

REPUBLIC OF SOUTH AFRICA



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

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

CASE NO: 39717/2012

A handwritten signature in black ink, appearing to read "M. D. M.", is written over a horizontal line.

SIGNATURE

10 March 2017

DATE

In the matter between:

UNIVERSITY OF JOHANNESBURG

Plaintiff

And

**AUCKLAND PARK THEOLOGICAL SEMINARY
(PTY) LTD**

1st Defendant

WAMJAY HOLDINGS INVESTMENTS (PTY) LTD

2nd Defendant

REGISTRAR OF DEEDS, JOHANNESBURG

3rd Defendant

**THE NATIONAL LEADERSHIP FORUM OF THE
APOSTOLIC FAITH MISSION OF SOUTH AFRICA**

4th Defendant

J U D G M E N T

VICTOR J:

[1] The plaintiff is the University of Johannesburg. The first defendant is Auckland Park Theological Seminary (Pty) Ltd (Theological Seminary) and the second defendant is Wamjay Holdings Investments (Pty) Ltd (Wamjay). The first defendant is a Christian based seminary and the second defendant is a company wishing to build a Muslim faith based school.

[2] The University seeks an order that the Theological College and Wamjay be evicted from portion 1 of Erf 809 Auckland Park Township, registration division IR, province of Gauteng situated 51 Richmond Avenue Auckland Park Johannesburg, (the property).

[3] The University also seeks the cancellation of the registration of the notarial long term lease agreement registered against the Title Deed with reference number K4963 of 1996.

[4] The issue for determination in this matter is whether the Theological College could cede the long term lease it had concluded with the university to Wamjay without the University's consent, and secondly whether the lease was in fact one capable of being ceded and the dispute between the parties was whether it fell into the category *delectus personae*.

[5] The Theological Seminary and Wamjay claim that the University's claim be dismissed with costs and seeks an order that the

notarial long term lease entered in by Theological Seminary and the University registered on by the Registrar of Deeds on 20 December 1996 under number K4963/1996 remain valid in all respects.

[6] On 13 October 2011 the Theological Seminary and Wamjay concluded a written cession agreement whereby it ceded its rights in the long lease to Wamjay and registered by the Registrar of Deeds on 11 April 2012 under number K691/2012L, Annexure D2 to the counterclaim and endorsed against the notarial long term lease agreement remains valid in all respects. The Theological College ceded only its rights to Wamjay, not its obligations.

Material Background Facts

[7] The University is the registered owner of the property. On 7 June 1993 the University and the Theological College concluded a written cooperation agreement in terms of which the parties would cooperate where the University would cooperate in respect of academic courses.

[8] On 25 April 1996 the University applied to the Minister of Education in terms of section 4 (2) of the Rand Afrikaans University Act 51 of 1966 for consent to let out certain of its properties including the relevant property to outside entities for a period of thirty years for the purposes of development. On the 18th of June 1996 the Minister granted his approval in the following terms, and I quote:

'I hereby grant permission for the Rand Afrikaans University to let certain specified property, detailed drawings B1 to E1 for a period of thirty years for the purposes of developing these properties'

[9] It bears mention that the details of the properties were not specified except for that property which pertained to the Theological College. The 6th of December 1996, that is some three years after the written cooperation agreement, the University represented by Mr C. Labuschagne and the Theological College represented by Professor Hattingh, concluded a notarial long term lease in respect of the property. The lease was registered against the title deed as described. On 3 December 2007 the University gave the Theological College one year's notice of termination of the cooperation agreement with effect from 3 December 2008. It would appear that the intended cooperation did not fructify for a number of reasons.

[10] The cooperation agreement, would have involved the University providing higher education to the students of the Theological College, a symbiotic relationship, and it would have provided an opportunity for the University to provide seminary education to the religious community at large.

