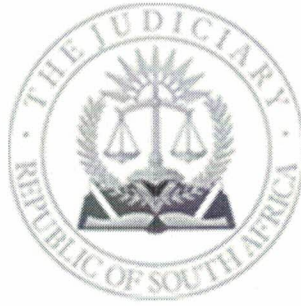


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2017/21216/21

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

05 October 2017

In the matter between:

BLUE CRANE ECO MALL LTD

FIRST PLAINTIFF

VUKILE PROPERTY FUND LTD

SECOND PLAINTIFF

AND

OH MY RESTURANTS AND COFFEE SHOPS (PTY) LTD

& NIKKEL TRADING 59 LTD

FIRST DEFENDANT

PRAGASEN NAIDOO

SECOND DEFENDANT

JUDGMENT

MOLAHLEHI, J

- [1] This is an application for a summary judgment in terms of which the plaintiffs seek an order for the payment in the sum of R161 996.58 by the defendants.
- [2] The plaintiffs further seek the ejectment of the first defendant from the leased commercial premises, at the Springs Mall, Casadale-Springs (the property). The defendants have opposed the application on the grounds that they have a *bona fide* defence. They have also raised a preliminary point concerning *lis pendens*. The first defendant has instituted a counter claim against the plaintiffs. Their claim is based on the alleged fraudulent misrepresentations, by the plaintiffs.

Point in limine

- [3] It is common cause that the plaintiffs instituted proceedings, on 22 July 2017 against the defendants in the magistrate court in the Ekurhuleni East district under case number 3114/2017. According to the defendants the cause of action in those proceedings are similar to the relief sought in the present action.
- [4] It is common cause that the parties concluded a written lease agreement in terms of which the first defendant leased from the plaintiffs the property. The plaintiffs' cause of action is based on the alleged breach of that contract by the first defendant.
- [5] The second defendant is bound to the lease agreement as surety and principal debtor. The first defendant is a company which operates in the trade of the

beauty industry. The first defendant invested the sum of R500 000.00 in the shopping mall after it saw it being marketed in the media.

- [6] According to the defendants the mall was marketed as a “high traffic mall” which would attract a huge volume of patrons. The defendants further stated that the parties had agreed that the first defendant would take occupation of the premises thirty days after the signing of the lease agreement.
- [7] The lease agreement was signed on 16 September 2016 and the first respondent was to commence trading on 16 March 2017.
- [8] The plaintiff charged the first respondent penalties for late occupation of the property. As a result of this a dispute arose during April 2017.
- [9] According to the defendants the reason for not taking occupation of the premises on time was due to the fact that the applicant’s architects charged for the design of the area which it was to be occupied by the first defendant.
- [10] The defendants aver that the plaintiff agreed to remove the penalties at a meeting which was held on 9 May 2017. However, the following day 10 May 2017 the plaintiffs sent an e-mail demanding payment of the penalties before the end of the day. The first defendant then requested the plaintiff to furnish them with an invoice, which it never did.
- [11] The defendants further allege that the plaintiff locked the entrance to the leased premises unlawfully and terminated the supply of electricity.

The legal principles

- [12] This being an application for summary judgment the plaintiff has to show that it has complied with the requirements of rule 32 (1) of the Uniform Rules of the High Court (the Rules). It is trite, in this respect that a plaintiff may apply for summary judgment where the defendant has delivered a notice of intention to defend on a claim based on a liquid document, for a liquidated amount in money, for delivery of movable property or for ejectment together with interest and costs.
- [13] In terms of rule 32(2) of the Rules, in a summary judgment an application has to be made on a notice of application filed together with an affidavit deposed to by a person who can swear positively to the facts verifying the cause of action and the amount, if any, claimed and stating that in his or her opinion there is no *bona fide* defence to the action and that the notice of intention to defend has been delivered for the purpose of delay.
- [14] The defendant who opposes the summary judgment application may in defence either furnish security for any judgment that may be given or satisfy the court with an affidavit or with the leave of the court, by oral evidence given by himself or herself or by any other person who can swear positively to the facts that he has or she has a *bona fide* defence to the action. It is also an essential requirement that the affidavit or oral evidence should disclose fully the nature and grounds of the defence and the material facts relied upon by him or her.

