



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

CASE NO: 44393/2020

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE:

(2) OF INTEREST TO OTHER JUDGES:

(3) REVISED: NO

DATE: 12 AUGUST 2022

SIGNATURE:

In the matter between:

TUHF LIMITED

Applicant

and

ESSELEN STREET HILLBROW CC

First Respondent

266 BREE STREET JOHANNESBURG

Second Respondent

(PTY) LTD

10 FIFE AVENUE BEREA (PTY) LTD

Third Respondent

68 WOLMARANS STREET JOHANNESBURG (PTY) LTD

Fourth Respondent

HILLBROW CONSOLIDATES INVESTMENTS CC

Fifth Respondent

MARK MORRIS FARBER

Sixth Respondent

JUDGMENT

SENYATSI J:

- [1] This is an opposed application for money judgment in terms of which the applicant TUHF Limited (TUHF) implore this court to order all the respondents to pay, jointly and severally the one paying the other to be absolved, the sum of R9 349 073.89 with interest accumulates at the rate of 2.50% above the commercial banks' prime rate plus 1% per year, calculated daily and compounded monthly in arrears from 1 February 2020 to date of payment, both dates included
- [2] In an alternative to [1] above, TUHF prays that the respondents be ordered to pay, jointly and severally, the one paying the others be absolved, the sum of R9 198 953. 70 with interest calculated at the rate of 2.50% above the commercial banks' prime rate plus 1% per year, calculated daily and compounded monthly in arrears from 1 November 2020 to date of payment, both dates included.
- [3] The TUHF also seek the auxiliary reliefs as well as the costs to be awarded against the respondents on an attorneys and client scale as agreed to in terms of the loan agreement.
- [4] TUHF is a public company with limited liability which carries out its business from Johannesburg. It is the successor- in-title of a non-profit company, Trust for Urban Housing Finance an association incorporated in terms of section 21 of the Companies Act, 1973, with registration number 1993/00217/08.
- [5] The applicant converted to a private company (registration number: 2007/025898/07), which subsequently converted to a public company on 4 November 2014.

- [6] The First Respondent is 28 Esselen Street Hillbrow Close Corporation without the chosen *domicilium citandi et executandi* within the area of jurisdiction of this Court.
- [7] The Second Respondent is 266 Bree Street Johannesburg (Pty) Ltd, a private company with a chosen *domicilium citandi et executandi* within the area of jurisdiction of this Court.
- [8] The Third Respondent is 10 Fife Avenue Berea (Pty) Ltd, a private company with a chosen address within the area of jurisdiction of this Court.
- [9] The Fourth Respondent is 68 Wolmarans Street Johannesburg (Pty) Ltd, a private company with the chosen address of service of the process within the area of jurisdiction of this Court.
- [10] The Sixth Respondent is Mr Mark Farber, an adult male business man with the chosen address for service of the process within the area of jurisdiction of this Court.
- [11] All respondents are related parties and are controlled by the Mr Faber as an ultimate beneficial owner. The sixth Respondent is the sole director or member of the first to the fifth respondents. Mr Farber is the sole shareholder of the second, third and the fourth respondents.
- [12] Mr Farber represented the first to the fifth respondents in their dealings with the Applicant.

[13] The second, third, fourth, fifth respondents and Mr Farber concluded written unlimited suretyship agreements for the first respondents's indebtedness in favour of the applicant.

BACKGROUND

[14] The application arises as a result of the alleged breach of the loan agreement which was **concluded between the parties on 19 October 2016 to 2 November 2016.**

[15] The loan agreement provided that the first respondent would be in breach thereof in the event that the First Respondent caused an event of default and failed to remedy it. The applicant is, in such event entitled to accelerate and declare all amounts owing in terms of the loan agreement immediately due and payable.

[16] In terms of the loan agreement the first respondent would trigger an event of default, *inter alia*, if:-

16.1. any written warranty made by the first respondent or any surety is breached; and

16.2. the first respondent or any surety, breached or repudiated or evidences an intention to repudiate any of the provisions of the loan agreement or the security to which it is a party, and fails to remedy any such breach within any applicable notice or cure period calling upon it to do so.

