REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 13612/2011

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

8/10/12 .....
DATE SIGNATURE

In the matter between:

NSC CARRIERS AND FORWARDING CC	First Plaintiff
NORBERTO JOSE SANTOS COSTA	Second Plaintiff
NUEVO LATINA RESTUARANTS CC	Third Plaintiff
COSTA AND PANICCO CC	Fourth Plaintiff

and

HYPROP INVESTMENTS LIMTED	First Defendant
ABLAND (PTY) LTD	Second Defendant
FRANSIE GOUWS	Third Defendant
NICOLE MARY GREENSTONE	Fourth Defendant

JUDGMENT

Headnote

Claims in delict formulated to sue for relief similar to that already decided in a contractual suit – limitations of the rule in Lillicrap Wassenaar & Partners v Pilkington Brothers (Pty) Ltd

Res judicata and issue estoppel – some parties identical, others close related so as to be of one interest – judicial discretion in rejecting plea of issue estoppel - where earlier judicial decision adverse to plaintiff was given in application proceedings and the issue is again raised in a subsequent action – a factor to weigh in exercise of discretion to uphold or reject plea of issue estoppel – the forensic process possible in an action could result in a different outcome to that governed by application proceedings – plea of issue estoppel dismissed

Special plea to stay plaintiff's claim pending payment by plaintiff to defendant of a judgment debt in respect of related application – generally, stay of an action to be brought by application not by a special plea –

moreover, not competent to seek to stay a proceeding pending payment of a judgment debt – failure to pay a judgment debt not tantamount to contempt of court order - collection of such debt to be achieved by usual means of execution or insolvency proceedings

SUTHERLAND J:

Introduction

[1] There are four plaintiffs and four defendants. All of the parties are in one or other of two directly opposing camps and for the purposes of this judgment they will be referred to collectively as plaintiffs and defendants, unless a distinction is necessary. The main adversaries are the parties who I shall refer to as NSC and Hyprop. Costa and Abland (Pty) Ltd can, for the purposes of the judgment, be respectively subsumed with those principal parties. The other parties, ie, the third and fourth plaintiffs and defendants respectively play a lesser role.

[2] By agreement, four special pleas are to be dealt with pursuant to Rule 33(4) of the rules of court and an order was made to that effect. The four issues are these:

2.1. First, should the plaintiff's claim be dismissed because of issue estoppel?

2.2. Secondly, are the third and fourth plaintiffs legitimately joined?

2.3. Third, are the third and fourth defendants legitimately joined?

2.4. Fourth, should the plaintiffs have a litigatible claim, ought they to be allowed to do so before the first and second plaintiffs have satisfied in full an admitted judgment debt owed by them to the first and second defendants?

[3] These controversies derive from the following circumstances.

3.1. In 2008 Hyprop and NSC concluded two identical written leases for commercial premises in the shopping centre. NSC took occupation in September 2008 but shortly thereafter ceased to pay rent and related charges. Eventually Hyprop cancelled the leases for such breach and on 12 April 2010 was successful in obtaining an order from Mokgotleng J confirming the cancellation and evicting NSC.

[4] Attempts by NSC to obtain leave to appeal were refused both by the court

a quo and by the Supreme Court of Appeal. The judgment of Mokgotleng J is referred to in this judgment as the eviction order. In April 2011 NSC, and the third and fourth plaintiffs who are juristic entities and business associates of NSC, instituted an action against Hyprop and the third and fourth defendants who are the employees, respectively, of Hyprop and Abland (Pty) Ltd.

[5] The factual matrix of both pieces of litigation is about the dealings the parties had, or allegedly had with one or another in relation to the leases. The parties agreed to the separation of the four special pleas and addressed them without any oral evidence. However, by agreement documentation was placed before the court in several bundles without having to adduce them in evidence and they are all what they purport to be, although the truth of their contents is not necessarily admitted.

[6] By such means, the pleadings, consisting of the particulars of claim, a plea and a replication and two virtually identical sets of papers in the two eviction applications that were addressed in the eviction order and the plaintiff's petition for leave to appeal to the Supreme Court of appeal, which was refused, were placed before this court.

