Modderfontein.

4) In both matters, the second respondent has signed written deeds of suretyships binding himself in favour of the applicants jointly and severally as surety and co-principal debtor in *solidum* with the first respondent, for the due and punctual performance by the latter of all obligations arising from the lease agreements.

5) The applicants contend that the first respondent has breached the lease agreements as a result of its failure to pay monthly rentals and ancillary charges, consequently, both lease agreements were cancelled. The first respondent was requested to vacate the respective premises, but has refused to do so. Consequently since the 3 February 2009 the first respondent has been in unlawful occupation of the premises, and continues to unlawfully trade therefrom.

6) The respondents oppose the granting of the relief claimed on the basis that when the second respondent negotiated with the applicants representatives, to lease the premises, during such discussions which ultimately led to the conclusion of the lease agreements, applicants

representatives made fraudulent misrepresentations which induced him to enter into the lease agreements on behalf of the first respondent, and consequently bind himself as surety and co-principal debtor.

7) The first respondent contends that pursuant the fraudulently induced lease agreements, it has effected useful and necessary improvements to the premises to the value of R5 358 000.00 and R1 300 000.00 respectively in respect of the niche restaurant and tobaconnist, and accordingly, has a *ius retentionis* that is an improvement lien in respect thereof which entitled it to remain in occupation and possession of both premises until compensated.

8) The respondents contend further that implicit in the lease agreements was the fraudulent misrepresentation that in concluding same, the applicants had obtained from the local authority consent:

(a) to commence building the premises;

(b) *for the first respondent as a tenant to occupy the built premises;*

(c) *to apply for an occupational certificate which was eventually obtained in respect of the premises;*

(d) *to apply for and obtain approval of the building plans; and*

(e) *comply with all the relevant by-laws of the local authority.*

9) The first respondent also contends that when occupation of the premises was given to it, without the issue by the local authority of a certificate of occupancy in respect of Stoneridge Centre in which premises are situate, this was a breach of the provisions of ***section 14*** of ***the National Building Regulations and Building Standards Act 103 of 1977,*** and which in terms of ***section 14(4)(a)*** is a criminal offence. Consequently, applicants are in breach of the maxim *nemo ex suo delicto meliorem suam conditionem facere potest* (no one is allowed to improve his own condition by his own wrongdoing), and applicants are therefore, precluded from recovering rentals and ancillary charges in terms of the lease agreements.

10) The respondents contend therefore that as a result of such fraudulent misrepresentations, the lease agreements were *void ab origine*

alternatively, *voidable,* thus entitling the first respondent to rescind same and claim consequential damages.

A CONSIDERATION OF THE RESPONDENTS DEFENCES

Fraudulent Misrepresentation

11) The civil law onus of proving fraud is on the respondents. In ***Lawsa 2nd edition Vol 6 Criminal Law*** it is stated: "*although mere civil fraud is not necessarily equivalent to criminal fraud, it must still be established that when a person through misrepresentation, that is "the perversion of the truth" alleges that a set of facts exists when it does not, he or she has the intention to commit fraud (for purposes of civil law) which results in actual or potential prejudice to the representee".*

12) In **R v Myers 1948 1 SA 375 (A),** a case where the issue was whether a person was guilty of fraud or was merely negligent. Greenberg AJ, **at 382-383** *et seq*, quoting Lord Herschell's Report at page **374** in ***Derry v Peek*** expressed himself thus*:*

'...fraud is proved when it is shown that a false representation has been made(1) knowingly or (2) without belief in its truth, or (3)recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in its truth…."

13) Mr Roos on respondents' behalf argued that the court should find that the respondents had proven that the applicants representatives were guilty of fraud by having made fraudulent misrepresentations to the second respondent which induced him to conclude the lease agreements on first respondent's behalf. Counsel further submitted that the applicants had not denied this assertion.

14) Mr Nowitz on applicants' behalf argued that all the defences raised by the respondents were legally invalid and not sustainable as all were premised on facts which were extraneous to the purview of the lease agreements.

15) I now turn to consider whether Mr Roos' submissions relating to his contentions regarding fraud or fraudulent misrepresentations as argued are sustainable.