Dispute on the proper interpretation of the words in the lease referring to Tertiary Education

[11] The enquiry really commences with a proper interpretation of

the lease agreement. Towards 8.1 and 8.2 of the lease agreement bears consideration. I quote the clauses in question in Afrikaans as reflected in the lease under the heading “*Gebruik van eiendom*” the following is stated:

‘8.1 Die Huurterrein sal gebruik word deur die huurder vir opvoedkundige godsdienstige en aanverwante doeleindes, **die oprigting van kampus vir onderwys, onderrig, navorsing, opleiding, kantore en studentefasiliteite.** (my emphasis).

8.2 Die huurder het die reg om geboue, konstruksies, fasiliteite, verbeterings en landskapering en strukture op te rig met die oog op die gebruik van die Huurterrein soos in klousule 8.1 van hierdie ooreenkoms omskryf, en met dienverstande dat die boukonstruksie en ander planne ten aansien van sodanige geboue, konstruksies, fasiliteite, verbeterings in landskappering en strukture eers aan die Registrateur (Bedryf) aan die verhuurder voorgelê moet vir sy kommentaar en skriftelike goedkeuring. Gemelde goedkeuring sal nie onredelik deur die verhuurder geweier word nie.’

[12] The University places great emphasis on the word ‘sal gebruik word’ meaning ‘shall be used’. The clause goes on to provide that it shall be used for higher education meaning tertiary education. The University contends that there is an obligation on the Theological College to use the leased premises for tertiary education. The university asserts that the provisions of Clause 8 are not to imposed in the alternative upon a

proper construction these obligations are cumulative. Both parties rely on dictionaries for the (meaning of the) word 'kampus'. The University relies on the *Nasionale Woordeboek, Afrikaanse Woordverklaring*, previously *Kenwoordeboek van Afrikaans* for the definition of Kampus as '*universiteits-terrein of student-gemeenskap*'. The University also relies on the definition of student as '*iemand wat ingeskryf is en klas loop aan 'n universiteit of inrigting vir hoë onderwys*'. And in the *Afrikaanse Woordeboek* part 5 '*kampus*' is defined as *terrein tussen, rondom die akademiese geboue van n universiteit of kollege waar die studente kan ontspan*. 2. '*Kompleks van hierdie geboue en terreine wat gewoonlik as die setel of hoofdeel van die universiteit beskou word.*'

[13] The University relies on the interpretation of the provisions of the lease and as referred to in the definitions as being aimed at the principle that the Theological College could only the lease premises for Tertiary education, religious and related purposes and for the establishment of a campus for education, tuition, research, offices for training and student facilities.

[14] It is common cause that Wamjay would use the premises to establish a religious based school for primary and high school education. In other words it would not erect a university type educational facility. Wamjay and the Theological College dispute the interpretation given to the words "campus, higher learning", and suggest that it could be equally applied to the intention of Wamjay to erect a school, in other words the

word “campus” could also be a school campus and that higher learning would also encompass the senior part of the school.

[15] It is common cause between the parties that the essential issue for interpretation is whether upon a proper interpretation of the lease agreement the rights were personal, that is *delectus personae*. The Theological College and Wamjay submit not and that it was therefore entitled to cede the rights to Wamjay. The Theological College asserts that its conduct did not constitute an unequivocal and direct intention to be no longer bound to the lease, and therefore that conduct did not amount to the repudiation of the lease.

Delectus personae

[16] The question of *delectus personae* has to be interpreted in the context of the lease and the statutory framework. The preamble to the cooperation or academic agreement records that the Minister of National Education at the time had given the consent contemplated in 10B of the University’s Act 61 of 1955 for the agreement between the University and the Theological Seminary for the training of students.

[17] This fact remains pivotal in assessing the nature of the relationship between the University and the Theological College. It is the University’s submission that the cooperation agreement, although not specifically referred to or acknowledged to be such by its various witnesses, it nonetheless was the forerunner to the lease and therefore

cannot be ignored. In particular section 10 (B)(1) of the Act and I quote:

‘Agreements regarding training of students: 1:

Notwithstanding anything to the contrary in any Law contained in relation to the seat of the university, a council may with the consent of the Minister and subject to the provisions of sub-section (2) enter into agreements in connection with the training of students with provincial, educational and other authorities or with the council or governing body of an institution whose purpose it is to provide a division of higher education.”

