**REPUBLIC OF SOUTH AFRICA**

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

CASE NO: **2006/2035**

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

..... .....
**SIGNATURE** **DATE**

In the matter between:

| | |
|---|---|
| **SUPERSTRIKE INVESTMENTS 53 (PTY) LTD** | Plaintiff |
| And | |
| **SIYAKHA MANAGEMENT SERVICES PTY LTD** | First Defendant |
| **BONILE SIMON JACK** | Second Defendant |
| **OPTIMA PROPERTY SOLUTIONS PTY LTD** | Third Defendant |

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**JUDGMENT**

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**A.C. BASSON, J**

The parties

[1] The plaintiff, Superstrike Investments 53 (Pty) Ltd is a private company incorporated with limited liability and the developer of the Palm Springs Mall

(hereinafter referred to as "the mall") situated in the broader Orange Farm area. The first defendant is Siyakha Management Services (Pty) Ltd a private company incorporated with limited liability. The second defendant is Mr Bonile Simon Jack a director of the first defendant. At all material times the second defendant represented the first defendant in its dealings with the plaintiff. The third defendant is Optima Property Solutions Pty Ltd and was the broker/agent who introduced the first defendant to the plaintiff as a prospective tenant of the mall. The third defendant has not entered an appearance to defend and no order is sought against the third defendant.[1]

The dispute

[2] The plaintiff sues the first and second defendants for damages arising from the cancellation of a lease agreement. The second defendant is sued because he signed as surety for the first defendant. In essence it is the case for the plaintiff that the defendants expressly orally represented to the plaintiff that the first defendant was the franchisee of Fruit & Veg City and that the business to be operated from the premises would be a Fruit & Veg City shop. This representation was repeated by the first and second defendants in writing in the offer to lease and in the signed lease agreement. It is further the plaintiff's case that the said representation was made with the intention to induce the plaintiff to enter into the offer to lease and the lease agreement. The plaintiff claims that it was so induced to enter into the lease agreement to its prejudice. As a result of the misrepresentation the plaintiff became entitled to cancel the lease agreement and indeed did so by entering into an agreement of cancellation on 21 July 2006. The plaintiff alleges that the representation was to the knowledge of the defendants false in that the second defendant was aware of the fact that the first defendant was not the franchisee of Fruit & Veg City and that Fruit & Veg City had not approved the premises for purposes of a Fruit & Veg City store.

[3] The quantum and merits of the plaintiff's claim have been separated. The first and second defendants seek a dismissal of the plaintiff's claim.

[1] On 26 May 2011 an order was granted in terms of which the plaintiff's claim against the third defendant was separated from the plaintiff's claim against the first and second defendants in terms of Rule 33(4).

The Offer to Lease 1 June 2006

[4] Miss Annalise Manichkum (the Managing Director of the third defendant – hereinafter referred to as "the agent") introduced the first defendant as a prospective tenant for a shop in phase 2 of the mall. Mr Richard Herring (hereinafter referred to as "Richard") explained that the plaintiff was looking for an anchor tenant in the second phase of the development of the mall. Shoprite Checkers is already the anchor tenant in the first phase of the development. He explained the importance of having an anchor tenant as the anchor tenant draws customers to the mall and ultimately benefits the line shops. Line shops around or near the anchor tenant therefore feed off the anchor tenant and usually conclude their lease agreements on the back of the anchor tenant's lease. Richard explained that if an anchor tenant withdraws it has catastrophic consequences as that could result in the line shops withdrawing from the mall.

[5] On 10 January 2006 the second defendant wrote to the agent stating that he would like to confirm their interest to open a Fruit & Veg City store at the mall. In this email the second defendant specifically recorded that –

> "We have a standing agreement with Fruit & Veg City to identify feasible sites for this purpose. The training space required is about 1200 m² with access to about 2000 m² parking.
>
> The final lease agreement will be subject to satisfactory negotiations in terms of rental per square metre as well as other matters relating to the responsibility for costs relating to the maintenance of the facility.
>
> All these matters will be dealt with together with Mr Mike Coppin of Fruit& Veg City."

[6] Richard explained that the plaintiff had requested to receive an offer to lease from Fruit & Veg (the franchisor) and that they were keen to conclude a so-called "corporate lease" with Fruit & Veg as opposed to a lease agreement with the franchisee (the first defendant). Ultimately the lease agreement was concluded with the first defendant.