16) On the 7th July 2008 the first respondent's Board of Members adopted a resolution authorising the second respondent to *"enter into and sign a lease agreement binding the company/corporation (as Tenant) to* ***Hyprop Investments Limited and Abland (Pty) Ltd Corporation*** *and any of their successors in title or transferees (or Landlord) in respect of the premises being Shop 14 at Stoneridge Centre* ***upon such terms and conditions as set out in the lease agreement laid before the meeting and approved"*** (my emphasis)

17) It is patent that the first respondent's Board of Members resolution incontrovertibly shows that it had sight of the lease agreement, when it discussed the terms thereof, and it thereafter voluntarily (without prior fraudulent misrepresentations as alleged) resolved to bind the first respondent and consequently, authorised the second respondent to sign the lease agreement on first respondent's behalf.

18) The applicants attorney's letter dated the 14 January 2009 written in response to the respondents attorney's letter dated the 8th January 2009, pertinently and emphatically denied the fraudulent misrepresentations imputed by the respondents to their representatives during the contractual negotiations by stating: *"8.2 apart from denying the allegations made by you against our clients' leasing team in your letter under reply, your attention is drawn to paragraph 38.4 which provides that the LANDLORD shall not be bound by any express or implied term, representation, warranty, promise or the like not recorded in the Lease Agreement and you waive the defence of estoppel in this regard*". (my emphasis)

19) The respondents in their attorneys' letter dated 6 February 2009, made the following remarks:

"*11 ... Our client (that is the first respondent) is not seeking a reduction in rental, but merely an indulgence within which to commence paying rentals in October 2009 (for October 2008 and October 2009), and continue to pay double the amount of rental on a monthly basis, which would be in lieu of the first year and second*

year jointly. The third year rentals would be paid in accordance with the lease ….

12. Our client has spent a large amount of money on both its businesses, and clearly they do not wish to forego and/or lose that money. Thus clearly it is our client's intention to honour the lease, and continue for a further period thereafter, in order to recover its monies invested in the businesses.

13. Accordingly we again request, that your client consider our clients proposal regarding the delayed payment of the rentals, and that it also considers the complaints raised by our client and advises that positive action it will take in that regard."

20) Mr Roos argued that the content encapsulated in the respondents attorney's letter dated 6 February 2009 is inadmissible as it is evident that the letter was captioned "*without prejudice*". It is trite that the phrase "*without prejudice"* in a document does not *per se* presage an absolute bar to its admissibility as evidence.

21) Combrik J in **Jili v South African Eagle Insurance Co. Ltd 1995 (3) 269 (N) at 275** held: *"No conclusive legal significance attaches to the phrase 'without prejudice'. The mere fact that a communication carries that phrase does not per se confer upon it the privilege against disclosure ...* ***(Gcabashe v Nene 1975 (3) SA 912 (D) at 914E-G, and see Cross D on Evidence 5th ed at 300)****".* A perusal of the document does not foreshadow any confidentiality or privilege pertaining to settlement negotiations, neither does it attempt to compromise actual or impending litigation.

22) Communications between the parties clearly show that as late as the 4 August 2009, the respondents never raised the question of the second respondent having been fraudulently induced to enter into the lease agreements on first respondent's behalf, neither is there any suggestion that the first respondent intended to resile from or cancel the lease agreements as a consequence of the purported fraudulent misrepresentations.

23) The imputation by the second respondent that he was purportedly through fraudulent misrepresentations induced by the applicants

representatives to conclude the lease agreements is consequently unsustainable. The objective proven facts ineluctably demonstrate that the respondents have not proven that the applicants are guilty of fraudulent misrepresentations or indeed, fraud as they must to succeed with this defence.

THE DEFENCE RELATING TO MISREPRESENTATIONS PERTAINING TO THE PREMISES

24) The first respondent denies breach of the lease agreements and contends that the applicants fraudulent misrepresentations relate to its failure to:

a) *deliver an almost full level of occupancy of the premises projected as an upmarket shopping centre;*

b) *provide secure parking, adequate security and display of the premises name;*

c) *launch and market the premises in a proper and acceptable manner;*

d) *provide the roof cover over the walkways; and*

e) *provide health club and a billboard for the premises.*

25) The first respondent contends that as a result of the failure by the applicants to execute its representations, on 11 March 2009 it elected to rescind the lease agreements, because as a result of the applicants' fraudulent misrepresentations as alleged same were *void ab origine.*

26) ***Clause 38*** of the lease agreement provides:

"*38* ***ENTIRE AGREEMENT***

38.1 This Lease constitutes the entire and whole agreement between the parties who acknowledge and record that there were no prior representations or warranties given which induced the contract, save insofar as such warranties or representations are set out herein.

