REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 44394/2020

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: NO

In the matter between:

TUHF LIMITED	Applicant
and	
68 WOLMARANS STREET JOHANNESBRG (PTY) LTD	First Respondent
10 FIFE AVENUE BEREA (PTY) LTD	Second Respondent
MARK MORRIS FARBER	Third Respondent

JUDGMENT

Delivered: By transmission to the parties via email and uploading onto CaseLines the Judgment is deemed to be delivered. The date for hand-down is deemed to be 16 November 2021.

SENYATSI J:

[1] In this opposed application, the applicant TUHF Ltd (“TUHF”) seeks money judgment against the respondents for R4 899 004.22 with interest calculate from 1 February 2020 to date of payment.

[2] TUHF also seeks an order to authorise to take cession of any rental amounts payable by every tenant occupying the immovable property known as Wolbane Mansions to the first respondent, 68 Wolmarans Street Johannesburg (Pty) Ltd (“the first respondent”) alternatively the respondents, and further to its duly authorised agent (“the cession”).

[3] The applicant furthermore seeks an order directing the respondents to sign all documents to facilitate the cession, failing which the Sheriff that there be authorised to sign all documents necessary to give effect to the cession.

[4] The applicant also seeks an order directing the respondents to furnish it, within 15 days of the order with the names and contact information of the Wolbane Mansions tenants.

[5] The applicant also seeks an order directing that the applicant may take steps necessary for purposes of collecting rental from the Wolbane Mansions tenants.

[6] The other prayer sought is that the immovable property at Erf 2154 Johannesburg Township, Registration Division- IR, The Province of Gauteng, measuring 467 square metres held by Deed of Transfer Number T7596/2014 (“the immovable property”) be declared executable and the applicant be authorised to issue a writ of attachment calling upon the Sheriff of this Court to attach the immovable property, to sell it in execution of the judgment.

[7] The applicant seeks, furthermore an order directing the respondents to pay a penalty fee equal to 5% (five percent) plus VAT of the monthly outstanding amount in arrears and unpaid by the first respondent within 2 (two) days of an instalment payment date as from 10 February 2020 to date of payment in full of 1 or 2 (as the) case may be above, both dates included.

[8] As alternative to [7] above, the applicant seeks an order directing the respondents to pay a penalty fee equal to 5% (five percent) plus VAT of the monthly outstanding amount in arrears and unpaid by the first respondent within 2 (two) days of an instalment payment date as from 10 November 2020, to date of payment in full of 1 or 2 as may be above, both dates included plus costs on attorney and client scale.

[9] The applicant, TUHF Limited registration number: 2007/025898/06 is a public company with limited liability and duly incorporated and registered in terms of the company laws of South Africa with its registered and principal place of business at 12th Floor, West Wing, Libridge Building, 25 Amenshof Street, Braamfontein, Johannesburg. The applicant is 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.

[10] The applicant converted to a private company under registration under 2007/025898/07, which subsequently converted to a public company on 4 November 2014.

[11] The first respondent is 68 Wolmarans Street Johannesburg Pty Ltd registration number: 2013/086984/07, a private company duly registered and incorporated as such in terms of the company laws of South African with its registered address and chosen domicile address at suite 210 Killarney Office Block, 60 Riviera Road Killarney, Johannesburg.

[12] The second respondent is Fife Avenue Berea (Pty) Ltd registration number 2013/086974/07, a private company duly registered and incorporated as such in accordance with the company laws of South Africa with its chosen domicile at Suite 210 Killarney Office Block, 60 Riviera Road Killarney, Johannesburg, Johannesburg, Gauteng.

[13] The third respondent is Mr Mark Morris Farber, an adult male businessman with identity number [....]who's chosen domicile for service and execution of any Court process is 25 Centre Road, Morningside, Johannesburg.

[14] From the pleadings it is evident that the first and second respondents are related entities conducting the same business enterprise of real estate and derive income from the rental charged to tenants. The first and second respondents are controlled and directed by the third respondent, who is a director and a shareholder of both companies.