[7] On 7 March 2007 the agent sent through the first offer to lease. This offer to lease was a corporate lease. On 22 March 2006 a signed offer to lease was returned to the plaintiff. This offer to lease was no longer a corporate lease but was signed by the second defendant on behalf of the first defendant. The

gross rental rate was reduced from R52 to R42 per square metre. Richard explained that he did not sign this offer as this was now a franchisee lease and no longer a corporate lease. The tenant is indicated as Fruit & Veg and the shop is indicated as per the attached plan in phase 2 of the mall.

[8] On 29 May 2006 Richard sent an offer to lease directly the first defendant bypassing the agent. This offer identified the tenant as the first defendant trading as Fruit & Veg City (represented by Bonile Jack - the second defendant). The shop is identified as shop number 68 in phase 2 at Palm Spring Mall measuring 1200 m². The offer contains the following paragraph:

> "I also confirm that Fruit & Veg City have approved my entering into this deal and the Landlord is hereby requested to proceed with the building of 1200 m² store as per the specifications given to the landlord."

[9] This paragraph was manually amended by the second defendant to read as follows:

> "I also confirm that Fruit & Veg have approved the site for trading purposes and that the Landlord is hereby requested to proceed with the building of our 1200 m² store as per the specifications given to the landlord."

The offer to lease (as amended) was signed on 1 June 2006. Although the parties refer to this as "an offer" it is in fact an agreement.

[10] Two facts emerge from the signed offer to lease: Firstly, the first defendant confirmed that Fruit & Veg approved the "site" for trading and secondly, the second defendant expressly instructed the landlord to proceed with building the store as per the specifications given to it. No mention is made in this offer of the fact that the first defendant is not in possession of a franchise agreement from Fruit & Veg granting it the right to open and trade as a Fruit & Veg City store and no mention is made of the fact that Mr Coppin of Fruit & Veg City first had to approve the location of the shop before the first defendant would be entitled to trade as a Fruit & Veg.

<u>Lease Agreement 15 June 2006</u>

[11] It is common cause that the plaintiff (represented by Mr Steven Herring - a director) and the first defendant (represented by the second defendant)

entered into a lease agreement on 15 June 2006. In terms of this agreement the first defendant rented a property in the mall and more specifically in phase 2 of the development. The relevant stamp duties in the amount of R 50 065.56 was paid over to SARS by the plaintiff.

[12] In terms of clause 3.2 of lease agreement it is specifically recorded that the shop will trade as a Fruit & Veg City and that its permitted use is the sale of fresh fruit and vegetables, fresh milk, fresh juice, pasta and related items, dry fruits and nuts and dry spices. The plaintiff first had to obtain permission from Shoprite Checkers to waive their exclusivity to sell food and to allow the plaintiff to put approximately 1000 m² at the disposal of Fruit & Veg City in phase 2 of the mall. Shoprite Checkers subsequently waived their exclusivity and therefore paved the way for the plaintiff to conclude a lease agreement with the first defendant.

[13] Various annexures are attached to the agreement. Annexure "C" refers to the Architectural Outline Specifications of Fruit & Veg City. This document provides for the general specifications in respect of, *inter alia*, ventilation gutters; down pipes; doors; internal wall and partitions; floor finishes; ceilings; general fittings and fixtures; plumbing and installation; juice and milk bar; the water bar and the receiving area. Also attached is the floor plan of the shop depicting, *inter alia,* the main entrance offices and trading area; the milk bar; the water bar and the housewives corner. Clause 2.1.12 specifically refers to the detailed specifications contained in Annexure "C". The following is specifically recorded in clauses 3.3 and 3.4:

> "3.3 The Lessor has agreed to lease to the lessee who has agreed to hire the Premises which lease shall be subject to the terms and conditions of this lease."
>
> "3.4 The shop will trade as FRUIT AND VEG CITY and is permitted use is the sale of fresh fruit and vegetables, fresh milk, fresh juice, pasta and related items the two, dry fruits and nuts, and dry spices."

Annexure "D" refers to the proposed floor plan. Fruit & Veg is depicted on the plan as shop 68.