The LANDLORD shall not be bound by an express or implied term, representation, warranty, promise or the like not

recorded herein, and the TENANT waives the defence of estoppel in this regard."

27) I now turn to consider whether the first respondent's purported rescission of the lease agreement is legally valid, or whether a perusal of the terms of the lease agreement necessarily establish whether these "*complaints*" or undertakings as described by the first respondent are within or extraneous the purview of the lease agreements. Regarding:

a) the suitability of the premises as an upmarket shopping centre, ***clause 21*** provides: *the Landlord does not warrant that the premises will comply with any requirements of any local or other authority for the purpose of any licence required by the Tenant for the conduct of its aforesaid business or that the premises are fir for the purpose for which they are let or that any licence or that any premises are fit for the purpose for which they are let ...;"*

b) security and display of premises name, ***clauses 4 and 19*** absolve the applicants from any obligation and liability;

c) marketing and the launching of the centre, ***clauses 5*** of annexure "**D**" and ***clause 46*** respectively refer to marketing but neither imposes any contractual obligations on the applicants;

d) the health club, there is no reference or warranties thereto in the lease agreement;

e) open date and launch, ***clause 5*** which refers to this exigency imposes no liability on the applicants and creates no contractual obligation;

a) Liability for damages , ***clause 19*** which exempts the applicants from liability provides:

"*19.1 The Tenant shall not under any circumstances have any claim or right of action whatsoever against the Landlord for damages, whether direct or indirect, loss, cancellation or otherwise, nor shall it be entitled to withhold or defer payment of rent, by reason of:*

19.1.1 The premises being in a defective condition or falling into disrepair or any particular repairs ... and whether arising from the negligence of the Landlord, its servants or agents;

19.1.3 *All provisions of this clause shall apply and shall be fully operative notwithstanding that any loss, damage or injury hereinbefore referred to may occur or be sustained in consequence of any act or omission by the Landlord or any of its directors, servants or agents whether negligently or otherwise and notwithstanding that the Landlord may have been in breach of any of its obligations."*

28) There is no dispute that the lease agreements have been cancelled, the applicant contending that such cancellation occurred on the 3 February 2009 and was predicated on the first respondent's breach due to its failure to pay arrear rentals and ancillary charges. The first respondent contends cancellation premised on fraudulent misrepresentation, alternatively, rescission on 11 March 2009. There was consequently no privity of contract between the parties at the inception of these proceedings.

29) The first respondent is in terms of ***Clause 31*** is obliged to continue to pay the monthly rentals irrespective of or pending the determination of any dispute between the parties. ***Clause 31*** provides:

"*31* ***DISPUTED OCCUPATION***

While for any reason or on any grounds the TENANT occupies the premises and the LANDLORD disputes its right to do so, the TENANT shall, pending determination of such dispute, either by negotiation or litigation, continue to pay an amount equivalent to the monthly rental and the amounts due in terms of ***clauses 6 and 40*** *provided in this Lease*...."Consequently, the first respondent by its failure to pay monthly rentals and ancillary charges is in breach of the lease agreement and consequently has no legal basis in law to rescind the lease agreement.

30) In ***Bowditch v Peel and Magill 1921 AD 561 at p572***, Innes C.J held: "*A person who has been induced to contract by the material and fraudulent misrepresentations of the other party may either stand by the contract or claim a rescission. ...It follows that he must make his election between those two inconsistent remedies within a reasonable time after knowledge of the deception. And the choice of one necessarily involves the abandonment of the other. He cannot both approbate and reprobate. Here the plaintiffs alleging that the contract was fraudulently induced not only claimed damages as*

*distinct from rescission, but they claimed damages for breach of contract. By their pleadings they elected to stand by the contract, and thereby they abandoned any right to rescind it. The learned Judge held that fraud had not been proved, and that, therefore, the plaintiffs could not claim damages on that basis; but they could claim rescission. Even then, however, they still had the other choice; they could stand by the contract and enforce it, or claim damages for its breach. The principle was laid down by DE VILLIERS, C.J. (**Woodstock Municipality v Smith (26 &C at p. 701)**).”*

31) The first respondent did not exercise its remedies within a reasonable time neither did it timeously allege any knowledge of deception before the 3 February 2009, when the applicants cancelled the lease agreements as a result of its failure to pay monthly rentals and ancillary charges.

