IN THE NORTH GAUTENG HIGH COURT

(HELD AT PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.

26/5/2010 ... DATE ... SIGNATURE

30/05/11

In the matter between: **Case no. 48402/07**

AXTER PROPERTIES CC	**Applicant**
and	
YUSUF SULEIMAN KALLA	**1ST Respondent**
DION MBAYE	**2ND RESPONDENT**

JUDGMENT

PRELLER J:

This is an application for a spoliation order in respect of shop 1, 15C Excelsior Street, Polokwane. It is common cause that the applicant is the owner of the complex in which the relevant shop is situated, but just about everything else is in dispute.

Five persons with the surname Kalla are the members of the applicant close corporation. It is alleged that they are related but it is not disclosed what the relationship is. The applicant's business consists entirely of managing and letting the shops comprising the complex.

The first respondent says that he and his late father were, since 1974, the shareholders in a company that owned the building. The company was later converted to a close corporation and it is not disclosed why, how and when the other four members acquired their interest. It is common cause that no association agreement as contemplated in section 44 of the Close Corporations Act, 1984 was in existence. The first respondent is one of the two members that hold the biggest interest (27% each) in the applicant and his allegation that the other members allowed him to manage the affairs of the applicant until the events of May 2007 is not seriously disputed.

On 19 May 2007 the applicant purported to hold a meeting of members and to adopt a resolution in terms of which it was resolved that the first respondent would inter alia no longer be permitted to collect rentals from tenants or to represent the applicant in any way without being authorised to do so by a "duly authorised resolution". I say "purported" because the respondents dispute that the meeting had been validly convened. Moreover, one of the points resolved was that a meeting of members would be urgently called, inter alia to "ratify this resolution" which, according to the respondents, confirms that even the applicant did not regard the resolution as valid. As it is, not much turns on whether the resolution was validly adopted on that day or not.

A further meeting was held on 30 June 2007 at which it was resolved to approve and implement the resolutions of the previous meeting. The first respondent had been given notice of this meeting by a letter received by him on 27 June and his attorneys were informed thereof in a letter faxed to them by the applicant's attorneys on the same day. On 2 July the latter wrote to the applicant's attorneys that the notice of the meeting was invalid, as it had not allowed the first respondent sufficient time before the meeting. That letter does not deal with the reasons why the date, time and venue of the proposed meeting were not reasonably suitable to the first respondent as contemplated in section 48(2)(a) of the act. Of note is also the statement by his attorneys that the first respondent is "... willing to abide by the decision of the majority members ...". The first respondent, however, annexed a letter from his attorneys dated 28 June to his answering affidavit in which it is stated that he had already in April made reservations to go on holiday from 29 June.

Mr. N G D Maritz SC on behalf of the applicant, submitted that the first respondent lives in Polokwane and that three days' notice is sufficient. In any event, he submitted, it is irrelevant whether he received adequate notice of either of the two meetings, because of the provisions of section 46(c) of the act, which reads:

> **"(c) differences between members as to matters connected with the corporation's business shall be decided by majority vote at a meeting of members of the corporation;".**

Because the resolution had been adopted by members holding a combined interest of 73% in the applicant, he submitted that the presence of the first respondent and his vote against those of the others would not have prevented the resolution being adopted.

In his answering affidavit the first respondent relies on the fact that the other members had allowed him for many years to manage the affairs of the applicant on his own without interference. That, he said, constituted "..... a tacit and/or implied agreement as referred to in section 44(3) ... of the act ... which cannot unilaterally be terminated by a group of such members.". He relied on that implied agreement and on sections 46(a) and 54 of the act for his authority to permit the second respondent to obtain the services of a locksmith to remove the lock and chain on the door of the shop that will be dealt with later.

I shall deal but briefly with the remaining facts. After the applicant terminated the first respondent's authority as set out above, he produced three lease agreements allegedly concluded by him on behalf of the applicant with other tenants in the centre before the termination of his authority. Except for the name of the lessee, they are identical to the one concluded with the second respondent. All of them were concluded on 1 April 2007 and were for a period of ten years, commencing on 1 January 2007. The validity of those agreements are not relevant for present purposes but, for several reasons, they look highly suspect to say the least.

The second respondent, trading as Trio Trade, had sublet shop 1 to a business known as Lucky House from May 2007. When the applicant noticed that it did not receive rental from Lucky House for the month of May, it informed the attorney acting for Lucky House that the first respondent's authority to represent the applicant had been terminated and that the applicant would in future collect the rent. The applicant later received the rent from Lucky House for the months June to August, and also agreed with them to extend their occupation to the end of September. Lucky House vacated the premises on 26 September and returned the keys to the applicant's letting agent. The door to the shop was further secured with a chain and lock. When the respondents could not get access to the shop, the first respondent, relying on the implied agreement referred to, authorised the second respondent to obtain the services of a locksmith to open the lock.