COMMON FACTS

[15] The first respondent concluded a loan agreement on 8 August 2013 for the sum of R5 771 166, included in the amount of the loan facility was a purchase price of the immovable property in the sum of R3 595 000; R1 750 000 to refurbish the immovable property, R 113 160 for facilitation fee and R313 006 was provision for the capitalisation of the amounts becoming due and payable during the grace period agreed to by the parties before the instalments became due and payable.

[16] The loan was to be repayable by way of 174 monthly instalments amounting to about R74 000 at an Agreed Interest the base rate plus the rate of 2.50% per amount during the facility period and Base Rate plus 3.5% per annum during the construction period. The Base Rate agreed to by the parties was Prime Rate plus 1% applicable from time to time.

[17] The loan facility was secured by way of a mortgage bond passed and registered in favour of TUHF for the sum of R8 million, a Deed of Suretyship issued by the second respondent in favour of TUHF as well as Deed Suretyship issued by the third respondent in favour of TUHF.

[18] It was a condition of the loan facilities that monthly repayments would be honoured as and when they fell due.

[19] It is common cause that all monthly instalments were honoured as and when they fell due and safe for the two instalment of May and June 2020 which are the subject of this litigation, all subsequent instalments are up to date.

[20] It is also important to note that during March 2020 due to alleged events of default arising out of the loan agreement, TUHF issued a separate application and the case number 7844/2020 in this court and judgement, which is the subject of application for leave to appeal has been handed down.

[21] In the instant application, the basis of the relief sought by TUHF for repayment acceleration of the full loan amount is due to the defences raised by the respondents under case number 7844/2020 who challenged the validity of the Deed of Suretyship given by the second respondent for the proper and due fulfilment of the loan repayment obligations by the first respondent as well as the two repayments made in May and June 2020. TUHF contends that due to those two events of defaults, it is entitled in terms of the loan agreement to accelerate the fully capital repayment with interest as agreed to.

[22] The respondents opposed the application and issued a counter-application for stay of the proceedings or dismissal thereof. I must add that the application will not be stayed as the first application has been disposed of.

[23] The respondents contend that there is a dispute of fact on whether or not TUHF had agreed to be short paid for May and June 2020 due to the national state of disaster declared in South Africa as a result of lockdown due to Covid 19. The second respondent contends that the Deed of Suretyship it executed in favour of TUHF is invalid due to non-compliance with the solvency requirements in terms of the new Companies Act, 2008. The respondents furthermore contend that this application amounts to an abuse of court process and lastly that the applicant has not complied with the Uniform Rule 46A of the Court Rules. I will deal with each of these contentions below.

LIS PENDENS

[24] The law on *lis pendens* is trite. The requirements for special plea of *lis pendens* are as follows [1]

(a) pending litigation;

[1] See Genge v Minister of Environmental Affairs Tourism 2005 (6) SA 297 (EC);

(b) between the same parties are there previous;

(c) based on the same cause of action;

(d) in respect of the same subject matter.

In opposing the defence, the applicant contends that the dispute or even the nature of the events of default in the first application which has, been disposed of, are not the same as those in the present application and consequently not relevant to the dispute and the events of default in this application.

[25] It should be mentioned that clause 18.1 of the loan agreement provides as follows:

> 18.1. Each of the following events shall constitute an Events of Default under the Loan Facility: -
>
> > 18.1.1 the Borrower fails to pay any amount due by it in terms of this Agreement on the due date for payment there of … and fails to remedy any such breach within any applicable cure period;
> >
> > 18.1.6. the Borrower or any Surety commits a breach of any of the terms and conditions of this agreement any surety to which it is party;
> >
> > 18.1.7. the Borrower or any Surety breaches or repudiates or evidences and intention to repudiate any of the provisions of this agreement or the Surety to which it is a party and does not remedy any such breach within any applicable notice or cure period calling upon it to do so;
> >
> > 18.1.8. any representation, warranty or statement made or repeated deliberately in connection with this Agreement or the Security or in any documents delivered by or on behalf of the Borrower or any Surety is incorrect in any respect when made or deemed to be made or repeated;
> >
> > 18.1.9. any written undertaking or warranty made by the Borrower and/or the Surety is breached;
> >
> > 18.1.10. any Security or any part thereof shall for any reason cease to be of Full force and effect under any applicable law or any part thereof otherwise ceases to constitute valid security in respect of the relevant asset(s) or revenue, and the borrower fails to restore or procure the

restoration of such security or fails to provide additional security to the satisfaction of the Lender;

18.1.15. the value of assets of the Borrower or any Surety is less that its liabilities;

18.1.20. the Borrower fails to comply with all and any municipal by-laws…"

[26] Clause 18.2 of the loan agreement provides as follows:

"18.2. …upon the occurrence of an Event of Default and at any time thereafter, if such on event continues, the Lender shall in its sole and absolute discretion be entitled (but not obliged), without prejudice to any rights which the Lender may have, by notice issued by the Lender to the Borrower to;

18.2.3. accelerate and declare all amounts owing in terms of this agreement immediately due and payable, …;

18.2.6. enforce all or any of the Borrower's rights under the agreement or any Security … for which the Borrower irrevocably appoints the Lender as its agents to perform all acts and to sign all documents and relevant authorisations on its behalf … and/or;

18.2.7. take legal action to take-over, perfect attach, release or sell any security taken or referred to in this Agreement…"

[27] The loan agreement furthermore provides in terms of clause 28 that the agreement constitutes the whole agreement. Clause 29 thereof provides that no variations of the loan agreement would be of force or effect, unless reduced to writing and signed by both parties and that legal costs due by the first respondent would be on an attorney and client scale.

[28] Having restated the relevant clauses of the loan agreement, I now deal with the requirements for *lis pendens*. The respondents contend that this application involves the same cause of action as the one that has been disposed of. The requirement of the same cause of action can be relaxed if the circumstance justify such relaxation.

[29] In dealing with this requirement, the court in *Caesarstone Sdot-Yam Ltd v Marble and Gramte2000 CC & Others*[2], held that a special plea of his *lis pendens* was permissible where the dispute (*lis)* between the parties was being litigated elsewhere. The court furthermore held that it was inappropriate for the same dispute to be litigated in the court in which the plea is raised. The Court quoted with approval the following passage from Voet 44.2.7[3]:

> "Exception of *lis pendens* also requires the same persons, thing and cause. The exception that a suit is already pending is quite akin to the exception of *res judicata*, in as much as when a suit is pending before another judge, this exception is granted just so often as, and in all those cases in which after a suit has been ended there is room for the exception of *res judicata* in terms of what has already been said. Thus the suit must have already have started to be mooted before another judge between the same persons, about the same cause, since the place where a judicial proceeding has once been taken up is also the place where it ought to be given its ending".

It is clear from this approach that if the cause of action is the same and the parties are the same, the *lis pendens* special plea should be favourably considered by court.

[30] The principles of *lis pendens* and the approach to be adopted has also found favourable approval in a number of cases by our courts. In *Wolf NO v Solomon*[4], the principles were reiterated. The principle of *lis pendes* also finds application 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 authoritatively. In the absence of any of those elements there is no potential for a duplication of actions.[5]

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[2] 2013 (6) SA 499 (SCA)
[3] Johannes Voet The Selective Voet being the Commentary on the Pandects (Gane's translation 1957) Vol 6 at 560. The passage appears in a chapter headed 'The Exception of Res Judicata
[4] (1898) 15 SC 297 at 306-307
[5] See Nestle (South Africa) (Pty) Ltd v Mars Inc. 2000 (4) SA 542 (SCA) para 17

[31] In the instant case, the case that has already been disposed of involved the same parties. It follows therefore that, the requirement of the parties being the same is satisfied. The argument has been advanced on behalf of the applicant that although the parties are the same, the cause of action is different and by implication, the court is called upon to exercise its discretion to adjudicate the matter. This is well so and I am in favour for considering the matter as I believe it is in the interest of justice to do so.