[7] I turn to deal with each of the special pleas in turn, first being that of *issue*

estoppel or res judicata.

7.1. The parties were agreed that the particular variant of the defence of *res judicata* in this matter is that which we call issue estoppel. The practical effect is to allow a broader conspectus in relation to the requirements that the two sets of matters be between the same parties, be the same relief and be the same cause of action.

7.2. In *Prinsloo v Goldex 15 (Pty) Ltd* (as yet unreported) 2012 ZASCA 2008, 28 March 2012, at paragraph [23] and [26] the court had the following to say concerning *res judicata* and issue estoppel:

> "[23] In the common law the requirements for res judicata are three-fold [a] same parties, [b] same cause of action, [c] same relief. The recognition of what has become known as issue estoppel did not dispense with this three-fold requirement. But our courts have come to realise that strict and rigid adherence to the requirements referred to in items [b] and [c] may result in defeating the whole purpose of res judicata. That purpose, so it has been stated, is to prevent the repetition of lawsuits between the same parties, the harassment of the defendant by a multiplicity of actions and the possibility of conflicting decisions by different courts on the same issue. (See *Evans v Shield Insurance Company Limited* 1980 (2) SA 815 (A) at 835G.) Issue estoppel therefore allows a court to dispense with two requirements of the same cause of action and the same relief where the same issue has been finally decided in previous litigation between the same parties.

> [26] Hence our courts have been at pains to point out that the potential inequity of the application with issue estoppel in particular circumstances requires addressing. The circumstances in which issue estoppel may conceivable arise that it is so varied that its application cannot be governed by fixed principles or even by guidelines. All this court could therefore do was to repeatedly sound a warning that the application of issue estoppel should be considered on a case-by-case basis and the deviation from the three-fold requirements of res judicata should not be allowed when it is likely to give rise to a potentially unfair consequence in subsequent proceedings. (see *Kommissaris van Binnelandse Inkomste teen Absa Bank* 1995 [1] SA 653 [A] at 667B - E and *Smith v Porritt* 2008 [6] SA 303 [SCA] at paragraph [10]). That, I believe, is also consistent with a guaranteed and a fair hearing in Section 34 of our constitution."

[8] The particulars of claim in this action are a formidable achievement, with annexures that runs to 369 pages, of which, mercifully, only 22 are devoted to actual averments. The relief claimed falls into two parts. The first category consists of a claim by each plaintiff for a sum of money in damages. The second category is a claim to nullify deeds of suretyship, which are annexures to the lease agreement, alternatively, releasing the surety who is in both instances the second plaintiff.

[9] The essence of the claim is that all four of the defendants are responsible for making fraudulent misrepresentations, both positive, and by omission, to all four of the plaintiffs about the subject matter of the leased premises, which

induced all the plaintiffs to act to their detriment by variously investing in the business to be conducted in those leased premises and thus causing them in turn to suffer damages, for which the defendants are alleged to be liable.

[10] It is further alleged that these misrepresentations were made with the intention to induce the first plaintiff to conclude the leases, to induce the second plaintiff to conclude the suretyships, to induce the first plaintiff to take occupation, to induce the first plaintiff to incur setting up expenses, to induce the third and fourth plaintiffs to incur costs associated with the establishment and running of the businesses, and to induce the first and second plaintiffs to incur substantial liabilities to the first and second defendants.

[11] Only the first and second plaintiffs and the first and second defendants were parties to the leases. The other plaintiffs are alleged to have been the entities which would actually run the businesses in the premises leased by NSC.

[12] The first special plea alleges that these claims are hit by the principle of *res judicata* by reason of the outcome in the eviction order to which reference has already been made. The main controversy in relation to the requirements of *res judicata* is the commonality of the cause of action and the other requirements of *res judicata* or issue estoppel about commonality of identity, although not literally meant, is not controversial as the parties are so closely related to one another. That requirement therefore may be relaxed.