[14] Mr Coppin of Fruit & Veg (hereinafter referred to as "Coppin") only visited the mall *after* the lease agreement was signed. Coppin is a founder of Fruit &

Veg and is the Franchise Director of Fruit & Veg. He explained that he had met the second defendant when the second defendant was still on the board of the Johannesburg Fresh Produce Market. After negotiations with the second defendant a successful franchise agreement was concluded with the first defendant in respect of a shop in Mabopane. Coppin explained that in the case of the Mabopane store the second defendant showed him the site and only after negotiations with the landlord - which included the relocation of the store to a more favourable location - was a lease agreement signed. The second defendant was thereafter requested by Coppin to find more business opportunities – especially in the so-called township areas - to open further Fruit & Veg stores. On one occasion the second defendant had identified a possible opportunity in Midrand but after Coppin had visited the site it was rejected by Coppin as a possible business opportunity.

[15] Coppin explained that although the second defendant was in fact granted the franchise to open a store in the Orange Farm area he was not aware of the fact that the second defendant had indeed signed a lease agreement in respect of the mall. He also testified that he had not seen the premises until after the lease agreement had been signed and that he did not know what the location of the store was. In fact he testified that had he known about the lease agreement he would have told the second defendant not to sign a lease agreement until he (Coppin) had seen the location of the store.

[16] On 7 July 2006 Mr Grant Steenkamp (the tenant coordinator) sent an e-mail to Coppin requesting the specifications for the store. Coppin responded on 9 July 2006 that he will send it over the weekend. He testified that he was surprised when he received the e-mail because he had not seen a lease agreement nor has he seen the site plans. After this email Coppin then decided to visit the site together with Mr Woods (the Area Manager). He testified that he walked around on the site which was still in its foundation phase. He then met with Steven. He testified that he had informed Steven that he could not allow the first defendant to open the store in the mall because he was not happy with the location of the store. According to Steven, Coppin was extremely arrogant. Coppin told him that he did not like Orange Farm because it was a low income area and that he did not like the site and that he would not take the store. Although Coppin could not recall

the contents of the conversation in great detail he did concede that he may have told Steven that he did not like the shopping centre. According to Coppin he would have considered the mall if was offered an alternative location but that did not happen as a result of the altercation. Neither Coppin nor Steven contacted each other to discuss the possibility of an alternative arrangement. The outcome of this altercation was that Richard contacted the second defendant to cancel the agreement as it was clear that Fruit & Veg would not open a store in the mall.

[17] In an e-mail following the meeting, Coppin confirmed that "[w]e have decided that the site would not be suitable for a FVC [Fruit & Veg City]..". Coppin explained that he intended the word "the site" to mean the location of the shop in the mall. He testified that he had telephoned the second defendant and informed him that he was not prepared to allow him to trade a shop form that location. The result was that the first defendant was unable to perform in terms of the lease agreement. I am in agreement that this constituted an anticipatory breach that clearly went to the heart of the contract.[2] The second defendant also conceded that the first defendant could not perform in terms of the lease agreement unless it was amended.

Cancellation of the lease agreement 20 July 2006

[18] On 20 July 2006 the plaintiff (represented by Steven) and the first defendant (represented by the second defendant) concluded an agreement of cancellation. This agreement contains only two clauses and reads as follows:

> "1. On the 15th June 2006 an Agreement of Lease was entered into between the above parties.

[2] *Nash v Golden Dumps (Pty) Ltd* 1985 (3) SA 1 (A) at 22D-F: *"I come now to the final issue in the case, viz the applicability of the principle laid down in the Crest Enterprises case (1972 (2) SA 863 (A)). Where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract, he is said to "repudiate" the contract (see Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou1978 (2) SA 835 (A) at 845A - B). Where that happens, the other party to the contract may elect to accept the repudiation and rescind the contract. If he does so, the contract comes to an end upon communication of his acceptance of repudiation and rescission to the party who has repudiated (see Joubert Law of South Africa vol 5 para 226). The consequence of this is that the rights and obligations of the parties in regard to the further performance of the contract come to an end and the only forms of relief available to the party aggrieved are, in appropriate cases, claims for restitution and for damages."*

> 2. It has been mutually agreed that the lease be cancelled with immediate effect."

[19] This agreement does not expressly provide that the agreement is in full and final settlement. This much was also conceded by the second defendant. The second defendant, however, testified that he would not have signed the agreement had he been made aware of the fact that the plaintiff intended to sue him for misrepresentation. On 20 July 2006 the first defendant also informed the plaintiff in writing that the lease had been cancelled with effect from date of signature. Steven explained that it was necessary to have such a letter in order to claim back from SARS the stamp duties paid in respect of the agreement of lease.