[32] As regards the second requirement of the same cause of action, the respondents contend that the like the first application, the present application is based on the alleged breach of loan agreement, the mortgage Bond and the deed of suretyship.

[33] In the present application, TUHF alleges a number of events of default central to which is the short payment for May and June 2020. In its defence, the first respondent contends that the reduced payment was as agreed to by the parties due to the declaration of national state of disaster by the President of the Republic which led to a complete national lockdown following the Covid-19 pandemic. This contention was denied by TUHF as result of which these proceedings were instituted

[34] As in the first application TUHF seeks judgment against the second respondent based on the same Deed of Suretyship which was argued in the first application. This is in my respectful view, meets the second requirement pertaining to the same cause of action for the special plea of *lis pendens* to succeed. I hold the view that the respondents have succeeded in proving that indeed this is the same cause of action.

COVID 19 RELIEF

[35] The first respondent has consistently maintained that short payment made during May and June 2020 was as a result of an agreement between the parties.

[36] The basis of its contention was the discussions that took place between Mr Farber who represented the first respondent and Mr Du Preez who represented TUHF. The discussions took place on 11 May 2020 in terms of which Mr Farber

inquired whether TUHF was providing Covid 19 relief. Mr Farber was told to contact Mr Govender apparently the national loans manager of TUHF.

[37] Upon contacting Mr Govender, Mr Farber was advised to prepare an email to Mr Makwela of TUHF about the proposal to pay the reduced repayment proportionate to the rental percentage collected. In fact, the email to Mr Makwela, which is annexed as "C" to PJ92 to the founding affidavit reads as follows:

> *"From Mark Farber*
> *Sent: Wednesday, 29 April 2020, 21:37*
> *To: Nano Makwela*
> *Subject: Covid Relief*
>
> *Good Morning Nano*
> *Please advise as to what relief TUHF is offering its clients with regards to the Covid 19 situation*
>
> *Regards*
> *Mark Farber"*

[38] Mr Makwela, on behalf of TUHF replied on the same day as follows:

> *"From: Nano Makwela*
> *Sent: Wednesday, 29 April 2020, 15:18*
> *To: Mark Farber*
> *Subject: Your request to TUHF*
>
> *Good Afternoon Mark,*
>
> *Please note that TUHF does not have a blanket approach and treats each case on its merits. Our clients have been encouraged to honour their monthly commitments to TUHF and the municipality.*
>
> *Kind Regards*
> *Nano"*

[39] It was following these two emails quoted above that on the 11 May 2020 at 13:34 Mr Farber wrote the following email to Mr Makwela:

"From: Marik Farber
Sent: Monday, 11 May 2020
To: Nano Makwela
CC: Sivandra Govender
Subject Covid 19 relief

Dear Nano

As discussed with Sivan,
Herewith attached the age analysis for the three respective properties concerned

The collections have been challenging this month and we expect next month to be even more so

Waldorf Heights collected 48.16%
Malvin Court collected 58.89%
Wolbine Mansions collected 71.39%

I propose paying the bond proportionate to the rental percentage collected. Please advise if this is acceptable.

Kind Regards
Mark Farber

[40] On the 11 May 2020, Mr Makwela then responds as follows by way of email:

"From: Nano Makwela
Sent: Moday 11 May 2020, 19:42
To: Mark Farber
Cc: Sivandra Govender
Subject: RE Covid 19 relief

Dear Mark

Agreed, but as per our last communication on the subject matter please send us the bank statements. This in a nutshell is what the parties engaged on.

Kind Regards
Nano Makwela

This in a nutshell is what the parties engaged on.