[13] Similarly, the requirement about the same relief, although not fully met in a literal sense, is acknowledged to be in reality a claim which has such an identity with a claim for compensation raised for the first time in the two eviction applications that it is tantamount to the same relief.

[14] The first question to be addressed in relation to this leg of the matter is the character of the claim of the plaintiffs and whether or not it is in delict or in contract. The claim is said by the plaintiffs to be framed in delict. Upon that premise the plaintiffs contend that they do not rely upon any supposed right that arises from the leases, but on clearly distinct grounds from any lease and it is conceded that the plaintiff cannot invoke a contractual right *vis-à-vis* the defendants.

[15] The plaintiff contends that it may come again to sue in delict, despite having elected to abide by the contract. This was a hotly debated point. The contention of the plaintiffs is inspired by a passage in Christie, The Law of Contract in South Africa, sixth edition at page 307. Professor Christie says the following:

> "Fraud is a delict and is no less a delict because it is connected with the making of a contract or takes the form of a fraudulent misrepresentation inducing a contract. A claim for damages for

> fraudulent misrepresentation is therefore a claim in delict, not contract. An allegation that the plaintiff has suffered damages is necessary in order to disclose a cause of action. It follows from the delictual nature of the claim that it lies against the third party who fraudulently induced the contract, but was not a party to it, and may be brought by a person to whom a fraudulent misrepresentation was made and who is induced by it to commit himself financially to another party to whom it was made, and who was induced by it to enter into a contract with the maker of the misrepresentation, although the party claiming damages was not himself a party to the contract. In a straight forward case between the parties to a contract the innocent party may bring its claim for damages for fraud together with a claim for rescission, because damages for fraud, unlike damages for breach of contract are in no sense an enforcement of the contract and are therefore not inconsistent with rescission for fraudulent misrepresentation. If he does not claim rescission he may claim damages for fraud whilst standing by the contract, and it follows that a claim for damages for fraud and a claim for damages for fraud and a claim for damages for breach of contract may be combined in the same action. The innocent party's reason for not claiming rescission may be that the fraudulent misrepresentation did not induce him to enter into the contract so he is not entitled to rescind, or that he is unable to give restitution or believes that it cannot be given by the maker of the misrepresentation, or that he has committed himself to other contracts on the strength of that contract, or simply that he does not wish to rescind it. His reason is immaterial and makes no difference to his entitlement to damages."

[16] Professor Christie cites several cases in the footnotes to that passage. Most of the cases cited are about fraud in sales involving misrepresentations about the qualities attaching to land and clearly, in the absence of resiling, the claims were for a reduced price. However for these very reasons these cases

are distinguishable.

[17] The only case cited which is really helpful is that of *Ameridakis v Rumble* 1951 [4] SA 674 at 677. In that case the financier of a company that failed was liquidated. The Plaintiff then sued on the misrepresentations made which had induced his investment. The judgment refers to him being awarded damages on a delictual basis following the authority of *Caxton Printing Works [Pty] Ltd v Transvaal Advertising Contractors* 1936 TPD 209. The action, it was held, was available to him without the need to resile from the contract.

[18] Then there is of course the rule in *LilliCrap, Wasenaar and Partners v Pilkington Brothers SA Ltd* 1985 [1] SA 475 [A] about a party who is in a contractual relationship with another, being obliged to seek his remedies within the contours of the agreement and may not as a rule resort to a delictual remedy. Insofar as that rule is concerned the plaintiff contends that it is not unsuited. It relies on the decision in *Holtzhausen v Absa Bank* 2008 [5] SA 630 [SCA], especially at paragraphs [7 to [10.] That court held that the LillCrap case is not authority for the proposition that a party to a contract can sue only in contract, merely because it is possible to construct a claim in contract. It also held that if a party can frame a claim clearly outside of the contract, in delict, it may choose to do so. Cloete JA held at follows at paragraphs [7] and [8]:

"LilliCrap is not authority for the more general proposition that an action cannot be brought in delict if a contractual claim is competent. On the contrary, Grosskop AJA was at pains to emphasise at 496D - I that our law acknowledges a concurrence of actions where the same set of facts can give rise to a claim for damages in delict and in contract, and permits the plaintiff in such a case to choose which is to pursue. Thus in *Durr v Absa Bank Ltd* 1997 [3] SA 448 [SCA] a case which concerns the duties of an investment advisor, recommending investment in debt financing instruments, *Schutz JA* found no difficulty of saying (at 453G)

> "the claim pleaded upon contract, alternatively delict, but as the case was presented *as* one in delict, and nothing turns upon the precise cause of action I shall treat it as such."

