**IN THE KWAZULU-NATAL HIGH COURT, DURBAN**
**REPUBLIC OF SOUTH AFRICA**

**CASE NO: 5066/2012**

In the matter between:

**ARBOUR TOWN (PTY)LTD** **Plaintiff**

**and**

**SUNNY SKIES INVESTMENTS CC T/A COPPER CHIMNEY & SABAH COLLECTION (aka PEARL OF INDIA)** **First Defendant**

**ADIL RAZA MOHAMED SULEMAN SHAIKAH** **Second Defendant**

---

**JUDGMENT**

---

**SISHI J**

**Introduction**

[1] This is an opposed application for summary judgment. The plaintiff's claim against the defendants is for an amount due in terms of a written lease agreement. The plaintiff alleges that the first defendant breached the lease agreement by failing to pay an amount equivalent to the sum of rental and other charges amounting to R263 683, 57, for the months of February, March, April, and May 2012.

[2] The claim against the second defendant is based on a deed of suretyship executed by the second defendant in favour of the plaintiff in terms

of which the second defendant secured the first defendant's obligations to the plaintiff in terms of the lease agreement.

**Background Facts**

[3] The plaintiff and the first defendant concluded a written agreement of lease on 17 March 2010. On the same day, the second defendant bound himself, jointly and severally in favour of the plaintiff as surety and co-principal debtor with the first defendant for all amounts which the latter may then or thereafter have owed the plaintiff.

[4] In terms of the lease, the first respondent hired from the plaintiff certain business premises, being shop No.S21 and S22, the Galleria, corner of Moss Kolnick and Arbour Roads, Umbogintwini, for a period of 5 years commencing on 1 December 2009 and terminating on 30 November 2012.

[5] On 27 May 2012, and as a result of the first defendant's breach of the lease, the plaintiff cancelled the agreement of lease by service of summons in the magistrate's court under case No.2856/2012. The first defendant disputed the plaintiff's entitlement to cancellation by failing to vacate the premises. The first defendant is currently holding over the premises.

[6] The terms of the written lease agreement included a non-variation clause. Clause 26.1 provides:

> *"This agreement of lease constitutes the whole agreement between the parties and no warranties or representations of whatsoever nature whether express or implied shall be binding on the parties other than*

*as recorded herein. Any agreement to vary this agreement shall be in writing and signed by the parties…"*

[7] The terms of the lease agreement also included a term prohibiting a set-off. Clause 4.6 provides:

*"All rental and other amounts payable by the tenant in terms of this agreement of lease shall be made without demand, free of exchange and without any deduction or set off whatsoever"*

[8] The defendant's case is that a valid agreement of compromise was entered into between the parties and subsequently reduced to writing in compliance with the written agreement of lease.

[9] In addition to the defence of compromise, the defences of set-off and breach on the part of the plaintiff giving rise to a claim for damages are also raised by the defendants.

[10] In this judgment the plaintiff will be referred to as the applicant and the defendants as respondents.

**Compromise**

[11] Compromise, or *transactio*, is the settlement by agreement of disputed obligations whether contractual or otherwise[1].

[1] *Christie: The Law of Contract in South Africa 6th edition, page 475.*

[12] The purpose of a *transactio* is not only to put an end to existing litigation but also to prevent or avoid litigation[2].

[13] The applicant contended that the written lease agreement contains a non-variation clause providing that any agreement to vary it had to be reduced to writing and signed by the parties.

[14] The relevant clause fully set out provides as follows:

> *"26.1 This agreement of lease constitutes the whole agreement between the parties and no warranties or representations of whatsoever nature, whether expressed or implied shall be binding on the parties other than as recorded herein. Any agreement to vary this agreement shall be in writing and signed by the parties. No relaxation or indulgence which the landlord may show to the tenant shall in anyway prejudice the landlord's rights hereunder. An acceptance of payment of rental and other charges or any other payment shall not prejudice the landlord's right or operate as a waiver or abandonment thereof or estop it from exercising any right enjoyed by it hereunder by reason of any subsequent payment not being made strictly on due dates"[3].*

[15] In clause 1.7 of the definition section of the lease agreement, the phrase "in writing" is defined as follows[4]:

---

[2] *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd & Others 1978 (1) SA 914 (A) at 921.*

[3] Lease Agreement para 26.1, p 40 papers.