[17] As security for and in respect of the due and punctual performance by the first

respondent of its obligations of whatsoever nature in terms of the loan agreement, the first respondent would:-

17.1 register a mortgage bond over an immovable property for an amount of R14 971 050. 00 together with an additional 30% provision for contingent costs (“the mortgage bond”)

17.2 ensure that the sureties pass in favour of the applicant written unlimited suretyship agreements

[18] In terms of the suretyship agreements the sureties warranted that the suretyship agreements would in all respects be valid and binding (“the warranty”)

[19] In terms of the mortgage bond the parties agreed, amongst others, that in the event of a default, the first respondent ceded it right to rental income at the immovable property and the applicant may recover and receive all rent income and fruits from the immovable property (“the cession provision”).

[20] On 2 March 2020, due to the alleged events of default arising in terms of the loan agreement the applicant issued an application under case number 7843/2020 in this court (“the first application”).

APPLICANTS CASE

[21] On 26 August 2020 in answer to the first application, the respondent filed a supplementary answering affidavit (“supplementary answering affidavit”) in terms of which the respondents declared under oath, *inter alia*, that the suretyship agreements passed by the second, to fifth respondents are void in terms of section

45(6) of the Companies Act 2008 (“the Companies Act”) and not complaint with section 46 of the Companies Act.

[22] The respondents declaration under oath, that the suretyships agreements are void, so avers the applicant, constitute events of default in terms of the loan agreement and mortgage bond that arose after the launch of the first application (“the new events of default”)

[23] The applicant contends that due to the new events of default, it is by virtue of the cession provision in the mortgage bond entitled to take cession of the rental income at the immovable property (“the cession”), which cession the first respondent has unlawfully and intentionally refused to facilitate.

[24] The applicant seeks an order in terms of the notice of motion.

RESPONDENTS CASE

[25] The respondents contend that the present application is a pure abuse of the court process. They contend that the applicant seeks to exit its relationship with the respondents at all costs to the extent of designing the alleged breaches to the loan agreement to suit its (TUHF) agenda.

[26] The respondents contend that the applicant’s *modus operandi* has resulted in the incurrence of extraordinary legal costs, which the respondents furthermore contend that the applicant seeks to outspend the respondent in this and related litigations.

[27] The defences raised by the respondents is that this application amounts to an abuse of court process that must be stayed, alternatively discussed on the

following grounds:

27.1. The matter is *lis pendens* because:

27.1.1. the first Waldorf Heights application is between the same parties as those in the present matter;

27.1.2. the first Waldorf Heights application is based on the same cause of action as in the present proceedings, being the loan agreement

and

mortgage bond thereto, and

27.1.3. the first Waldorf Heights application is for the same reliefs in the present matter, save that in this application, in the alternative the relief sought in the first Waldorf Height application, the applicant seeks payment of the capital sum and penalty fees from a later

date

to that sought in the first Waldorf Heights application.

[28] The respondents furthermore contends that the validity of the second to fifth respondent's deeds of suretyship is pending for decision in the first Waldorf Heights application. They pray that the court should stay the present application.

[29] It is furthermore contended by the respondents that the applicant has waived its rights on the alleged breach warranty concerning the validity of the deeds of suretyship in as much as it was aware, alternatively ought reasonably to have been aware, that the second to fifth respondents would not satisfy the solvency and liquidity test after executing the deeds of suretyship.

[30] The respondents contend that the short payments made by the first respondent under the loan agreement- which were made after the first Waldorf Heights application was instituted in March 2020, were made as a consequence of COVID – relief expressly being granted to the first respondent. The respondents contend **argued** that this raises genuine disputes of fact.

ISSUES FOR DETERMINATION

[31] The issues for determination are summarized as follows:-

- 31.1. whether the matter is *lis pendens* due to the first application;
- 31.2. whether there is a dispute of fact;
- 31.3. whether the validity of the suretyship agreements require determination before this application may proceed;
- 31.4. whether Rule 46A of the Uniform Rule is applicable to this application;
- 31.5. whether the applicant is engaged in the abuse of the court process.

LEGAL FRAMEWORK APPLICATION **THEREOF TO FACTS AND REASONS**

[32] In order to appreciate the issues raised in [31] above, it is important to have regard to the applicable legal framework pertaining to all the issues raised ***Lis Pendens***.