In the present matter the pleadings cover a claim for damages for negligent misstatement. The plaintiff does not rely on the breach of any contractual obligation which the defendants or its servants may have owed him as constituting the negligence for this claim. The plaintiff's case as it was presented in evidence was that a right which he had, independently of any such contract, was infringed. The decision in Lillicrap is accordingly of no application."

[19] To advance its case the plaintiffs must meet this test. It is true that the plaintiffs do not invoke any right under the contract or allege any breach of it by the defendants. Significance reference is nevertheless made to the leases and to their terms. However, these references are merely to coherently contextualise the claim which is, after all, a complaint about wrongful inducement to act to their prejudice, which prejudice occurred in the form, at least in part, of signing the leases.

[20] I am therefore satisfied that upon a proper reading of the claim as pleaded, the plaintiffs do not trespass in this respect across the line of contract.

[21] Despite the opportunity to do so, on this thesis, the difficulty that remains for the plaintiff to be resolved is whether or not that issue upon which the *causa* relies, that is to say a fraud, has already been decided in the Eviction order case. The main thrust of the defendant's argument in support of his special defence was that the very question of whether or not the defendants had behaved fraudulently was settled in the eviction order by the express finding of Mokgotleng J, that the defendant has not acted fraudulently.

[22] The very complaints put up in those applications to resist eviction were about the same subject matter as relied upon in the present action. That bare fact is incontrovertible.

[23] The plaintiffs contend that this is not a fatal impediment. They invoke the authority of *Prinsloo and Others v Goldex* (supra). The upshot of that matter is that a wrong judgment by a judge, finding that a party was guilty of fraud, ought not to have inhibited another judge in a subsequent phase of that litigation from rejecting a plea of *res judicata*.

[24] In *Prinsloo v Goldex* a finding of fact, on paper, was criticised by the Supreme Court of Appeal which held that the version was not so ridiculous that it could be rejected on paper. Brand JA held at paragraph [27] of that judgment as follows:

> "In this light I agree with the appellant's contention that the court a quo erred in allowing the plea of *res judicata* in the form of issue estoppel in this case. In the proceedings before Webster J the allegations of fraud against Prinsloo were clearly not properly investigated. Consequently his finding of fraud on motion papers was clearly inappropriate. But because of the rules pertaining to motion proceedings, he happens to be right in dismissing the application before him. In the result his inappropriate findings of fraud had not been tested on appeal. In these circumstances I believe it would be patently inequitable and unfair to hold the appellants bound to those inappropriate findings in the present proceedings."

[25] The plaintiff seeks to apply that line of reasoning to the present case on the premise that Mokgothleng J was equally wrong to have made a finding on paper *that there was no fraud* on the part of the defendants. It is therefore necessary to summarise what reasons were given for the outcome in the eviction order by Mokgotleng J.

[26] For the sake of clarity the plaintiffs are called the lessee and the defendants the lessor, when referring to the Eviction Applications. The lessor made the self-evident case that the failure to pay up constituted a material

breach and the lease was justifiably cancelled and eviction should follow. Non - payment was common cause.

[27] As a result the only true controversy in the Eviction Applications was whether the lessee could show a justification not to pay. They said that they were the victims of several misrepresentations. They consumed 32 pages in the answer and still added a supplementary answer to the mountain of paper they had created. However, stripped bare of the verbiage, what they alleged they were told by way of misrepresentations, amounts to this:

27.1. A new shopping centre was to be build and it was to be posh. The centre was already fully led and that it would be well marketed.