[4] Lease Agreement para 1.7 Definition Section p 22 papers.

> *"In writing" shall mean a written communication and shall include a letter, a notice, a telegram, but shall exclude an electronic mail and facsimile transmission".*

[16] The applicant contended that in the opposing affidavit respondents rely on a compromise agreement concluded when the offer was sent by fax and acceptance thereof emailed. The applicant accordingly submitted that in terms of the lease agreement there has been no valid compromise or varying of the written lease agreement.

[17] The respondents on the other hand contended that they do not owe the amount claimed as the written lease agreement between the parties had been replaced with an agreement of compromise.

[18] In the opposing affidavit, respondents make the following averments regarding an agreement of compromise:

> *"The agreement of compromise was entered into between the parties on or about 27/28 February 2012. The agreement was subsequently reduced to writing on or about 1 March 2012. The agreement of compromise, which is annexure "A" to the opposing affidavit was sent to the respondents on Friday, 2 March 2012 at approximately 17h00. An attempt was made earlier at about 11h47, to send it but was not received by the respondent. It was re-sent to him at approximately 17h00. When the agreement arrived, the deponent had already left the premises. The deponent says that he was thus unable to respond by the close of business day on 2 March 2012 as it is stipulated in the final paragraph of the agreement. The deponent returned to the premises on Monday, 5 March 2012, and he responded to the agreement by writing the word "accept" thereon, signing it and emailing it back to the applicant. According to the respondent, it was reasonable for them to*

*return the signed agreement on the next business day which was on Monday, 5 March 2012".*

[19] The respondents contended that the non-variation clause of the lease agreement has been satisfied as the agreement of compromise had been signed by both parties.

[20] It is contended on behalf of the respondents in the opposing affidavit that clause 1.7 of the written lease agreement defining the words "in writing" that they shall mean written communication should include letter, has also been fulfilled in that the agreement of compromise is indeed a letter.

[21] It is necessary in the circumstances to quote verbatim this alleged agreement of compromise dated 1 March 2012, addressed to the first respondent and to the attention of Adil Shaikh.

"Dear Sir,

**Galleria Shopping Centre : Sunny Skies Investments CC: Shops 21 and 22.**

With reference to your recent meeting with Mr Holger Pins, we hereby make the following without prejudice offer:

1. Your basic rental be reduced to R200.00 per sqm with effect from 1 March 2012;

2. We will waive rental for the outside sitting;

3. All other charges are to remain as per current lease agreement;

4. The arrears to date are the sum of R176 843, 95. You will pay R80 000.00 in lieu of the arrears, which is to be paid in 6 equal instalments over and above the normal monthly rental and other charges. The first instalment will be payable on 1 May 2012 and thereafter on or before first of every month;

5. All changes to Sabar and to Alfredo's to be agreed in writing by the landlord prior to any changes taking place – architectural plans to be submitted.

6. You will be given one months beneficial's occupational rental from 1 April 2012 to 30 April 2012 to refix shop S21, and no rental will charged on this shop, S21 over 40 square metres for beneficial occupation period only. Shop S22 is to remain open for trade during this time.

7. This final offer is open for acceptance by close of business 2nd March 2012 failing which the offer will lapse and legal proceedings shall continue".

The letter is signed by Barbara Parker, the general manager of Arbour Town (Pty) Ltd.

[22] The offer was accepted and signed on behalf of the respondents as indicated above.

**Was there a valid compromise agreement between the parties?**

[23] It is clear from the document that it is indeed a letter in writing which had been signed on behalf of both parties. It is clear from the contents of the letter dated 1 March 2012 that it deals with rights and obligations of both parties and intended to vary the terms of the original lease agreement. The

respondents also contended that this agreement was not a fax or an email, in itself, it was merely an attachment to same. This was indeed an offer from the applicant for acceptance by the respondents. It is therefore clear that if the document was sent by an electronic mail or fax, it does not comply with clause 1.7 of the written lease agreement. The respondents contended that the attachment sent via electronic mail fulfils the criteria of being reduced to writing.