[15] The requirements for a successful defence were set out in *Maharaj vs Barclays National Bank*,¹ in the following terms:

“Accordingly, one of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the court by affidavit that he has a bona fide defence to that claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons are disputed or new facts are alleged constituting a defence, the court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. All that the court enquires into is: (a) whether the defendant has “fully” disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law. If satisfied on these matters the court must refuse summary judgment, either wholly or in part, as the case may be.” The word “fully” as used in the context of the Rule (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the court to decide whether the affidavit discloses a bona fide defence.”

[16] The defendants initially raised the *lis pendens* as a defence against the application for the summary judgment. The issue was abandoned after the

¹ 1976(1) SA 418 (A) at 426 A-D.

applicant produce proof that the claim in the magistrate court had been withdrawn.

The defendant's defence

- [17] It seems to me that there was no dispute about the area which the defendants had leased and the fact that the penalty which was imposed by the plaintiffs was reversed.
- [18] The only defence that remained for the defendant is the counterclaim based on the allegation that the plaintiffs fraudulently represented the potential success of the shopping mall.
- [19] In the opposing affidavit the defendants allege that, during 2016 the representative of the plaintiffs represented to him that the mall would attract the foot traffic equivalent to that of Rosebank and East Gate Malls in Johannesburg. He was also informed that the area where the mall was situated would attract 70% of the population.
- [20] It is alleged that the first defendant relied on the representation as being true and was induced by the same to conclude the lease agreement. However, upon occupation of the space in the mall the first defendant experienced not even a 10% of the foot traffic and the turnover was only R10 236.89.
- [21] The first defendant contended that it has suffered damages in the sum of R1 550 000.00 as a result of the misrepresentation by the plaintiffs.

[22] It trite that it is not every statement made leading to the conclusion of a contract that would legally sustain a claim or defence of misrepresentation. The requirement for a statement to sustain a claim or defence of misrepresentation is set out in *Residency Property Investment (Pty) Ltd and others v Patel*,² in the following terms:

“[28] In order to constitute such a representation the statement or assertion must relate to an ascertainable fact as distinct from a mere expression of opinion — see *Jones v Mazza and Another* 1973 (1) SA 570 (R) at 572B – 573E, although a dishonest opinion as to a future event may be sufficient to found an action for fraudulent misrepresentation insofar as it falsely reflects the state of mind of the representor — see *Van Heerden and Another v Smith* 1956 (3) SA 273 (O) at 275 – 276. As in many other cases what is decisive is a holistic view of the terms of the representation and the context in which it was made.”

[23] In *Feinstein v Niggli*,³ the court held that for misrepresentation to sustain it must be shown that the representation of a fact that was false to the knowledge of the person who made it. It is further stated in the headnote of the same judgment that:

“A representation, in order to found a cause of action for rescinding a contract for fraud, must relate to a matter of present or past fact. Hence, a statement of opinion about the future prospects of a business may for that reason not amount per se to an actionable representation if it turns out to be wrong. But it has been rightly said that “a statement of expectation or a statement in the future tense

² 2011 (5) SA 432 (SCA)

³ 1981 (2) SA 684 (A)

may impliedly say something as to the existing position and so import an implied representation". A person's statement of opinion or forecast of the future success or profits of a business may, at the very least, amount to a representation as to his then state of mind, i.e. that he actually believes in what he says."

[24] In relation to fraudulent misrepresentation it is not sufficient to simply allege that the representation was false. The aggrieved party must allege the mental element relevant in the establishment of the element of fraudulent misrepresentation. In *Ruto Flour Mills (Pty) Ltd v Moriates and Another*⁴, the court in dealing with this issue said:

"It must also be alleged that the representation was untrue and that the defendants knew that the representation was untrue or had no genuine belief in its truth, and that the defendants intended that the plaintiff should act on the representation and, finally, that the plaintiff was induced to act to its prejudice that, is in this case to sell goods to the company on the faith of the representation."

[25] In *SPF and Another v LBCCT/A LB and Another*, Legodi J,⁵ (as he then was) in dealing with the issues of misrepresentation and fraud said:

"The general effect of misrepresentation and fraud on a contract can be shortly stated: A party who has been induced to enter into a contract by misrepresentation of an existing fact is entitled to rescind the contract provided the misrepresentation was material, was intended to induce him to enter into the contract and did so induce him."