27.2. They were told the lease agreement implied all the consents, permissions and so forth required from the Bureaucratic authorities had been procured and all licences were issued.

27.3. The brochures they were given set out what the centre would look like, more especially, it indicated that the centre would be wholly roofed and that it would project an image of high standard.

27.4. The first and second plaintiffs relied on these express and implied representations to enter the lease.

27.5. Ultimately the centre was not built as initially presented in the brochures and the authorisations were either not obtained or not obtained timeously and the shops were not fully let and the marketing was not up to scratch.

27.6. In addition the lessee had a complaint about a failure to perform in terms of the lease and say that they were not reliably and timeously supplied with gas, a critical necessity for the running of their restaurant.

27.7. The first plaintiff says he spent R5 358 000.00 odd on the usual start-up expenses and he furnishes a breakdown of how that is made up.

[28] In the action the claim reiterates the self-same misrepresentations described above, albeit in slightly different words. In my view the case advanced in the action is the same case advanced in the eviction applications, subject to some minor qualifications, and although it has been articulated to try to give a different complexion to the current claim to distinguish it from the original claim by asserting that four plaintiffs and not only two plaintiffs invested money on the strength of misrepresentations, but the complaint remains, nevertheless, indistinguishable from that in the Eviction order.

[29] The claim in relation to getting released from the suretyships is not only ancillary to the lease, but is indeed an extended part of the leases *qua* annexures to those documents.

[30] Mokgotleng J considered these defences based on fraud. He rejected it as a fabrication. The basis for the rejection was that upon a survey of the correspondence, no less than the allegations in the papers, it was clear that the plaintiff had at an early stage made an election to abide the agreement, despite its full awareness of the flaws in the project and having made that election it could not now allege that its default in payment was a result of a grievance about those disappointments.

[31] Moreover, not a tittle of protest had been raised about a fraud, rather the conduct displayed total acquiescence with the lease, save to comply with the duty to pay up.

[32] Paradoxically the plaintiffs concede that it was a correct finding that they had elected to abide and not resile, and were stuck with the contact of lease, but in the same breath reject the significance of that finding as pertinent to the correctness of the finding that no fraud was perpetrated. This they cannot

logically do.

[33] It was suggested that the finding of an absence of fraud was probably an *obiter dictum*. This I find is plainly wrong. The finding was part of the key decision constituting the *ratio*. That is to say, there could not have been a fraud as the lessee with full knowledge of the circumstances evidenced no complaint and in correspondence and in conduct evinced a fixed intention to remain in occupation.

[34] It is correct that the judgment also made reference to the exclusionary clauses of the lease that forbade the lessee from raising any defence built on misrepresentations, a common enough clause to be found in many leases. However, it is untenable to construe that finding as the *ratio*. The language of the judgment simply does not support such a construction.

[35] The upshot is that upon a proper reading of the eviction order judgment by Mokgotleng J, a firm finding was made that on the case advanced there was no fraud by way of the said misrepresentations proven. Moreover, I am unable to conclude that the finding was wrong on the facts. The notion that the issue should have been referred to oral evidence presupposes a dispute of fact. In my view there was no dispute if fact raised.

[36] However, the case to infer fraud from the misrepresentations was not made out. The denials by the lessor, as far as they went, are, in truth, immaterial to an evaluation of the allegations of fraud. Taking the factual allegations as a given, the question was whether the lessee had made out a case to construe those misrepresentations as being the result of fraudulent intent. There was simply no such case made out. Moreover, on the common cause facts, the lessee had never cried wolf, had abided the transaction and initially sought indulgences to facilitate payment. Not for nothing was the finding by Mokgotleng J that the election to rescind or abide having been made in favour of abiding, the space to invoke fraud had been forfeited.

[37] The role played by the SCA was raised. The defendant contends that by refusing leave to appeal the findings of the judge *a quo* were endorsed. I do not think that this could ever be correct. A refusal of leave to appeal in response to a petition is never accompanied by reasons and ought never to be interpreted as meaning anything more than the appeal would not have succeeded in changing the order. A similar remark was made by Brand JA in the Goldex matter referred to above.