The relationship between Fruit & Veg and the first defendant

[20] It is for purposes of this judgement important to point out what the relationship between Fruit & Veg and the first and second defendants was at the time when the lease agreement was signed. It is clear from the evidence of Coppin that he (in his position as Franchise Director of Fruit & Veg City) would not allow a franchisee to open a store if he was not satisfied that the store would be in a favourable location. Although it was the evidence of Coppin that the second defendant did have permission to open a store in Orange Farm it is clear from his evidence that if he was not happy with the location of the store he would not allow the franchisee to open a store. This is consistent with his evidence that he had told Steven that he would not allow the franchisee to open a store in the mall. It was also the evidence of Coppin that he was surprised when he was asked in an email to submit site plans as he had not seen the site nor had he been made aware of the fact that the second defendant had signed a lease agreement. Coppin also explained that a franchisee must have a written franchise agreement before it can open a store although he stated that this can be signed at any stage. Of important, however, is Coppin's evidence that, although it was correct that the second defendant was allowed to look for possible locations for new stores, he must first look at the store and approve whether a store can be placed in a specific location. In fact, Coppin expressly stated that the second defendant could not trade in a specific shop if he did not approve of the location and that the second defendant could not open a shop without his

approval. I have already referred to the fact that prior to the email from Steenkamp dated 7 July 2006, Coppin was not even aware of the fact that the second defendant had signed a lease agreement. In this regard Coppin testified that if the second defendant had brought him the lease agreement he would have told him that they first had to look at the location and that a lease agreement can only be signed after he has approved the location. After Coppin informed Steven that he would not allow the defendants to open a Fruit & Veg in the mall he sent an email informing Steven that they will not send the tenant specs as the site was not suitable for a Fruit & Veg City store.

What was represented to the plaintiff?

[21] Three documents are important: The offer to lease, the lease agreement and the cancellation agreement. It is now settled law that all documents are interpreted within its particular factual matrix. This contextual approach was summarised by the Court in *Joint Municipal Pension Fund v Endumeni Municipality* as follows:[3]

> "The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself',16 read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[3] 2012 (4) SA 593 (SCA) at 603F

[22] This does not, however, mean that the *parol evidence* rule no longer applies. See *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA)[4]

> "[39] First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning (*Johnson v Leal*1980 (3) SA 927 (A) at 943B). Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses (or, as said in common-law jurisprudence, it is not a jury question: Hodge M Malek (ed) *Phipson on Evidence* (16 ed 2005) paras 33 - 64). Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent (*Johnson & Johnson (Pty) Ltd v Kimberly-Clark Corporation and Kimberly-Clark of South Africa (Pty) Ltd* 1985 BP 126 (A) ([1985] ZASCA 132 (at www.saflii.org.za)). Fourth, to the extent that evidence may be admissible to contextualise the document (since 'context is everything') to establish its factual matrix or purpose or for purposes of identification, 'one must use it as conservatively as possible' (*Delmas Milling Co Ltd v Du Plessis*1955 (3) SA 447 (A) at 455B - C). The time has arrived for us to accept that there is no merit in trying to distinguish between 'background circumstances' and 'surrounding circumstances'. The distinction is artificial and, in addition, both terms are vague and confusing. Consequently, everything tends to be admitted. The terms 'context' or 'factual matrix' ought to suffice. (See *Van der Westhuizen v Arnold*2002 (6) SA 453 (SCA) ([2002] 4 All SA 331) paras 22 and 23, and *Masstores (Pty) Ltd v Murray & Roberts Construction (Pty) Ltd and Another* 2008 (6) SA 654 (SCA) para 7.)"

[23] More recently the Supreme Court of Appeals in *Shakawa Hunting & Game Lodge (Pty) Ltd v Askari Adventures CC*[5] endorsed the approach of the Court in *Endumeni* as follows:

> "[11] As to the evidence of the witnesses on what they believed or thought the agreement meant, it needs be remembered that we are here dealing with the interpretation of a contract. *Consequently, what the parties and their witnesses ex post facto think or believe regarding the meaning to be attached to the clauses of the agreement, and thus what their intention was, is of no assistance in the exercise*.[6] In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593; [2012] ZASCA 13 (SCA) this court (per Wallis JA) said this with regard to the construction of a document:
>
> > 'The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the

[4] 2009 (4) SA 399 (SCA)
[5] (44/2014) [2015] ZASCA 62 (17 April 2015). Footnotes omitted.
[6] My emphasis

> context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production.'