[33] Our law is trite that if an action is already pending between the parties and the plaintiff brings another action against the same defendant on the same cause and in respect of the same subject-matter, whether in the same or in a different court, it is open to the defendant to take the objection of *lis pendens*, that is, that another action respecting **concerning** the identical subject-matter has already been instituted. The court, in its discretion, may stay one action pending the

decision on the other.¹

[34] A defence of *lis pendens* upon the existence of a pending earlier action. The requirements of a plea of *lis pendens* are the same with regard to the person, cause of action and subject-matter as those of a plea of *res judicata*,² which in turn are that the two actions must have been between the same parties or either successors in title, concerning the same subject-matter and founded upon the same cause of complaint.³

[35] In order to decide what matter is in issue, the pleadings of the earlier case should be consulted and not the evidence led.⁴

[36] The actions may be in the same court or in different courts. A plea of *lis pendens* is valid although the two actions are pending in the same court.⁵ To bring two actions in one court on the same matter is *prima facie* vexatious and the court will generally put the plaintiff to an election.⁶

[37] There is also authority that the commencement of the second action is *prima facie* vexatious when the two suits are brought in different court of the same country, where the remedy and the procedure in both are practically the same.⁷

[38] *Lis pendens* is not, however, an absolute bar. It is a matter within the discretion of the court to decide whether an action brought before it should be stayed

¹ See Cilliers, Loots, Nel: Herbstein & Van Winsen: The Civil Practice of the High Courts of South Africa, 5th Edition, Juta, Volume 1 at p310

² See Mark & Kantor v Van Diggelen 1935 TPD 29 AT 37; Van As v Appollus 1993(1) SA 606 (C) at 608J- 609a

³ See Pretorius v Barkley East Divisional Council 1914 AD 407 at 409; Milford's Executor v Edben's Executor 1917 AD 682; Le Roux v Le Roux 1967 (1) SA 446 (A)

⁴ See Marks & Kantor v Van Diggelen supra at 33

⁵ See Mark v Kantor supra at 29

⁶ See Osman v Hector 1933 CPD 503

⁷ See Osman v Hector supra at 508

pending the decision of the first action, or whether it is more just and equitable that it should be allowed to proceed.⁸

[39] Consideration of convenience and fairness are decisive in determining whether the court will decide that the *lis* which was first to commence should be the one to proceed.⁹

[40] The onus of proving the requisites for the *lis pendens* defence rests with the respondents.¹⁰ In *Nestle (SA) (Pty) Ltd v Mars Incorporated*¹¹ in dealing with the features of *lis pendens* and *res judicata* court held that:-

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

[17] There is room for the application of that principle only where the same dispute, between the same parties is sought to be placed before the same tribunal (or two tribunals) with equal competence to end the dispute. In the absence of any of those elements there

⁸ See *Michael v Lowenstein* 1905 TS 324 at 328; *Les Marquis (Pty) Ltd v Marchand* 1989 (2) SA 651 (T) at 658D; *Yekelo v Bodlani* 1990 (3) SA 970 (T) AT 973d; *Friedrich Kling GmbH v Continental Jewellery Manufacturers; Guthmann v Wittenauer GmbH v Continental Jewellery Manufacturers* 1993 (3) SA 76 (C) at 83 D

⁹ See *Van As v Appollus* supra 610D

¹⁰ See *Dreyer v Truckers Land and development Corporation (Pty) Ltd* 1981 (1) SA 1219 (T) at 1231; *Sikatele v Sikatele* [1996] 1 All SA 445 (Tk)

¹¹ [2001] 4 All SA 315 (A) at [16] to [17]

is no potential for a duplication actions ...”

- [41] Based on the principles set out in this judgment on *lis alibi pendens*, the question is whether or not the respondents have discharged the onus on establishing the requisites for *lis pendens* and whether this court should exercise its discretion and stay the proceedings.
- [42] In order to determine the issue, it is relevant to look at the pleadings in the first application. The first application was based on breach of the loan agreement due to the respondents’ alleged failure to pay rates and taxes. The current application is based on breach of the warranty provisions, in that the respondents now allege that the suretyship agreements are invalid or **are in** alleged non-compliance with section 45 of the Companies Act, 2008.
- [43] The respondents contend that the present application is based on the same cause of action. They contend that the first application was based on the same loan agreement, the same mortgage bond and the same various deeds of suretyship. I do not agree with this submission. It is so that the same loan agreement, the **same** mortgage bond and the **same** various deeds of suretyship are used in both applications. However, the causes of action are distinguishable in that in the first application, the action was based on the alleged breach of loan agreement by failure to make payments for municipal utilities, rates and taxes. In the current application, the cause of action is based on the breach of warranty condition on the validity of securities in the loan agreement by **averring** that the deeds of suretyship are invalid due to non-compliance with section 45 of the Companies Act 2008 based on the alleged failure by the respondents themselves to comply with the liquidity and so many requirements in providing security to the first respondent.