[38] The role played by the SCA was raised. The defendant contends that by refusing leave to appeal the findings of the judge *a quo* were endorsed. I do not think that this could ever be correct. A refusal of leave to appeal in response to a

petition is never accompanied by reasons and ought never to be interpreted as meaning anything more than the appeal would not have succeeded in changing the order. A similar remark was made by Brand JA in the Goldex matter referred to above.

[39] What remains, thus, is whether or not it is appropriate in the exercise of a judicial discretion, notwithstanding these considerations, that the claim should be allowed to stand or the plea should be upheld. Such a discretion indeed exists.

[40] The remarks at paragraph [10] of the Goldex matter are instructive in this regard. It states that the decision must be fact specific, and in Scott v Porrit 2008 (6) SA 303 (SCA) at paragraph [10] it was held that the discretion involves considerations of fairness and equity. The Goldex case illustrates an instance where the *res judicata* barrier was lifted and where a court found the earlier judgment to be wrong. However, I am unable to conclude that Mokgotleng J was wrong in the instant case.

[41] The question that arises now is whether or not a wrong earlier judgment is the sole basis that can be invoked. Can another ground exist? In my view, perhaps most importantly, it is obvious that the correctness of the finding of Mokgotleng J in the eviction order remains simply a correct finding on paper.

[42] To prospect of unsuiting a party in another paper battle is distinct from the prospect of unsuiting a litigant where the risk of a trial. There is a risk that in a trial where discovery and cross-examination may conceivably yield, another outcome may result. In my view a substantial factor why not to unsuit a litigant on the basis of issue estoppel is the fact that a second case is a trial, not an application, and therefore has the capacity to produce a different result.

[43] It must never be overlooked that a finding on paper is always fundamentally vulnerable for that very reason. Thus, despite the circumstances that have been described above it is open to me to exercise a discretion not to dismiss the claims on the ground of *res judicata*. I find these considerations compelling and for those reasons the first special plea is dismissed. It should not however be supposed that in deciding thus, I am laying down a principle that whenever there is a trial that follows an application, regardless if other considerations, a *Res Judicata* plea is trumped.

[44] The second set of considerations is the second and third special pleas in relation to the joinder of the third and fourth plaintiffs and of the third and fourth defendants. It may properly be asked if only the third and fourth plaintiffs had been cited as plaintiffs could the *res judicata* issue have arisen. Why would they have been unsuited on the grounds of *res judicata,* however weak a case they might in truth have had to advance? Plainly, they would not.

[45] Similarly, if the third and fourth defendants had alone been sued would the extensively limited role they played in the affairs of the leased premises have been a basis for misjoinder? Once, as I have found, as alluded to above, that the claim is indeed within the proper confines of a delictual causa no proper reason exists in my view to uphold the misjoinder point, which was firmly bedded on the absence of a link to the contract.

[46] True enough, none of these persons are parties to the lease. They can only acquire rights or incur a liability at all on the grounds of their personal conduct. The claim as pleaded alleges that these two plaintiffs were induced by all four defendants, who acted in a representative capacity and in as much as they connived with their employers to defraud the plaintiffs, they are personally liable too. A nexus with the contract *per se* is not a requirement.

[47] It is common cause that the joinder pleas could have been addressed in an exception. In my view the claim passes the test on exception, which test is not high; If it is possible to read the pleadings in a manner that will render them not excipiable that must be the outcome.

[48] There is of course telling valid criticism of the claims. The chief criticism being the contradictions between the provisions of the leases and the alleged role of the third and fourth plaintiffs, for which no provision has been made, and

indeed appears, on at least one reading of the text, to exclude anyone other than the first plaintiff from rights of use of the premises.

[49] It might be said that the prospects of establishing such a claim on such potential evidence might be remote, but it is nevertheless so that it is when evidence is adduced that these claims should fail, if that is their fate, not at an earlier stage, such as exception. For these reasons I would dismiss both these two special pleas.

