

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 94888/2016

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

04/09/2018
DATEH. Modisa
SIGNATURE

In the matter between:

NIKKEl TRADING 94 (PTY) LTD t/a NAIL

First Applicant

PRAGASEN NAIDOO

Second Respondent

And

SA RETAIL PROPERTIES (PTY) LTD

Respondent

JUDGMENT

MODISA AJ:

- [1] This is a rescission application against the order or judgment of Fabricius J dated 07 March 2017;
- [2] At the time when the matter served before Khumalo J on 04 June 2008 the matter was postponed *sine die* with the further orders to the effect that the Applicants were ordered to pay the costs of the postponement on an attorney and client scale as well as an order that the Applicants had to file their replying affidavit and the condonation application thereof within 10 (ten) days from date of the order;
- [3] At the commencement of the hearing of this rescission application I made an order that the condonation application for the late filing of the replying affidavit is granted on the basis of no opposition from the Respondent;
- [4] The primary issue for the rescission was two fold; firstly, that the summons were served on the employee of the First Applicant at Eastrand Galleria Mall which is not the chosen *domicilium citandi et executandi* but same should have been served at 21 Cowy Road, Berea, Durban as it appears on page 61 of the papers¹. Secondly, that there exist a counter-claim of the Applicants which is premised on the alleged misrepresentation which were made by the Respondent's legal representatives to the extend that their business will be profitable;
- [5] The *domicilium citandi et executandi* in respect of commercial lease agreements would be the leased premises. In any event, the lease agreement² contains a clause which expressly deals or provides for the parties' chosen *domicilium sitandi at executandi*. It appears that in terms of clause 19.3 of the lease agreement³ the following provision is made:

1 : annexure C to the founding affidavit; tenant application form
 2 : lease agreement which appears on pp 45; annexure B to the founding affidavit
 3 : pp 54 of the paginated papers.

"The Tenant: The premises or alternate address 21 Cowy Road Berea Durban."

- [6] In any event, the fact that the summons were served on 21 Cowy Road Berea , Durban does not necessarily mean that there was no proper service having regard to the two confirmatory affidavits wherein the deponents simply state that they cannot recall as to whether the summons were received or not. They do not deny service of the summons;
- [7] There is nothing which prohibits service of the summons at Durban and it was , even on the Applicant's own version, their chosen *domicilium citandi et executandi* as an alternative address to that of the premises being Eastrand Galleria (East Point);
- [8] The address which appears on page 61 of the tenant application form cannot be taken into account in so far as the aspect of the service of summons is concerned because the document is not part of the lease agreement;
- [9] The issue pertaining to the counter-claim is ill-founded, so argued the Counsel for the Respondent. I agree with this proposition. If the items enlisted on annexure J ⁴ is for damages which have been suffered, nothing stands in the way of the Applicants to recover those damages;
- [10] Those items enlisted in annexure J can be dealt with separately by the Applicants in a different cause of action;
- [11] I was informed by Counsel for the Applicants that the basis of the claim is that the property was not suitable for occupation and there is nothing to proof any loss suffered by the Applicants or any monies incurred on

the items enlisted in annexure J;

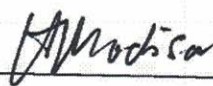
[12] It is crucial to outline the concession which has been made by the Applicant in their own founding affidavit⁵ and that concession is formulated as follows:

"Insofar as a bona fide defence is concerned, I do not deny the case made out by the respondent in the particulars of claim"

[13] This essentially means that the Respondent, according to the Applicants' own version, were entitled to judgment having regard to the lack of a *bona fide* defence on the part of the Applicants. They therefore admit the Plaintiff's⁶ case and there is no defence for withholding payment of rental or having fallen into arrears about payment of rental as the case may be;

[14] In the result the following order is made:

1. The application is dismissed;
2. The applicant is ordered to pay the costs on attorney and client scale.



MODISA AJ
HIGH COURT OF SOUTH AFRICA
GAUENG DIVISION, PRETORIA

⁵ See : pp 20 para 60 of the founding affidavit.
⁶ See : The Respondent in *casu*.

DATE OF HEARING: 28 AUGUST 2018

DATE OF JUDGMENT:

APPLICANTS' COUNSEL: ADV M PILLAY

APPLICANTS' ATTORNEY: E.W. VAN ZYL ATTORNEYS

RESPONDENT'S COUNSEL : ADV G.T AVVAKOUMIDES

RESPONDENT'S ATTORNEYS : MARK EFSTRATIOU INC