32) The first respondent belatedly, as a consequence of the applicants cancellation of the lease agreements on 3 February 2009, only in August 2009, does it allege fraudulent misrepresentation. This belated allegation of fraud is a patent recent fabrication, it is a

chimera, a mirage and proffered as a last refuge by the respondents in order to salvage a lost cause and consequently, has no legal validity.

33) It is patent that prior representations, warranty, promises, or the like do not and cannot bind the applicants, consequently, whatever representations applicants representatives made to 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.

THE DEFENCE OF *IUS RETENTIONIS*

34) The first respondent alleges that it has a claim for damages arising from a *ius retentionis* over the leased premises in respect of useful and necessary improvements made, and is therefore entitled to occupy the premises until it has been compensated the amounts of R1 300 000.00 and R5 358 000.00 respectively and consequential damages which it is still quantufying.

35) In the case of ***Business Aviation Corporation (Pty) Ltd and Another v Rand Airport Holdings (Pty) Ltd 2006 (6) SA 605 (SCA) para 6 at 609*** it was held: *"An appropriate starting point for a discussion of the questions raised by the appeal appears to be a statement of the generally accepted principle that in Roman-Dutch law, following Roman law, lessees were originally in the same position as bona fide possessors as far as claims for improvements to leased properties were concerned.* ***It follows that absent any governing provisions in the contract of lease****, lessees, like bona fide possessors, had an enrichment claim for the recovery of expenses that were necessary for the protection or preservation of the property (called impensae necessariae), as well as for expenses incurred in effecting useful improvements to the property (called impensae utiles)… More pertinent for present purposes, lessees, like bona fide possessors, who were still in possession of the leased property, also had an enrichment lien (a ius retentionis) that allowed them to retain the property until their claims for compensation had been satisfied*."

36) Pertinently, in the lease agreements the governing provisions are encapsulated in ***Clauses 11.2 and 19*** respectively. ***Clause 19*** provides:

> ***"19 EXEMPTION FROM LIABILITY***
>
> *19.1 The Tenant shall not under any circumstances have any claim or right of action whatsoever against the Landlord for damages, whether direct or indirect, loss, cancellation or otherwise, nor shall it be entitled to withhold or defer payment of rent, by reason of:*
>
> *19.1.1 The premises being in a defective condition or falling into disrepair or any particular repairs not being effected by the Landlord and whether arising from the negligence of the Landlord, its servants or agents or any other cause whatsoever.*

37) ***Clause 11.2*** provides: "*If any alterations or additions are made by the TENANT whether with or without the LANDLORD's written consent, it shall be obliged prior to the expiry or earlier termination of the Lease to remove them and reinstate the premises to the condition in*

which they were before the additions and alterations were effected and to make good any damage caused by the removal and reinstatement unless the LANDLORD directs in writing that such alternations or additions be not removed or reinstated, in which event such alterations or improvements shall become the LANDLORD's property in terms of ***Clause 11.3****.*

The TENANT shall in no circumstances have any claim for compensation for any such alteration or additions whether or not they are removed or the premises reinstated. The TENANT appoints the LANDLORD as its attorney and agent irrevocably and in rem suam with power of substitution, to effect any such removal of the alternations and the reinstatement of the premises at the cost of the TENANT."

38) The lease agreement patently and absolutely precludes the first respondent of availing itself of the defence of *ius retentionis* and absolves the applicants from liability arising from damages or any right of action or in particular compensation arising from the first respondent's *ius retentionis.*

39) I concur with Van Reen J in ***Rekdurum (Pty) Ltd v Weider Gym Athlone (Pty) Ltd t/a Weider Health & Fitness Centre 1997 (1) SA 646 (C)*** that: "*the essential content of a ius rentitionis in South African Law is the right on the part of a retento to retain physical control of another's property as a means of securing payment by the owner thereof- to the extend that he has been enriched. … … the exercise of a ius retentionis based on enrichment resulted in a pro tanto diminution of the rights of dominium of the owner of the object over which such rights were exercised* (**See Kommissaris van Binneslandse Inkomste v Anglo American (OFS) Housing Company Ltd 1960 (3) SA 642 (A) at 657C-G**). *The respondent, by conducting a business on the premises, is using it for a purpose wider than merely an object of security. By doing so the respondent is infringing the applicant's dominium minus plenum, namely its dominium minus the ius retentionis."*

40) There is no authority in South African Law which supports the proposition that the first respondent in securing its *ius retentionis* may continue to conduct trade from the applicants' premises contrary to the stipulations of the terms of a lease agreement.