[18] Professor O’Brien testified that this would have benefitted both the University and the Theological College. Sub-section 2 of section 10 (B)(1) of the Act also provides that any agreement entered into in terms of subsection 1 shall observe the guidelines prescribed by the joint statute. In terms of section 10 of the University’s Act a person can only be registered as a student of the University if she has obtained the equivalent of a matric certificate or has in terms of that section been exempted from the matric certificate.

[19] The University submits that this of itself suggests that any activity on the leased site would really pertain to students who are in the category of post-matric. The recordals in the cooperation agreement are as follows: That the purpose of the agreement is to achieve levels of higher education, and I quote:

“Tussenin universiteit en ‘n inrigting met die oog op opleiding vir ‘n graad, diploma of sertifikaat van die universiteit.”

[20] Section 4 (2) of the Rand Afrikaans University Act, now repealed but relevant at the time, states the following:

‘The University shall not without the approval of the Minister let, sell, exchange or otherwise alienate its immovable property or grant to any person any real right therein or sue servitude thereon. The University emphasizes the words in section 4 (2) of the grant to any person of any real right therein.’

[21] Of course it is common cause that a lot of work went into obtaining the s 4 (2) consent in the sense that the Theological College initially wanted to purchase the property. When it was evident that the Minister would not agree to that, a long term lease of ninety nine years was sought and that did not, according to the University find favour with the Minister, and the lease was approved for a period of thirty years to be extended.

[22] Of importance is the terms of the request addressed to the Minister, and I quote:

“The Theological College of the Apostolic Faith Mission of South Africa: The Apostolic Faith Mission of South Africa urgently needs property in the vicinity of our

University to build their Theological College. The students will come from multicultural backgrounds and the college will be responsible for the training of all Pastors of the Apostolic Faith Mission of South Africa. They have identified property owned by our University as the most suitable site. We would like to extend a helping hand to them by letting this property over a period of thirty years.”

[23] The Minister consented. It is the case of the Theological College and Wamjay that because of the general nature of the consent, the Minister was not specifically consenting to the Theological College, but really to a wide range of stakeholders. In my view the letter addressed to the Minister and the subsequent consent cannot be ignored. Quite clearly the words “to help a lending hand” to the Theological College does go some way to suggest that the lease was specifically aimed at the Theological College, and therefore the Minister’s consent cannot be read in isolation. The consent must be read with the request that preceded it.

[24] The University relies on the limitation on transfer of rights, such as those found in *Cosira Developments (Pty) Ltd v Sam Lubbe Investments CC t/a Lubbe Construction & Others* 2011 (6) SA 331 (GSJ) [19] a judgment by Van Oosten J, relating to circumstances where the sale of land was to have a particular purpose in that the land was to advance black economic empowerment, which precluded a further sale

without a council resolution. The University argued that this by analogy is the case it relies on.

Material Contextual Facts

[25] It has become accepted that in interpreting any document such as this lease, the principles in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) must followed. Where the meaning of a lease may be vague, unclear or does not give business efficacy to the lease it is appropriate to consider the context. Before moving onto the Law, it is important to look at the material contextual facts. These are largely common cause. The witnesses that testified were Mr Karel Labuschagne, Professor Jean Du Plessis who testified by way of a video link from Australia and Ms Keet from the University regarding the circumstances after the conclusion of the agreement, and in particular how the lease was carried out by the parties.

[26] The witness Mr Labuschagne testified that he was a member of the Bates Ontwikkeling Kommittee, and that the University had at that time decided to embark on a process of development of its various properties in Auckland Park. It was clear that the piece of land that the Theological College occupied at that time was too small. They intended to build a college on the land.