In opposition of the applicant's claim for a spoliation order, the second respondent relies on the authority of the first respondent to represent the applicant and also alleges that he exercised control over the leased premises through his sub-lessee Lucky House until the end of September when he personally took occupation. There is a third defence that is not expressed very clearly but seems to be that the applicant voluntarily gave him occupation (presumably by virtue of the lease agreement concluded with first respondent representing the applicant), alternatively that the applicant had attempted to spoliate him and that he ". . . . at most contra-spoliated the applicant by re-taking possession *instanter*.".

The last-mentioned defence can be disposed of *instanter* : irrespective whether Lucky House was the lessee or sub-lessee of the applicant or the sub-lessee of the second respondent and who occupied the premises through a sub-tenant, Lucky House returned the key to the applicant's letting agent and not to either of the respondents, thereby giving possession and occupation of the premises to the applicant. The second respondent could therefore not have been spoliated. Nor could his removal of the lock and chain have been a counter-spoliation: both respondents carefully refrain from disclosing the date on which the chain and lock were removed and it is not even possible to say that it happened on the same day. A classical example of a counter-spoliation would be where a bag-snatcher grabs a handbag from a lady and she promptly grabs it back. The second respondent discovered the lock and chain on the door probably hours or perhaps even days after they had been placed there. He then contacted the first respondent, who told him to contact a locksmith. One has no idea how long it took the locksmith to get to the premises. The removal of the lock could never have been a counter-spoliation.

It is clear that the applicant had been in peaceful and undisturbed possession of the premises. Even if the first respondent was still lawfully entitled to represent the applicant and to decide who may and who may not have occupation of its property, he did not have the right to take the law into his own hands and terminate the applicant's occupation on his own. That spoliation was committed by the first respondent by making use of the second respondent.

Mr Wagener SC on behalf of the respondents submitted that the first respondent will escape liability if either the first respondent actually had the authority to give him access to the premises on behalf of the applicant, or if the second respondent did not know and it cannot be said that he ought to have known or to have enquired whether the first respondent was perhaps not authorised to deal with the applicant's property. The second of the two alternatives is based on the provisions of section 54 of the act.

He submitted firstly that the first respondent had the actual authority to represent the applicant in this respect.. For this submission he relies on sections 54 and 46 of the act. Section 54 provides in effect that any member of a close corporation has the power to bind the corporation in an agreement with a third party, unless that member actually had no such power **and** the third party knew or ought to have known that the member has no such power. In terms of section 46 every member is entitled to participate in the carrying on of the business of the corporation and they all have equal rights to represent the corporation in the carrying on of its business. He submitted that in the absence of a properly executed association agreement in terms of section 46 which removes that power, any member has the power to bind the corporation. According to the submission, neither of the two resolutions amounts to an association agreement and his powers in terms of section 46(a) and (b) are not affected.

That argument loses sight of the provisions of section 46(c), in terms of which differences between members connected with a corporation's business shall be decided by majority vote at a meeting of members. A hypothetical example will illustrate the point: suppose that the five members decide to sell a motor vehicle belonging to the corporation and that member A will do the necessary. If it had then been open to each of the other four members to sell the vehicle to a purchaser of his own, relying on his powers in terms of section 46(a) and (b), the result will be chaotic. The powers granted to members by subsections (a) and (b) must clearly be executed subject to a majority decision. In addition there was the undertaking by the first respondent's attorney in his letter of 2 July in which he undertook to abide by the decision of the majority.

Mr Wagener further submitted that the authority to manage the business of the applicant that the first respondent had enjoyed since 1987 could not be revoked unilaterally by the other members.

That can with respect to Mr. Wagener never be the case. A decision by members can never be irrevocable and a decision taken by a majority can never be said to have been taken "unilaterally". In the context the submission would mean that the revocation of a previous decision must be unanimous, for which there is no support in the act.

It was common cause during argument that unless the second respondent knew or had reason to suspect that the first respondent did not have the authority to represent the applicant, he was entitled to act on the permission give to him by the first respondent to open the door forcibly. Mr Maritz submitted that the second respondent actually had the requisite knowledge by virtue of a summons that had been served on the tenant of shop 4 on 8 June. The lessee of that shop was the second respondent, although the tenant was, *ex facie* the summons, an entity with a different name. Together with the summons a letter was served informing the tenant that the first respondent no longer had the authority to collect rent or represent the applicant. There was furthermore the fact that the two respondents were represented by the same attorney, which makes it likely that the second respondent should have been informed of developments.

There is considerable force in these submissions, and in addition there is the fact that since May he did not receive any rentals from his purported sub-tenant, Lucky House. The second respondent did not disclose the terms of his agreement with Lucky House, but theirs seems to have been a monthly tenancy. Lucky House gave notice of its intention to vacate the shop at the end of August and subsequently arranged to extend its occupancy by a further month. For him to have planned to take occupation of the shop at the end of September, he must have been in contact with Lucky House and must have been informed by them of developments. If he did not actually ask Lucky House why he received no rent for four months he must have known the reason and therefore also that the first respondent could not validly have given him permission to open the lock on the door of the shop. I accordingly find that in taking possession of the shop forcibly, the second respondent committed a spoliation.

In the result I make an order in terms of prayers 2 and 3 of the notice of motion.

F G PRELLER
JUDGE OF THE HIGH COURT