[44] The exercise of this court's discretion, I am of the view is in the interest of justice and fairness and that the present application should not be stayed on the grounds of *lis alibi pendens*. Consequently, the respondents have failed to discharge the onus of proving all the requisites to succeed with the defence of *lis pendens*.

DISPUTE OF FACT

[45] The legal principles on the dispute of fact in the motion proceedings are trite.¹² Motion proceedings are decided on papers filed by the parties. In cases where there is a factual dispute which can only be resolved through oral evidence¹³; it is appropriate that action proceedings should be used unless the factual dispute is not real and genuine.¹⁴

[46] In *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd*¹⁵, the court held that where there is a dispute of fact final relief should only be granted in notice of motion proceedings if the facts as stated by the respondent together with the admitted facts in the applicant's affidavit justify such an order.

[47] This rule applies irrespective of where the onus lies. Where a factual dispute exists or arises before the hearing of an application and the applicant does not seek the matter to be referred either to oral evidence on a specific issue which is in dispute or to trial, the court has a discretion to either dismiss the application or direct that oral evidence be heard or that the matter goes to trial.

[48] In the present application, there is no dispute that the proceedings commenced as a result of the repudiation of the warranty provisions in the loan agreement

¹² See *Stellenbosch Farmers Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (A) SA 234 (C) at 235

¹³ See *Plascon-Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd* [1984] 2 All SA 366 (A)

¹⁴ See *Soffiantin v Mould* [1956] 4 All SA 171 (E)

¹⁵ *Supra* at 235 E-G

the applicant invoked the provisions of the loan agreement by approaching this court with an appropriate relief. The relief sought finds support in terms of clause 18.1 of Common Terms Module of the loan agreement which describes an event of default, *inter alia* as breached by any written warranty made by the first respondent or any surety.

[49] It is common fact that to aver that the written warranty given by the respondents as sureties for the fulfilment of all obligations by the first respondent is invalid on any alleged ground, does in my considered view, amount to the breach contained in the loan agreement.

[50] The averment that there is a dispute of fact which renders the application to be dismissed is therefore without factual merit and is rejected. The factual dispute related to the Covid 19 relief is also irrelevant to the present application.

[51] It should be accepted by this Court that TUHF advanced money to the first respondent and security provided backed by the security warranties contained in the loan agreement would have been one of the considerations. It is not against the provisions of the loan agreement for the respondent to challenge suretyship agreements validity based on the alleged failure by them and not TUHF to comply with the solvency and liquidity test in terms of sections 46 of the Companies Act, 2008. The attempt by the respondents to avoid the contractual obligations on security warranties, which included the deeds of suretyship is misplaced.

[52] More importantly, when TUHF contracted with the respondents, they did so in good faith with the understanding that the respondents has complied with all their internal procedures, which without doubt, implied that the respective boards of all the respondents ensured that the insolvency and liquidity test required in

terms of the Companies Act had been complied with.

[53] Section 20 of the Companies Act 2008 and the Turquand principle which is part of our law, preclude the respondents from escaping liability under an otherwise

valid contract solely on the grounds that some internal formality or procedure was not complied with. This is understandable because the internal procedures or formalities are within the control of the respondents and not an innocent applicant

in this instance. It follows that the deeds of suretyship are valid and enforceable.

RULE 46A OF THE UNIFORM RULES

[54] The respondents aver that Rule 46A of the Uniform Rules is applicable in this application. They contend that notice of motion is not in accordance with Form 2A of Schedule 1 to the Rules; notice of proceedings has not been given to persons who will be affected by the sale of Waldorf Heights and that this application is not supported by all the information set out in rule 46A (5).

[55] Rule 46A deals with execution against residential property which is the judgment debtor's primary residence. Rule 46A (1) and (2) provide as follows:-

“(1) This rule applies whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor

(2) (a) A court considering an application under this rule must

(i) establish whether the immovable property which the execution creditor intend to execute against is the primary residence of the judgment debtor; and

(ii) consider alternative means by the judgment debtor of

satisfying the judgment debtor's primary residence.

(b) A court shall not authorize execution against immovable property which is the primary residence of a judgment debtor unless the court, having considered all relevant factors, considers that execution against such property is warranted.

(c) The registrar shall not issue a writ of execution against the residential immovable property of any judgment debtor unless a court has ordered execution against such property.”