[27] The Theological College made a request and motivated the need for property to the University. The motivation was partly on the

basis that the University should favourably consider their application and Mr Labuschagne testified that whilst he was aware of the existence of the cooperation agreement, he had not seen or read the cooperation agreement and treated them as two separate agreements. However he was aware of the relationship at the time of the academic cooperation between the Theological College and the University, and it made sense that if the Theological College required extra land that the University should assist.

[28] The negotiations were done in the spirit of cooperation, but when it came to negotiating on price it was clear that it was an arm's length negotiation and that no concessions were made or indulgences were granted to the Theological College on the basis that it was a religious institution. It is clear from the correspondence at the time that the agreed price was lower than market value, but the parties finally agreed on a consideration sum of R700 000.00 as a once off payment.

[29] Both Mr Labuschagne and Professor Du Plessis confirmed that the University was aware that the Theological College intended to effect a development of approximately of R10 million on the property, and this was a source of debate between the parties. The University was disinclined to commit to reimbursing the Theological College at the end of the lease for the improvements.

[30] It is permissible for contextual facts to be considered when interpreting the lease agreement. The University relied on the recent judgment of the Supreme Court of Appeal in *Unica Iron And Steel (Pty) Ltd and Another V Mirchandani* 2016 (2) SA 307 (SCA) 313 where Leach JA referring to the dictum of Lewis JJA in *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* 2013 (5) SA 1 (SCA held:

'The court asked to construe a contract must ascertain what the parties intended their contract to mean. That requires a consideration of the words used by them and the contract as a whole and, whether or not there is any possible ambiguity in their meaning, the court must consider the factual matrix (or context) in which the contract was concluded.'

[31] The University points to the correspondence of the Theological College, in particular that of Professor Kuipers. He addressed correspondence to the University over a considerable length of time. This emphasises a personal dimension to the lease and that it was personal to the Theological College and not to any other third party. Reference is made to the letter of Kuipers dated 5 June 1995 where he makes reference to the *ooreenkoms wat tussen ons twee inrigtings bestaan* on at least four separate occasions and of course that related to an attempt to solicit the best possible price for his college.

[32] In his letter of 4 August Mr Kuipers speaks of the fact that the first defendant is in 'verwantskap (partnership) met u instituut'. In addition, he refers to the University and the Theological Seminary as

'akademiese vennote'. On 16 October 1995 Mr Labuschagne had requested from Professor Hattingh that the college present the plaintiff with an *'uitvoerbaarheid studie rondom u ruimte behoefte'*.

[33] In response, on 8 January 1996 Kuipers delivered a comprehensive proposal to which were attached plans reflecting the development of the project. In paragraph 2 of the letter Kuipers on behalf of the college agreed to the rezoning of its own premises from residential 1 to *'onderwys, opleiding en verwante doeleindes'*. In addition it was also at the insistence of the Theological College that the *'vergunnings gebruik'* for the purposes of *'godsdienst onderrig en opleiding en aanverwante doeleindes'* was inserted in Clause 8.1 of the lease.

[34] It is on that basis that the University relies on the personal aspect of this lease, not only on its own understanding, but upon a proper interpretation of the context corroborated by the correspondence emanating from the Theological College.

[35] The principle of context is highly relevant in this matter. In particular the dictum of Harms JA in *KPMG Chartered Accountants SA v Securefin Ltd* (2009) (4) SA 399 (SCA) [39] where he stated:

“Context is everything.”

[36] It is important to note that the witnesses for the University were consistent in their evidence and there was no contradiction that the

relationship between the University and the Theological Seminary was personal in its nature between them having regard to the relationship. In fact, no contradictory version was put to Mr Labuschagne on this aspect, and the evidence stands uncontroverted and unchallenged.

[37] Professor O'Brien testified about the real commercial benefit to the University and that evidence was unchallenged and stands uncontroverted. The evidence of Professor Du Plessis again pointed to the relationship aspect of the parties and his evidence accorded with the documentary evidence that was put to him.