And further:

> 'Unlike the trial judge I have deliberately avoided using the conventional description of this process as one of ascertaining the intention of the legislature or the draftsman, nor would I use its counterpart in a contractual setting, "the intention of the contracting parties", because these expressions are misnomers, insofar as they convey or are understood to convey that interpretation involves an enquiry into the mind of the legislature or the contracting parties. The reason is that the enquiry is restricted to ascertaining the meaning of the language of the provision itself.' (Footnotes omitted.)

[12] What was said in *Endumeni Municipality* regarding the expression 'the intention of the parties' is in line with what was expressed by Greenberg JA more than six decades ago in *Worman v Hughes & others* 1948 (3) SA 495 (A) at 505, namely:

> 'It must be borne in mind that in an action on a contract, the rule of interpretation is to ascertain, not what the parties' intention was, but what the language used in the contract means . . . .'

It follows that the testimony of the parties to a written agreement as to what either of them may have had in mind at the time of the conclusion of the agreement is irrelevant for purposes of ascertaining the meaning of the words used in a particular clause."

[24] There was some debate over the meaning of the word "site" and whether it should be interpreted in light of what is contained in the earlier draft. Suffice to point out that the fact that the initial draft which was amended by the second defendant is only relevant to show that the offer to lease was a negotiated document. The signed offer to lease cannot be properly interpreted using the earlier draft because firstly, the draft forms part of the prior negotiations between the parties and is accordingly inadmissible,[7] and,

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[7] *Van Aardt v Galway* 2012 (2) SA 312 (SCA): *"[9] Evidence was led at the trial from Mr Van Aardt, Mr De la Harpe (the draftsman of the agreement and at the time a practising attorney), Mr Galway and Mr Parker. Almost all of this evidence was plainly inadmissible. It concerned the intention of the parties in regard to various issues and in particular whether the purchase price was inclusive or exclusive of VAT and whether the property subject to the sale was inclusive or exclusive of the dairy and the equipment in the dairy. That evidence was inadmissible because it was evidence of the intention of the parties and their prior negotiations and it is clear on the authorities that such evidence is inadmissible.3 If there had been a prayer for rectification directed at these issues then it might have been relevant and admissible to explore the parties' intentions and discussions at the time of concluding the lease. However, there was no such prayer and it was not, contrary to counsel's submissions, relevant and therefore admissible as 'context' in relation to either the interpretation of the documents or the importation of implied or tacit terms into the lease."*

secondly, the deleted words or phrases in an earlier document cannot be used to interpret a subsequent document.[8]

[25] The authors of *Contract: General Principles*[9] state the following in respect of representations made during negotiations:

> "A representation is any conduct which creates a particular impression in the mind of the other contractant, The conduct may be a commission (representation *per commissionem*, that is by a positive act, doing something) or an omission (representation *per omissionem*, that is by refraining from doing something). A representation by commission may be made in so many words (orally or in writing) or by conduct alone."

[26] What did the first and second defendants, if any, represent to the plaintiff? Having regard to the principles set out hereinabove, I am persuaded that when the second defendant recorded in the offer to lease that Fruit & Veg City have approved "the site" for trading purposes he in fact conveyed and represented to the plaintiff that he had the necessary authority to trade a Fruit & Veg City store from shop no 68 in phase 2 of the mall. This representation is reinforced by the fact that the second defendant then specifically instructed the landlord to proceed with the building of the store as per the specifications. This representation is repeated in the lease agreement where the second defendant signed the lease again expressly conveying to the plaintiff that the first defendant "will trade as a FRUIT AND VEG CITY". The fact that specific reference is made in the attachments to Fruit & Veg City Architectural specifications could not have left any doubt in the mind of the plaintiff that the first and second defendants intended to trade as a Fruit & Veg and that they had the necessary authority to do so.