[41] It was submitted by counsel on behalf of TUHF that the email did not constitute a variation to the loan agreement because it was not signed by both parties as required in terms of the loan agreement. I do not agree with this contention for reasons advanced below.

[42] The electronic communications are regulated by the Electronic Communication and Transactions Act 25 of 2002 "the Act". The purpose of the Act is to provide for the facilitation and regulation of electronic communications and transactions. The Act must not be interpreted so as to exclude any statutory law or the common law from being applied to, recognising or accommodating electronic transactions data messages or any other matter provided for in this Act.[6]

[43] A requirement in law that a document or information must be in writing is met if the document or information is[7]-

(a) in the form of a data message;

(b) accessible in a matter unable for subsequent reference.

[44] Where an electronic signature is not required by the parties to an electronic transaction, an expression of intent or other statement is not without legal force[8] and effect merely on the grounds that:

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[6] See section 3 of the Act
[7] See section 12 (a) and (b) of the Act
[8] See section 5 of the Act

(a) It is in the form of a data message;

(b) It is not evidenced by an electronic signature but is evidenced by other means from which such person's intent or other statement can be inferred.

[45] Our Courts have had an opportunity to consider the binding effect of electronic signature. In *Spring Forest Trading 599 CC v Wilberry (Pty) Lts t/a Ecowash & Another* [9] the court considered a series of emails purporting to cancel the agreement. The court held that the approach of the courts to **signatures (that is electronic)** (my own emphasis) has been pragmatic, not formalistic. They look to whether the method of the signature used fulfils the function of a signature- rather that insist on the form of the signature used.

[46] TUHF contends that the email by Mr Makwela in terms of which he purports to agree to the reduced payment does not comply with the loan agreement requirement on variation clause and should therefore be ignored. Because he did not attach his signature. This contention is without merit; it loses sight of the fact that the meial is clearly from Mr Makwela. This is a proven fact on the papers. The bare denial does not assist TUHF in this regard.

[47] Mr Makwela, on behalf of TUHF clearly states that he agrees with the reduced payments in accordance with the proposed proportionate percentage payments relative to each property as per rental collected. It cannot be denied that these discussions and the agreed reduction took place against the background of complete national lockdown during the state of national disaster declared as a measure to control the spread of Covid-19. The contention by the respondents is in my respectful view, credible.

[48] It is also without doubt that but for the two months reduced payments which the first respondent genuinely believed had been agreed to all subsequent, monthly repayments were honoured as the Covid 19 restrictions were eased. As at the hearing of this application, the first respondent was up to date with its repayment

[9] 2015 (2) SA 118 (SCA)

obligations to TUHF. I hold the view that the first respondent has all intention to be bound by the agreement and hence the repayment obligations are honoured.

[49] Owing to denial by TUHF of the existence of the variation to pay reduced instalment, I hold the view that a dispute of fact has arisen. The legal principles on the approach to be adopted by court when a dispute of fact raised are trite.

In the leading case of *Plascon-Evans Paints Ltd v Van Riebeek Pty Ltd*[10], the court held that a qualification was necessary to the general rule regarding final interdicts in the motion proceedings. Sometimes the denial by the respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact. If the respondent in such a case had failed to apply for the deponents concerned to be called for cross examination, and if the court is satisfied as to the inherent credibility of the applicant's averments, the court may decide the disputed fact in the applicant's favour, without hearing oral evidence. When factual disputes arise, therefore, relief should be granted only if the facts stated by the respondent together with the admitted facts in the applicant's affidavits, justify the order. The only exceptions to this general rule are where the allegations or denials are so far-fetched that the court is justified in rejecting them on the papers.

[50] Having regard to the contents of the quote email exchanges between the parties and the dispute of fact raised by the respondents based on the said emails, I am not persuaded that the dispute of fact is so far-fetched that it must be rejected on the papers. On the contrary, I hold the view that the first respondent was justified in making reduced payments in accordance with what was proposed and with the rental collected for each property. It follows in my respectful view that the disputed fact on whether there has been variation to the agreement are not of such serious nature and, I find no reason to reject the version advanced by the first respondent. This matter can therefore be disposed of on papers.