[56] It is apparent to me that the first respondent acquired Waldorf Heights as a business venture. The property has several floors and is rented to tenants as residential units.

[57] Rule 46A does not find application on commercial properties such as the one owned by the first respondent. The tenants enjoy separate rights and privileges which are covered by their lease agreements with the first respondent. Our common law accords protection to them in that whoever in the future by way of sale of the property through private treaty or as part of execution of a judgment will honour the obligations of the seller contained in the lease. The proposition that individual tenants need to be advised of the judicial proceedings between the parties in this application has no legal merit.

ABUSE OF COURT PROCESS

[58] The respondents contend that the TUHF is engaged in the abuse of the court process in order to put undue pressure on the respondents in the second respondent's dispute with TUHF in relation to the Metro Centre matter.

[59] In the Australian High Court judgment of *Varawa v Howard South Co Ltd*¹⁶ the definition of ‘abuse of process’ was stated in the following terms:

“... the term ‘abuse of process’ **commotes** that the process is employed for some purpose other than the attainment of the claim in the action. If the proceedings are merely a stalking – horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the Court is asked to adjudicate they are regarded as an abuse for this purpose ...”

[60] The court in *Phillip v Botha*¹⁷ the Court adopted the definition of the Australian High Court definition of the “abuse of process” where the litigant clearly stated that the purpose of litigation was not a civil redress. But to show that the law applied equally to all citizens. The court correctly held that the proceedings amounted to abuse of process. There is therefore support in our law that no litigant should be allowed to engage in the abuse of court process.

[61] In the instant case, there is no evidence of abuse of court process. The litigation was initiated as a consequence of the repudiation of securities and warranties contained in the loan agreement, mortgage bond and deeds of suretyship. It follows that the defence of abuse of court process must accordingly fail.

ORDER

61. The following order is made:

61.1. That **28 ESSELEN STREET HILLBROW CC, 266 BREE STREET JOHANNESBURG (PTY) LTD, 10 FIFE AVENUE BEREA (PTY) LTD, 68**

¹⁶ (1911) 13 CLR 35 at 91

¹⁷ 1999 (2) 555 (SCA) at 565E

WOLMARANS STREET JOHANNESBURG (PTY) LTD, HILLBROW CONSOLIDATED INVESTMENTS CC, and MARK MORRIS FARBER (“the Respondents”) pay, jointly and severally, the one paying the others to be absolved, the sum of **R9,349,073.89** with interest calculated at the rate of 2.50% above the commercial banks’ prime rate plus 1% per year, calculated daily and compounded monthly in arrears from **1 February 2020** to Waldorf Heights’ tenants together with:-

- (a) Copies of any written lease agreements concluded between the First Respondent, *alternatively* the Respondents, *further alternatively* its duly authorised agent, and the Waldorf Heights’ tenants;
- (b) Particularity in respect of the terms of any implied and/or oral terms of any lease agreement concluded with the Waldorf Heights’ tenants; and
- (c) Particularity and copies of any existing property management mandates for the management of and rental collection at the Waldorf Heights;

61.2. That the Applicant may take steps necessary for purposes of collecting rental amounts from the Waldorf Heights’ tenants;

61.3. That the immovable property at: -

ERF 3209 JOHANNESBURG TOWNSHIP

REGISTRATION DIVISION I.R., THE PROVINCE OF GAUTENG

MEASURING 495 (FOUR HUNDRED AND NINETY-FIVE) SQUARE METRES

HELD by Deed of Transfer number T24467/2003

(Hereinafter referred to as the “**immovable property**”)

be declared executable, and the Applicant is authorised to issue Writs of Attachment calling upon the Sheriff of the Court to attach the immovable property, to sell the immovable property in execution;

61.4. That the Respondents pay a penalty fee equal to 5% (five percent) plus VAT of the monthly outstanding instalment amount in arrears and unpaid by the First Respondent within 2 (two) days of an Instalment Payment Date as from

21 February 2020, to date of payment in full of 61.1. above, both dates included; and

61.5. Cost on attorney and client scale.

**ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

DATE APPLICATION HEARD: 27 October 2021

DATE JUDGMENT DELIVERED:

APPEARANCES

*Counsel for the applicant: Adv A. Botha
Adv E. Eksteen*

Instructed by: Schindlers Attorneys

Counsel for the first respondents: Gavin Simpson Attorneys

*Instructed by: Adv G Wickins
Adv M De Oliveira*