[27] Did the second defendant know that he did not have the authority to open a Fruit & Veg City store without the go-ahead of Coppin? I am persuaded on the evidence that the second defendant knew that he did not have the authority to open a Fruit & Veg City store. It is clear from the evidence of the second defendant and especially that of Coppin that a person or franchisee will not be allowed to trade as a Fruit & Veg City store unless and until Coppin has approved the site and the location of the store. At the time of the

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[8] *Pritchard Properties (Pty) Ltd v* Koulis 1986 (2) SA 1 (A)

[9] Van der Merwe, Van Huyssteen, Reinecke & Lubber *Contact: General Principes* (3rd edition) at page 108.

signing of the offer to lease and the subsequent lease agreement Coppin has not yet approved the location of the store and could have vetoed the site and the location of the shop. The second defendant knew that there was such a possibility. In fact, in a letter dated 10 January 2006, the second defendant expressly mentioned that any agreement will be "dealt with together with Mr Coppin". Despite this statement the second defendant concluded the contract without Coppin. Furthermore, at the time of the signing of the lease agreement the defendants have not yet concluded a written franchise agreement with Fruit & Veg. In fact, Coppin only became aware of the lease agreement and only saw a copy of the lease agreement for the first time in Court. At the time of the signing of the lease agreement there therefore was no guarantee that the defendants would be able to perform in terms of the lease agreement and the second defendant must have known this.

[28] Although the second defendant testified that Steven and Richard were aware of the fact that he was not in possession of a written franchise agreement, this fact was never put to either of them. In fact, it was the evidence of Steven that had he known this he would not have signed the agreement. The second defendant also tried to persuade the Court that Steven knew or ought to have known when he read the offer to lease that Fruit & Veg City had only approved the "site" and not the "deal". I am not persuaded. At no stage was the plaintiff made aware that the Fruit & Veg City store was conditional upon the approval of Coppin. Furthermore, any reasonable person reading the offer and the lease agreement would have been brought under the impression that the defendants had the necessary approval to open and trade as a Fruit & Veg City store in the mall especially in light of the fact that the landlord was specifically instructed to construct the shop according to Fruit & Veg City specifications. Why would a prospective tenant instruct a landlord to proceed with the building of a store in accordance with Fruit & Veg City store specifications if it did not have the necessary authority to trade as a Fruit & Veg City store in a specific location? Furthermore, why did the second defendant not inform the plaintiff that the offer to lease was conditional upon the approval of Fruit & Veg City and more in particular that of Coppin before the defendants would be able to trade? When the lease agreement was ultimately signed the second defendant equally did not

inform the plaintiff that the lease was conditional upon the approval of Coppin. In fact, the lease agreement is completely silent on this issue and also silent on the fact that the defendants still had to conclude a franchise agreement with Fruit & Veg. What compounds matters further is the fact that the lease agreement expressly records that the shop will trade as a Fruit & Veg City. Again, any reasonable person reading the lease agreement would have been entitled to accept that the defendants had the necessary authority from Fruit & Veg City to open a shop and trade under the brand name of Fruit & Veg City. To a question why the second defendant did not include such a condition in the lease agreement, the second defendant merely testified that it was an oversight. Richard also testified that he believed the second defendant when he was told that he could open a Fruit & Veg store. More in particular, Richard testified that he was not informed that Coppin first had to approve the site before the second defendant could trade as a Fruit & Veg City store. He further testified that the second defendant knew where the store was located and that he did not believe that anyone would have signed a lease agreement if they did not know the location of the shop. In this regard Steve also testified that it was common practice that tenants would ask about the shop layout and the location of the shop prior to signing a lease agreement. He testified that he has been involved in the development of approximately 20 malls in South Africa and various in Zambia and that in each instance the tenant knew where the store was located.

[29] It was further also not disputed that the intended Fruit & Veg City shop would have been an anchor tenant and that the lease of the various line shops was concluded on the back of the lease agreement with the defendants. In this regard it was the evidence of Steven that he would not have signed the lease agreement if the first defendant intended to trade under another brand name. He explained that he signed the lease agreement in the belief that Fruit & Veg had approved the deal. Steven was also adamant that he would not have signed the lease had he known that the second defendant did not have the necessary approval from Fruit & Veg City. He also testified that he would not have signed the lease agreement if the parties still had to agree on the exact location of the store. The lease agreement does not contain a

provision that the agreement is subject to negotiations or discussions as to where the shop would be located.