[24] What is important with this document is that it was an offer which was open for acceptance by close of business on 2 March 2012, failing which the offer was going to lapse. It is clear from the respondents' opposing affidavit that this offer was only accepted by the respondents on 5 March 2012 and not on 2 March 2012 for reasons set out in para 18 of this judgment. In the circumstances of this case as the offer was not accepted by 2 March 2012, there is no valid agreement between the parties. The fact that the applicant always communicated with the respondents in business dealings via email or fax does not detract from what is contained in clause 1.7 of the lease agreement. Furthermore, the compromise agreement between the parties is not valid as it was faxed and emailed between the parties contrary to clause 1.7 of the lease agreement.

[25] The defence of compromise agreement can therefore not succeed.

**The defence of set off.**

[26] Clause 4.6 of the lease agreement provides that all rental and other amounts payable by the tenant in terms of this agreement of lease shall be made without demand, free of exchange and without any deduction or set off whatsoever. It is clear that the parties contracted out of the respondents' common law right to rely on set-off.

[27] Agreements to contract out of the operation of set-off are binding. Where the parties have agreed that rental due is payable without deduction or set-off, set-off does not operate automatically[5].

[28] The claim of R144 438.00 claimed by the respondents in the affidavit as set-off, arises out of the lease agreement as the respondents' contribution to costs of fitting a ceiling in the shop; effecting improvement on the shop front; for plastering and painting the premises; and installing the electrical wiring and plug points. Respondents have demanded this amount of money but the applicant has refused to pay it. Furthermore, the applicant asked the respondents to effect improvement to the exterior of the shop on behalf of the applicant in that he required the respondents to tile the fore-court area for which the applicant undertook to pay the respondent for financial outlay occasioned thereby. He has, however, been unable to find invoice in respect thereof. The respondents contend that the compromise agreement does not exclude set-off, whether it is a claim against the applicant.

---

[5] Herrigel NO v Bon Raods Construction Co (Pty) Ltd and Another 1980 (4) SA 669 (SWA) and also Altech Data (Pty) Ltd v M B Technologies (Pty) Ltd 1998 (3) SA 748 (W) at 760I – and 761D-G.

[29] It has been pointed out above that in terms of the lease agreement, the amounts of rental owed, could not be set off in any manner.

[30] I have already indicated above that annexure "A" to the respondent's opposing affidavit does not constitute an agreement of compromise. In the absence of the valid compromise agreement which has the effect of replacing the terms and conditions of the main lease agreement, then all the defences raised by the respondents based on compromise cannot be sustained.

[31] In the alternative, the plaintiff has contended that the opposing affidavit is contradictory to the extent that it cannot be said that the defence is *bona fide.*

[32] It was submitted on behalf of the plaintiff that the defence must be put up in such a way that it can be said to be put up honestly, i.e. *bona fide* defence, the Court held[6]:

*"The defendant must consequently put up a defence honestly, disclose fully the nature and grounds of it and in so far as he relies upon facts lay before the Court, facts which if proved will be a good defence."*

[33] It will suffice if the defendant swears to a defence, valid in law in a manner which is not inherently and seriously unconvincing[7].

---

[6] Soorju v Pillay 1962(3) SA 906 NPD at 908H

[7] *Breitenbach v Fiat SA (EDMS) BPK 1976 (2) SA 226 (T) at 228 B.*

[34] The applicant contends that the facts alleged in the opposing affidavit are contradictory. On the one hand, deponent states that the agreement of compromise was concluded “On or about 27/28 February 2012, and subsequently reduced to writing on 1 March 2012” as seen in annexure “A” to the opposing affidavit.

[35] However, the annexure relied on does not constitute and agreement but an offer. Furthermore, the deponent goes on to say that annexure “A” was signed on 2 March 2012 and the acceptance of that offer was communicated on 5 March 2012. On the latter version, the compromise agreement would have been concluded on 5 March 2012 which contradicts earlier statement on that it was concluded on or about 27 or 28 February 2012. The applicant submits that the version is full of contradictions that it cannot be said to be a *bona fide* defence. In my view, there are no contradictions in what is set out in the opposing affidavit. This simply means that the agreement was entered into on 27/28 February 2012, subsequently reduced to writing on 1 March 2012 and sent to the deponent on 2 March 2012 and, was signed by respondents on 5 March 2012 when the offer was accepted. In my view, the applicant’s submission in this regard has no substance.