[38] The University placed reliance on the principle in our Law that a right of a personal nature cannot be ceded. In this regard see *The Law of Cession* by Susan Scott 2nd Edition at page 202. See also the English Law in this regard, see Anson's *Law of Contract* 28th Edition, Treitel the *Law of Contract* 13th Edition and Cheshire GC, Fifoot CHS and Furmston MP, *The Law of Contract* 10th Edition at page 466 at paragraph 37.

[39] Although those authors really deal with assignments in the nature of the personal right it applies to the cession of long leases as well. Selikowitz J in *Goodwin Stable Trust v Duohehex (Pty) Ltd* 1998 (4) SA 606 (C) 617 states the following, I quote:

‘The restriction on cession imposed by the delectus persona concept is simply a manifestation of the general principle that the cession should not disadvantage the debtor.’

[40] On behalf of the Theological College and Wamjay great emphasis was placed on the norm and in a very helpful analysis the interpretation of Law in regard to the contract. The reliance on *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd 2016 (1) SA 518 (SCA)* paragraphs 24 to 31 is as follows:

‘The argument of Novartis, as I understand it, is that interpretation is an entirely objective process: in deciding what a contract means, a court must have regard to the words used and construe them objectively.’

[41] If a document was intended to provide a complete memorial of a jural act, evidence may not contradict and or modify its meaning. In this regard the Theological College and Wamjay submit that the contract is perfectly clear and that there is nothing that is vague and confusing. The contract of itself is quite clear on the nature of the lease, and that it is not to be interpreted based on its wording as making provision for a right in *delectus persona*.

[42] In the event that the court does accept that context may be testified about, the Theological College and Wamjay then rely on the passage in *Endumeni*. This case provides that a sensible and business like result would mean that the Theological College was perfectly entitled to cede the lease to Wamjay and therefore, whether the court allows the background context or not, the Theological College points out that the words of the document are relevant and that the parties expressed their contractual intentions. They submit that context should not deviate from

the intentions as expressed, particularly because the document itself was a complete memorial of the jural acts which the parties intended.

[43] However, it is quite clear that the document itself went through a long process of negotiation. In fact it was many months, almost a year in extent. It is also clear that Professor Du Plessis made it clear that he did not want the Theological College to sublet, because that would bring unapproved parties into the University environment. In particular at some stage as a fundraising mechanism there was talk that the Theological College would allow a BP Petrol Station to be erected. The University under no circumstances wanted such a situation to arise.

[44] The definition of *delectus persona* is dealt with in LAWSA at page 30 as follows:

“A delectus persona is a right which may not be ceded without the consent of the debtor if the performance the debtor is to render to the proposed cessionary would differ in character from the performance of the debtor is to render to his or her current creditor. The identity of the creditor, that is the delectus personae, thus becomes decisive.”

[45] In this case it is quite clear that the long debate leading up to the conclusion of the lease did emphasize the personality of the creditor, that is the Theological College, and that when the college wanted to go outside and incorporate for example the BP Garage, this aspect became

decisive in the negotiation.

[46] The evidence led by the Theological College was that of Mr Thalia and that of Ms Keet. It is quite clear that Mr Thalia could not testify to the circumstances surrounding the conclusion of the long lease and therefore in interpreting the context, his evidence was not helpful, save and except that, he gave his evidence honestly and without embellishment, but could not unfortunately provide any light on the question of the *delectus persona* surrounding the lease.

[47] The evidence of Ms Keet could also not deal with the circumstances surrounding the conclusion of the lease agreement, but did deal very fully with the conduct of the parties after the conclusion of the lease. It is common cause that the property was sold to an entity and that ultimately the property was sold back to the University.

[48] The entity to which the property was sold was a developer. It had in fact developed accommodation for the University students in an adjoining erf known as the Sophia residence.

[49] It is the case for the Theological College and Wamjay that to give sensible commercial effect to a long lease it would be artificial to suggest that the permission of the owner of the property was necessary, in particular it is an urban lease where no such permission is necessary.

[50] The Theological College therefore challenges the University's submission that in concluding the cession agreement between it and Wamjay constituted a repudiation of the lease and therefore relies on a, the precise meaning of what a repudiation means.