41) Consequently, legally the first respondent is holding over and is trading unlawfully from applicants' premises because the lease agreement has been cancelled. See ***Port Wild Props 12 (Pty) Ltd v Real Time Investment 384 CC,*** an unreported Full Bench judgment of this court ***case no: A5041/08.***

42) Where a lease agreement has not been induced by fraudulent misrepresentation and has been lawfully terminated as a result of a breach thereof by the lessee, it is legally impermissible for the lessee to continue to remain in occupation of the premises on the basis that such continuing occupation insures the security of its *uis retentionis.*

THE *PARI DELICTO* DEFENCE

43) The first respondent contends that occupation of each of the premises was given without the issue by the local authority of a certificate of occupancy in respect of the buildings in which each of the premises is situate, this argued the first respondent is in breach of the provisions of ***section 14 of the National Building Regulations and Building***

Standards Act 103 of 1977 and in terms of ***section 14(4)(a)*** is a criminal offence on the part of the applicants.

44) ***Section 14(4)(a)(i)*** provides:

"(4) (a) The owner of any building or, any person having an interest therein, erected or being erected with the approval of a local authority, who occupies or uses such building or permits the occupation or use of such building-

(i) *unless a certificate of occupancy has been issued in terms of subsection (1) (a) in respect of such building;*

(ii) *... shall be guilty of an offence."*

45) Mr Roos referred me to the California Court of Appeal case of ***Espinoza Calva (2008) 169 CAL App. 4th 1393***, ***Cal.Rptr.3rd*** and urged me to follow the principle expounded therein by invoking ***section 39(1)(b) and (c) of The Constitution of the Republic of South Africa Act 108 of*** which decrees that this court can have regard

to international and foreign law where there is no analogous precedent in our law.

46) Mr Roos argued that the ***Ispinoza*** judgment directly accords with the maxim: "*Nemo ex suo delicto meliorem suam conditionem facere potest (no one is allowed to improve his own condition by his own wrong doing)* and there was no reason why this court could not apply the rationale in that decision to the present matter.

See: ***Wimbledon Lodge (Pty) Ltd v Gore NO and Others 2003 (5) SA 315 (SCA) at 321G, para 10***

47) A cursory perusal of the ***Ispinoza*** decision shows that ***section 109(1) of the SANTA Ana Municipal Code*** "*prohibits the use or occupation of a building until the building official has issued a certificate of occupancy".* In contra-distinction, ***section 14(4)(a)(i)*** of the ***National Building Regulations and Building Standards Act 103 of 1977*** does not *per se* necessarily impose an absolute and complete prohibition of the occupancy or use of a building unless a certificate of occupancy has been issued.

48) In terms of ***section 14(1A)*** *of the said Act:* "*The local authority may, at the request of the owner of the building or any other person having an interest therein, grant permission in writing to use the building before the issue of the certificate referred to in subsection (1), for such period and on such conditions as may be specified in such permission, which period and conditions may be extended or altered as the case may be, by such local authority.*"

49) In the ***Espinoza*** judgment reference is made to the fact that ***The California Supreme Court*** held in ***Tri-C- Inc v Sta-Hi Corp. (1965) 63 Cal. 2d 199***: *"There is no doubt that the general rule requires the courts to withhold relief under the terms of an illegal contract or agreement which is violative of public policy....*

When the evidence shows that ... [an illegal party] in substance seeks to enforce an illegal contract or recover compensation for an illegal act, the court has both the power and duty to ascertain the true facts in order that it may not unwittingly lend its assistance to the consummation or encouragement of an illegal contract or act which public policy forbids. These rules are intended to prevent the guilty party from reaping the benefit of his unlawful conduct, or to protect the public from future consequences of an illegal contract. They do

not necessarily apply to both parties to the agreement unless both are ***truly pari delicto****."*

50) The lease agreement the parties concluded, is **not an illegal contract**, neither is it a nullity nor is it *void ab initio*. *See:* ***Kopelowitz v West and Others 1954 (4) SA (W) at 300-301***: "*The maxim in pari delicto potior est conditio defendentis is concerned with the parties moral guilt, not criminality".* In the case of ***Jajbhay v Cassim 1939 AD 537*** it was held: "*A party seeking to extricate himself from the consequences of an illegal or immoral contract had to demonstrate that he had come to court with clean hands.*

... Courts must discourage illegal transactions, nevertheless recognised that its strict enforcement may sometimes cause inequitable results between parties to an illegal contract". To prevent inequalities, therefore, it thus enunciated the principle that the rule must be relaxed where it is necessary to prevent injustice or to promote public policy. One such instance where the rule would be subordinated to 'the overriding' consideration of public policy was where the defendant would be unjustly enriched at the plaintiff's expense."