Did the second defendant acting on behalf of the first defendant make a fraudulent or intentional misrepresentation?

[30] The plaintiff relies on the following three representations and allege that this amounted to fraudulent misrepresentations:

(i) that the first defendant was the franchisee of the Fruit & Veg City franchise;

(ii) that the first defendant was authorised to open our Fruit & Veg City franchise at the mall; and

(iii) that the business to be operated from the premises would be a Fruit & Veg City shop.

An assessment of whether the plaintiff has proven that the second defendant knew that he did not have authority to open the store must be done taking into account the objective facts.

[31] In essence the argument on behalf of the defendants was that although it admitted that the defendants made a representation, that representation did not constitute a fraudulent misrepresentation simply because the second defendant fully intended opening a Fruit & Veg City Store. The fact that it did not materialise only results in a contractual claim. It was submitted that because a contractual claim is not made out in the Particulars of Claim, the plaintiff's cause of action is limited to that of fraudulent misrepresentation.

[32] On behalf of the plaintiff it was submitted that the claim arises from a false statement made prior to the conclusion of the contract and later repeated in two written agreements. This claim based on fraudulent misrepresentation is a claim in delict. The contractual claim is founded on the anticipatory breach of a material term of the contract namely the inability of the first defendant to trade as a Fruit & Veg City store and the acceptance thereof. It was submitted on behalf of the plaintiff that the Particulars of Claim contain sufficient averments of fact to also make out a cause of action based on the cancellation following the anticipatory breach. In any event, so it was

submitted, the evidence has canvassed this issue and that the Court should decide the matter on the evidence before it.

[33] In order to determine whether the representations amounted to fraudulent representations the Court will consider whether the representations was false or not and whether it was made knowingly, without an honest belief in the truth of the statement or recklessly. In this regard the Court in *Rex v Myers*[10] the Appellate Division (as it then was) held as follows:

> "I think it can be summed up, for the purposes of the present case, by saying that if the maker of a representation which is false has no honest belief in the truth of his statement when he makes it, then he is fraudulent." [11]

Kerr[12] explains as follows:

> "To prevent a false [i.e an incorrect] statement being fraudulent they must, I think, always be an honest belief in its truth.
>
> A representor who knows that his representation is incorrect has no belief in its truth.
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> ….
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> The party alleging that a misrepresentation is fraudulent has to prove the absence of honest belief. This he may do, said Lord Herschell, by showing
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> > that a false [i.e incorrect] representation has been made (1) knowingly, (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 the truth of what he states."[13]

[34] I am not persuaded on the evidence that the second defendant had an honest belief that he would be able to obtain permission from Coppin to open the Fruit & Veg Store. At the very least he knew from past experience that there was a very definite possibility that Coppin would not approve of the shop. This must be considered together with the fact that he chose not to disclose to the plaintiff that his authority was conditional upon the go-ahead from Coppin. At the very least the second defendant had a duty to disclose

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[10] 1948 (1) SA 375 (A)
[11] At page 382
[12] AG Kerr The Principles of the Law of Contract (6th edition).
[13] At pages 280 – 281 Footnotes omitted.

this material fact to the plaintiff. [14] Instead of doing so he instructed the plaintiff to continue with the construction of the shop. In these circumstances I am not persuaded that the second defendant had an honest belief in the representations made to the plaintiff. See *Ruto Flour Mills (Pty) Ltd v* Adelson:[15]

> "Generally speaking fraud is proved when it is shown that a false representation has been made, (i) knowingly or, (ii) without belief in its truth or, (iii) recklessly careless whether it be true or false. If there is an honest belief in the truth of the false statement then fraud is not established. Negligence or unreasonableness in itself, however gross, does not constitute an absence of honest belief in questions of fraud; *R v Myers*, 1948 (1) SA 375 (AD) at pp. 382 - 384. In the ordinary case of fraud, apart from such factors as materiality and inducement, a plaintiff has to prove, *(a)* a false representation or misrepresentation and, *(b)* the state of mind of the defendant in respect of such representation."