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[10] 1984 (3) SA 623 (A)

[51] It is settled law that if a party has knowledge of a material and bona-fide dispute or should reasonably foresee its occurrence and nevertheless proceeds on motion, that party will usually find the application dismissed.[11]

[52] It is also settled law that an application for hearing of oral evidence must, as a rule, be made *in limine* and not once it becomes clear that the applicant is failing to convince court on the papers appeal. The circumstances must be exceptional before a court will permit an applicant to apply in the alternative for the matter to be referred to evidence should the main argument fail.[12] There are no exceptional circumstances in this present application for the court to consider referring this application for oral evidence. The applicant was aware or ought to have been aware that serious disputes of fact on the averred variation during the national state of disaster was going to arise. The motion proceedings were issued not only despite this knowledge but also due to the other pending application.

ABUSE OF COURT PROCESS

[53] It has been argued on behalf of the respondents that the instant application is an abuse of court process. The basis of the submissions is that this second application is intended to drain the respondents through the court process such that they give up the legal challenge.

[54] Our courts have, in the past, considered the meaning of abuse of civil court process. In *Phillips v Botha*[13], Hoexter JA said the following with reference to an Australian High Court case of *Varawa v Howard Smith Co Ltd* Vol 13 CLR (1911) 35 at 91:

> "…the term abuse of process connotes 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 coerse 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 the purpose…"

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[11] See Lombaad v Droprop CC and Other 2010 (5) SA 1 (SCA) at para 31
[12] See De Reszke v Maras [2005] 4 All SA 440; 2006 (1) SA 401 (C) at para 32-33.
[13] 1999 (2) SA 555 (SCA)

[55] The Court has an inherent power to prevent abuse of its process by frivolous or vexatious proceedings.[14] Where the court finds an attempt made to use for ulterior purposes civil court proceedings in circumstances that point to abuse of its process, it is the Court's duty to prevent such abuse. This power, however, is to be exercised with great caution and only in a clear case.

[56] In the instant case, when TUHF initiated this application, it was already busy in another directly related application based on the same loan agreement, mortgage bond and deed of suretyship. To hide the true colours (the true extent) of the abuse, TUHF made new averments regarding the defences that were raised in the first application and used those and the alleged short payments as additional new grounds of breach. This was despite the fact that the other application had not been determined and in the face of a glaring dispute of fact on the averred variation of repayments for May and June 2020 as part of the Covid-19 relief. I cannot infer any motivation for launching such legal attack other than abuse of the court process. This unfairly exposed the respondents to multiple actions that are all related and the same.

[57] It is evident in my view that TUHF was determined somehow to get the relief it seeks despite the opposition. This in my respectful view, amounts to abuse of court process which should be visited upon by an appropriate court order for this court to show its disapproval of TUHF's conduct.

OTHER DEFENCES

[58] As this application can be disposed of for reason already advanced, the court does not consider it necessary to deal with the other defences raised.

[59] It follows that TUHF must fail in its application for

Therefore, it follows that TUHF must fail in its application for the relief sought.

ORDER

[60] The following order is made

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[14] See Western Assurance Co v Caldwells Trustee 1918 AD 262 ; Corderoy v Union Government 1918 AD 512 at p517, Hudson v Hudson and Another 1927 AD 259 at p267

(a) The application is dismissed;

(b) The application is ordered to pay the costs at the scale as between attorney and client including the costs of counsel.

SENYATSI ML

Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

REPRESENTATION

Date of hearing: 21 May 2021

Date of Judgment: 16 November 2021

Applicants Counsel: Adv. E Eksteen

Instructed by: Schindlers Attorneys

Respondent's Counsel: Adv. G Wickins

Adv. M De Oliveira

Instructed by: Gavin Simpson Attorneys