See: ***Klovow v Sullivan 2006 (1) SA 259 (SCA)***

51) The first respondent admits that it has not since the inception of the lease agreements (except one payment) paid monthly rentals and ancillary charges, which include the local authority rates and taxes, water and electricity and VAT in respect of the monthly lease rentals. The first respondent makes bold that it is occupying the respective premises and trades therefrom as a niche restaurant and tobacconist in order to secure its goodwill, pay its staff and exercise its *ius retentionis*.

52) The continued unlawful occupation by the first respondent of the applicants premises and its failure to pay monthly rentals and ancillary charges constitutes unlawful enrichment. The first respondent's unlawful refusal to pay the local authorities rates and taxes, electricity, water and VAT on monthly rentals, is a breach of the local authority's by-laws and the ***Value Added Tax Act 89 of 1991.***

53) It may be cogently and persuasively argued that both parties are in *pari delicto*, in that, the applicants have contravened ***section 14 of Act 103 of 1977.*** The equities however, favour the applicants in that they are continually suffering loss of income and consequential damages as

a result of the first respondent's unlawful refusal to vacate their premises. The first respondent sustains no consequential damages or loss whatsoever, and is daily unlawfully enriching itself at the expense of the applicants whilst contravening the local authority by-laws and ***Value Added Tax Act 89 of 1991.***

54) In the present circumstances, "*the overriding"* consideration of public policy dictates that the maxim *in pari delicto potior est conditio defendentis* can be relaxed to prevent injustice and inequity because the first respondent is, and continues, to be unjustly enriched at the applicants expense whilst being guilty of continuously contravening the law.

55) Concerning the question of costs, Mr Roos argued that ***clause 30.2*** only entitled applicants to recover attorney and own client costs after obtaining a court order in respect thereof, and after taxation of such costs. I demur, ***clause 30.2*** provides: "*if as a result of breach or non-observance or delay in complying with any of its obligations under this Lease by the Tenant, the Landlord instructs or consults an attorney in enforcing its rights, the Tenant shall pay on demand all*

costs and expenses thereby incurred by the Landlord with such attorney on the scale as between attorney and own client …"

56) It is patent that this clause does not lend itself to the interpretation accorded it, that this clause only entitles the applicant's to claim attorney and own client costs as contended by Mr Roos. There is no necessity for the applicant's to obtain a court order or to tax such costs before recovering same. This does not however, denude the first respondent of its right to dispute such costs and insist on the taxation thereof before paying same.

THE ORDER

57) In the premises the applicants have succeeded in proving that the respondents defences are legally unsustainable, consequently, the following order is made:

a) Cancellation of the two lease agreements is confirmed;

b) The first respondent is ordered to vacate Shop Nos 14 and 44 respectively situate at Stoneridge Centre, Stoneridge. Modderfontein within 7 (seven) days of this order, failing the Sheriff is authorised to evict the first respondent.

c) The first and second respondents are jointly and severally ordered to pay the applicants the amount of R 88 794.12 and interest thereon at the rate of 15.5% per annum *a temporae morae* from the 13 January 2009 to date of final payment, the one paying the other to be absolved in respect of ***case no: 2009/12581***.

d) The first and second respondents are jointly and severally ordered to pay the applicants the following amount of R 711 208.11 and interest thereon at the rate of 15.5% per annum *a temporae morae* from the 13 January 2009 to date of final payment, the one paying the other to be absolved in respect of ***case no: 2009/47543***.

e) The first and second respondents are jointly and severally ordered to pay the applicants legal costs on an attorney and client scale, the one paying the other to be absolved.

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MOKGOATLHENG J

JUDGE OF THE HIGH COURT

DATE OF HEARING: **27 November 2009**

DATE OF JUDGMENT:

ON BEHALF OF THE APPLICANT:

INSTRUCTED BY: **Nowitz Attorneys**

TELEPHONE NUMBER: **(011) 325 - 5300**

ON BEHALF OF THE RESPONDENT:

INSTRUCTED BY: **Dogulin Shapiro & Da Silva Inc.**

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