⁴ [1957] (3) SA 113 at 117A

⁵ (26492/13) [2016] ZAGPPHC 378 (20 April 2016)

[26] The learned judge further at paragraph [14] of his judgment sets out the requirements for a successful reliance on a claim or defence of fraud as follows:

“[14] A party wishing to rely on fraud must not only plead it, but must also prove it clearly and distinctly. The onus is the ordinary civil onus, bearing in mind that fraud is not easily inferred. The essential elements for a claim or defence based on fraud are the following:

- (a) There must be a representation by the other party or by that party's agent. In the present case K who represented the plaintiffs during the negotiations. Representation may consist of non-disclosure.
- (b) It must be alleged that fraud or misrepresentation was false and or intentional or negligent.
- (c) It must be alleged and proved that the representation induced the representative or innocent party to act.
- (d) If damages are claimed, it must be alleged that the representee suffered damages as a result of the fraud.”

[27] In the present matter the defendant contended that the information given by the plaintiff was unique and given by the person who had facts that backed up his statement. It further contended that it was attracted to do business in Gauteng after learning about the volume of the foot traffic that the mall would command.

[28] The relevant parts of the opposing affidavit of the defendants for the purpose of determining whether the defendants have made out a *bona fide* defence read as follows:

“26 During 2016 I attended a meeting chaired by Mr. Schutte of the plaintiff who represented that the mall would attract foot traffic equivalent of that of Rosebank and East Gate Mall in Johannesburg. I was also informed that the plaintiff’s research revealed that the mall was located in a geographic area where the economically active market segment amounted to 70% of the population, comprising middle to high income earners and the total market catchment amounted to 81 000 households.

In effect that the plaintiff represented to me that their extensive research revealed that the mall would provide a much needed service to these 81 000 households, which would support the mall.

It was further represented to me at the meeting that rental for 90m² would be the sum of R35 000,00, was nothing to be alarmed about because the business would generate a revenue stream of ten times the value of the rental because of the number of patrons that it would attract per day.”

Evaluation/analysis

[29] The starting point in the evaluation of whether the defendant has a *bona fide* defence that is good in law is the provisions of the lease agreement governing the issue of representation made by any of the parties before its conclusion. In this respect clause 47.4 of the lease agreement provides as follows:

“47.4 Any warranties or representation, whether express or implied not stated herein, shall not be enforceable against the Lessor.”

[30] And clause 50 of the lease reads as follows:

“50 This Lease constitutes the whole agreement between the parties and no warranties or representations whether express or implied not stated herein shall be binding on the parties. No agreement at variance with the terms and conditions of this Lease, unless in writing shall be binding on the parties.”

[31] The validity and the enforcement of the above clauses of the lease have not been challenged by the defendants. It follows therefore that in the absence of fraud there can be no counter claim based on any representation made before the conclusion of the lease.

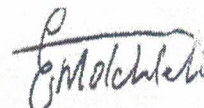
[32] In my view, the counter claim based on misrepresentation by the plaintiff cannot, in the absence of a plea that the statement was fraudulently made, constitute a defence that is good in law. The defendants have neither pleaded that the representation relied on as a defence was falsely made nor that what was said was a statement of fact and that fact was false. In other words in the absence of an averment in the defendant's opposing affidavit that the research opinion about the future success of the mall was fraudulently made, the counter claim cannot serve as a *bona fide* defence that is good in law.

[33] Following the above discussion, I am of the view that the defendant has failed to show that it has a *bona fide* defence that is good in law and therefore the plaintiff's application for a summary judgment stands to succeed.

Order

[34] In the premises the following order is made:

1. The defendants are jointly and severally liable to pay the plaintiff the amount of R161 996.58, the one paying the other to be absolved.
2. The first defendant and anyone claiming occupation through the first defendant is evicted from the commercial lease premises described as Shop Number SH10L006 and Shop Number SH10L007, including the parking bay that had been allocated, Springs Mall Erf 1257, Casseldale Extension 4, situated at Wit and Jan Smuts Roads, Casseldale, Springs, Gauteng.
3. The defendants are jointly and severally liable for the costs of the suit on the scale as between attorney and client, the one paying the other to be absolved.



E Molahlehi

Judge of the High Court

Johannesburg

Representation:

For the Plaintiffs: Adv. J G Dobie

Instructed by: Reaan Swanepoel Attorneys

For the Defendants: Adv SJ Hayward

Instructed by: Azgar Ally Khan and Associates Attorneys

Heard: 15 August 2017

Delivered: 05 October 2017