[51] In this regard the Theological College referred to the leading case on repudiation. See *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA) paragraph 16 to 18 where Nienaber JA states the following:

'Where one party to a contract without lawful grounds indicate to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract, is said to repudiate the contract. The test is not subjective but objective. The perception is that of a reasonable person placed in the position of the aggrieved party and whether such a notional reasonable person would conclude that proper performance in accordance with the true interpretation of the agreement will not be forthcoming.

A repudiation is not likely presumed. The conduct must be clear and unequivocal and it must be, it must stand objective analysis and it cannot be equated with any other feasible hypothesis, and the party alleging the repudiation must prove that the conduct of the other party amounts to a repudiation of the agreement.'

[52] In this regard the Theological College relies on the fact that the University sold the property in question albeit for a brief period, subject of course to the lease, and therefore if the lease was personal to it, it certainly would have not embarked upon the conduct that I have referred to. In addition, the Theological College submits that if the court finds that the conduct was a breach rather than a repudiation of the lease, then the University was not entitled to cancel the lease since it did not put the Theological College or Wamjay in *mora* as required by the *lex commissorium* in Clause 11 of the lease before it was entitled to cancel.

[53] The University submits that the breach was of such a fundamental nature that there was no need to comply with putting the Theological College in *mora*.

[54] In conclusion, it is therefore necessary for this court to assess whether the factual matrix and context is such that the clauses in question, that is Clauses 8.1 and 8.2 amount to a lease, which is governed by the principle of *delectus persona*. In my view having regard to the extensive debate prior to the conclusion of the lease, the undisputed evidence of the correspondence emanating from Mr Kuiper on behalf of the theological College, I find that the lease is indeed one which was personal to the Theological College.

[55] In addition it is also quite clear that the conduct in selling off the property to the various developers in respect of this particular

property really relates to aspects relevant to the University and its operation. By virtue of the fact that there was already a residential property the Sophia Residence next to the property in question it is consistent with the University's goal to keep control over the developments on its premises.

[56] Although specific stakeholders were not named in the general consent by the Minister, it is also relevant to note that what was envisaged according to the plan to be sold to stakeholders was a site for a sport centre. The Theological College submitted that the sport centre would indeed be relevant to the University but importantly would be available to the general public. The argument applies to the shopping centres. What can't be overlooked is the fact that those facilities would be relevant to the general operations of the university.

[57] In addition, neither party was able to show that the general consent of the Minister was for the purposes of expanding not only the commercial aspect for the University and that it would acquire money for selling the properties, but also the Theological College was unable to demonstrate that the intended sales would be for a purpose unrelated to the convenience of the University and its staff.

[58] In my view therefore the University has made out a case that the lease was one of *delectus persona* and that it is accordingly entitled to the relief that it seeks.

[59] A Draft Order has been prepared and marked X. It is handwritten.

[60] Prior to the conclusion of the trial it was brought to my attention that there was an agreed Draft Order in respect of the litigation between the University and the fourth defendant and that there was an agreed Draft Order that they wish me to make an Order of Court.

The Order that I would make is the following:

- [1] The agreed Draft Order marked X in respect of the fourth defendant is made an Order of Court.
- [2] The first and second defendants and all persons occupying through or under them are evicted from Portion 1 of Earth 809 Auckland Park Township registration division IR Province of Gauteng held under title deed T9764/209 situated at 51 Richmond Avenue Auckland Park Johannesburg, and they shall vacate the property by 30 November 2016.
- [3] That the third defendant is ordered to cancel the registration of the notarial long term lease agreement with registered reference number K4963/1996 registered against the title deed of Portion 1 of Earth 809 Auckland Park Township registration division IR Province of Gauteng held under title deed T9764/2009 situated at 51

Richmond Avenue Auckland Park Johannesburg.

[4] The first and second defendant's counterclaim is dismissed with costs.



M VICTOR

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

COUNSEL FOR THE APPLICANT
INSTRUCTED BY
COUNSEL FOR THE RESPONDENTS
INSTRUCTED BY