[35] More in particular it was submitted that the first defendant did not represent that he was a franchisee of Fruit & Veg City in light of the fact that the first defendant had a general right to open a Fruit & Veg City store in the area. This may be so but this is not what was represented to the plaintiff. It was represented in both the offer to lease and the lease agreement that the first defendant was the franchisee in respect of the specific mall/shop. This much is clear from clause 3.4 of the lease agreement.[16] I have already referred to the fact that it was submitted that the second defendant honestly believed that he would be the franchisee in the mall and that this was not a representation as even Coppin confirmed that the first defendant was a franchisee. I have already indicated that I do not accept this submission. I do not accept that the first defendant could have had such an honest belief: Firstly, from past experience the second defendant knew that if Coppin did not approve the site and premises a lease agreement will not be concluded. In Mabopane a lease agreement was only concluded after Coppin had

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[14] Van der Merwe, Van Huyssteen, Reinecke & Lubber *Contact: General Principes* (3rd edition) at page 108 and 112 - 113: "*The wrongfullness of a representation by commission is more readily apparent than the wrong fullness of an omission. The latter will only be wrongful if the representing breach some duty to act positively in order to prevent a wrong impression from arising or to remove any existing wrong impression. …. A representation is not regarded as wrongful merely because it is false and actually misleads the other contracting party; the fact or facts to which the representation relates must fall within the compass of the norm protecting negotiating parties against misrepresentation. This qualification is usually expressed by requiring that the representation must be material, or as it is often phrased, must relate to material facts. Facts will generally be material if there are reasonably likely to induce someone to enter into the contract. A representation may also be material if it is made with the intention to mislead the other part and induce him to conclude the contract.*"

[15] 1959 (4) SA 120 (T) at 122G – H

[16] *Supra* at paragraph [13]

approved the premises and the location of the store. Secondly, in Midrand Coppin refused to give his permission to open the store. In the present circumstances, the second defendant knew fully well that Coppin had not yet authorised the site but nonetheless represented to the plaintiff firstly that it had the authority to trade from the site and secondly that the shop will trade as a Fruit & Veg City store. By representing that the business to be operated from the premises would be a Fruit & Veg City shop, the second defendant necessary implied that the first defendant was lawfully able to do so. This representation was false and the second defendant knew that it was false. This false representation induced the plaintiff to conclude the lease agreement.

[36] In the event, taking into account that the second defendant knew fully well that Coppin had not gone to the site and approved the site, including the location, and the fact that he knew that Coppin could – and had in fact done so in the past - simply reject the location as it ultimately did, the second defendant could not have had an honest belief in the statement that the first defendant would trade as a Fruit & Veg City store. Despite the fact that the second defendant knew that Coppin could reject the site, no suspensive condition was included in the lease agreement to provide for this eventuality whilst knowing that this was a possibility.

[37] Lastly, in respect of the cancellation agreement the oral negotiations that preceded the conclusion of this contract are inadmissible as the *parol evidence* rule applies. This document contains only two terms and does not expressly record that it is in full and final settlement of the disputes between the parties. It should also be pointed out that an earlier argument of the defendant that a mutual cancellation agreement *per se* extinguishes any claim for damages was also rejected by Victor, J in an earlier judgment in this matter. I also do not accept that the plaintiff had waived its right to claim damages. See in this regard *Laws v Rutherford*[17]

> "I proceed to consider whether, even then, they establish the waiver relied upon. The *onus* is strictly on the appellant. He must show that the respondent, with full knowledge of her right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it.

[17] 1924 AD 261 at 263

> Waiver is a question of fact, depending on the circumstances. It is always difficult, and in this case specially difficult to establish."

[38] In the premises I am persuaded that the representations were fraudulent, and that there was an intention to induce the plaintiff to enter into a lease agreement. There can be no doubt that the fraudulent misrepresentation was material. The plaintiff has therefore proven the merits of its claim based on fraudulent misrepresentation. In respect of costs, the lease agreement provides for costs on an attorney and client scale.

[39] In the event the following order is made:

1. The first and second defendants are jointly liable for the damages suffered by the plaintiff as a result of the cancellation of the lease agreement.
2. The defendants are jointly liable to pay the costs on an attorney and client scale.

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**A.C. BASSON**

**JUDGE OF THE HIGH COURT**

**GAUTENG LOCAL DIVISION**

Counsel for the Plaintiff: Adv S. Vivian

Counsel for the Defendants: Adv W. Strobl

Attorney for the Plaintiff: T. G. Fine Attorneys

Attorney for the Defendants: Ramsey Webber Attorneys

Trial took place from 13 – 16 April 2015

Judgment was delivered on 29 April 2015