**Material breach of the agreement**

[36] The respondents alleged that the applicant committed a material breach of the agreement in that it failed to effect repairs to the ceiling of the shop when the roof of the building leaked so badly that the rain poured into

the restaurant and onto the customers food on many occasions, causing customers to become disillusioned with the restaurant and thereby causing harm to first respondents reputation. Eventually the ceiling became so sadden with rain water that the entire ceiling fell down during the Easter holiday season of 2012, resulting in huge loss of income for the respondents.

[37] The applicant, despite numerous requests refused to effect the necessary repairs for many weeks. The respondents eventually effected the repairs in terms of clause 21.1.2 of the written lease agreement in the amount of R18 900.00 which amount the applicant is liable. But despite demand the applicant has failed or neglected to pay. No invoice has, however, been annexed to the affidavit in support of this claim.

[38] The respondents contended that there is nothing preventing the respondents from using defences of “set-off” and “breach” of the agreement as the parties are governed by the compromise agreement which does not exclude same.

[39] The applicant submitted, correctly in my view that the defences of “set-off” and breach of the agreement do not form part of the written lease agreement and therefore not valid defences against its claim.

[40] I have already made a finding that there was no valid compromise agreement between the parties. In the absence of a valid compromise

agreement between the parties, the relationship between them is governed by the original lease agreement.

[41] It is correct as the respondents contended that a compromise agreement operates in the fashion that it is not affected by the invalidity of the original contract nor it is affected in any manner by the original contract as it stands as an entirely new and separate agreement to which each party is bound as if the original contract never existed[8].

[42] It is also true that a compromise has the effect of res judicata and is an absolute defence to an action on the original contract[9].

[43] In the absence of a valid compromise agreement the defence of breach the agreement is no defence at all to the applicant's claim.

[44] In the absence of a valid compromise, varying the terms of the lease agreement, it cannot be said that the defendant has a valid defence in law or a bona fide defence. The plaintiff is accordingly entitled to summary judgment.

---

[8] Dennis Peters Investments (Pty) Ltd v Ollerenshaw 1977(1) SA 197 (W) at 202 G-H.

[9] Dennis Peters investments supra at 202 E to F: Van Zyl v Niemann 1966(4) SA 661(A)

**Application to strike out**

[45] The causes of complaint referred to in the application to strike out had been removed prior to the hearing of this application. A properly commissioned affidavit had been substituted for the original. The causes of the complaint had, in my view, been removed.

[46] In the circumstances, the application to strike out cannot succeed. In my view, each party should be ordered to pay its own costs in the application to strike out.

[47] In the result, the following order is made:

Summary judgment is granted against the first and second defendant's jointly and severally, the one paying the other to be absolved, for:

1. Payment of the sum of R263, 683. 57;

2. Interest thereof at the rate of 15,5% a *tempora morae* from the date of judgment to the date of final payment.

3. Costs of suit on the attorney and client scale.

**Application to strike out**

(1) The application to strike out is dismissed.

(2) Each party to pay its own costs in this application.

_____

**SISHI J**

**APPEARANCES**

| | | |
|---|---|---|
| Date of hearing | : | 12 September 2012 |
| Date of judgment | : | 12 December 2012 |
| Counsel for the Plaintiff | : | M Bingham |
| Plaintiff's Attorneys | : | **GIDEON PRETORIUS INC**<br>8th Floor Old Mutual Building<br>300 Anton Lembede Street<br>DURBAN<br>Ref: Abri Kritzinger/Galleria/0019 |
| Counsel for the Respondent | : | J Gates |
| 1st & 2nd Respondent's Attorneys | : | **D.K. SINGH, VAHED & PARTNERS**<br>88 Harvey Road<br>Morning side<br>DURBAN<br>(Ref: Mr Archary/zh/SUN4/0003 |