[50] The last issue relates to the application to say the action pending satisfaction of the judgment debt. The application is novel in two respects. It is brought as a special plea, not on application supported by affidavit, and secondly it relates to a stay pending a judgment debt being paid. Not as is more commonly seen in these courts, a stay pending the costs of previous litigation being paid.

[51] A passage in Herstein and Van Winsen, The Civil Practice of the Superior Courts, (5th edition) at page 307, is cited in support of the plaintiff's perspective that a special plea is an irregular step to raise such a point. It is argued that what the special plea amounts to is the equivalent of a plea in bar. The authors of Van Winsen, say at page 307:

"The proper course when a stay is sought against litigation alleged to

> be vexatious is to make a substantive application supported by affidavits, giving the grounds upon which relief is sought. It is wholly irregular to claim this relief by way of a plea in bar".

[52] The only authority which is cited for this notion is *Fisheries Development Corporation of South Africa Limited, v Jorgenson and Another* 1979 (3) SA 1331 (W) and the particular passage relied on is at page 1338H. What Nicholas J says there is this:

> "The procedure adopted by the defendants in raising this matter by way of a special plea is not an appropriate one. The proper course when a stay is sought against litigation alleged to be vexatious is to make a substantive application supported by affidavits, giving the grounds upon which the relief is sought. The affidavits can be answered by the affidavits from the other side, and the facts in a way fully placed on record. To claim this relief by way of a plea in bar is highly irregular."

[53] It seems to me that the Jorgenson case is materially distinguishable from the present case. What was dealt with there was, quite clearly, a question relating to vexatious litigation. That factor is absent here. What is here advanced is that the plaintiffs owe the defendants money and it is unfair that they again litigate and cause the defendant further costs, while there is no rational reason for not paying up, if they can.

[54] The application for a stay in these circumstances is said by both counsel who appeared to be unprecedented to the best of their knowledge. Indeed I have found no precedent myself for such a practice or principle.

[55] The core principle intrinsic to such relief would have to be articulated as being that a debtor cannot sue a creditor if it has an unpaid judgment debt. That is quite radical, especially when a creditor has the apparatus of sequestration or liquidation to recover what is due, if it is necessary to resort thereto. Moreover I am informed from the bar that the process of execution on that judgment is in progress at this very time.

[56] Unlike an order for a specific performance of an act in respect of which a litigant might be in default, and possibly, in contempt of the court order, the mere payment of money does not involve any disregard for the court order itself. If a litigant cannot pay, the necessary remedies, as alluded to already, are available to a judgment creditor.

[57] The true underlying principle for refusing to entertain a litigant's appearance before the court is the litigant's refusal to defer to the court's orders. Thus to allow litigation in parallel with a disregard for costs and other orders, is simply a mechanism to protect the court's authority, rather than to provide a benefit to an adversary.

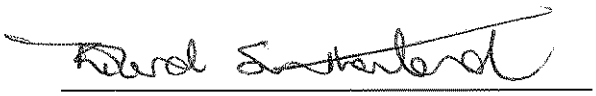
[58] No intention to abuse legal process by non-payment can be properly inferred in this instance. In the result, even if such relief might be assumed to be competent, which I doubt it can be, at least in respect of a money order, these facts do not, in my view, warrant it. Accordingly the application for a stay is refused.

[59] No intention to abuse legal process by non-payment can be properly inferred in this instance. In the result, even if such relief might be assumed to be competent, which I doubt it can be, at least in respect of a money order, these facts do not, in my view, warrant it. Accordingly the application for a stay is refused.

[60] Accordingly I make an order as follows:

60.1. The four special pleas are all dismissed.

60.2. The costs attendant on the preparation and argument concerning the issues subject to the rule 33(4) order shall be costs in the cause at the trial.



SUTHERLAND J
(Edited: 2012/10/08)

Appearances:

For the Plaintiff : Adv G Kairinos
For the Defendant : Adv M Nowitz