IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No. 3068/2016

In the matter between:

KLEO INVESTMENTS (EDMS) BPK Applicant

and

MARIUS WESSELS N.O. 1st Respondent
HELEN WESSELS N.O 2nd Respondent
MARNIA WESSELS N.O 3rd Respondent

JUDGEMENT BY: MOLITSOANE, AJ

HEARD ON: 3 NOVEMBER 2016

DELIVERED ON: 20 JANUARY 2017

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[1] This is an application for a declaratory order and other ancillary orders in terms of which the applicant seeks the following relief:

1.1 That it be declared that the agreement dated 15 October 2008 entered into by and between the applicant and

Wessels Trust (the Trust) is a valid agreement between the parties;

1.2 That the said agreement be deemed to be terminated and /or cancelled; and

1.3 That an order of eviction be granted against the respondents from the premises known as shop1,Shumans Building, Jasmyn Street, Wilgehof, Bloemfontein.

[2] Applicant is the owner of a building known as Shumans Building, which is over 60 years old. He became owner thereof in the year 2010. The said property was formerly the joint property of Christina Kleovoulou and Demetris Phillipou.

[3] Prior to the applicant being the owner of the Shumans Building, the former owners and the Trust had entered into a lease agreement in terms of which the said owners leased the premises aforesaid to the Trust.

[4] At the time when applicant became owner of this building, the Trust continued to be lessees of the applicant by virtue of the common law principle of *huurgat voor koop* and also by virtue of clause 2.4.1 of the lease agreement dated 15 October 2008(the original agreement).

[5] The agreement dated 15 October 2008 was valid from the 1st December 2008 to the 30th November 2013. This agreement

has since been renewed by the parties and in terms of the latest renewal it is valid till the 30th November 2018.It is the validity of this agreement which is the subject of this dispute.

[6] On the 5th November 2014 the applicant as landlord, represented by P Kleovolou and the tenant, described as "to be advised", represented by Marius Wessels (a trustee of Wessels Trust) signed another agreement (the Spar Agreement) to lease the premises shop 1, Shumans Building erf 10285, Jasmin Street, Wilgehof Bloemfontein.

[7] The main issue for determination is whether the original agreement has been substituted by the Spar agreement, as a result of which the original agreement, can no longer be regarded as a valid agreement between the applicant and the Trust.

[8] It is further argued on behalf of the trust, in the alternative, that should I find that the original agreement was still a valid agreement between the parties, and then in that case, respondent argues that termination of the said agreement in terms of clause 24.2 thereof was *mala fide*, and therefore unlawful.

[9] It is not in dispute that a Spar agreement was entered into and signed as indicated above. According to the applicant the Spar agreement did not culminate into a binding agreement because the agreement was subject to a suspensive condition, which condition was not fulfilled.

[10] On the other hand, it is argued on behalf of the Trust that the agreement of the 15th October 2015 has been replaced by the Spar agreement.

[11] At the onset, it is important to deal with the issue of who the parties to the Spar agreement are. Messrs Kleouvlou and Wessels acting on behalf of the applicant and an "entity to be advised" respectively entered into the Spar agreement which was reduced to writing and was signed on the 5th November 2014.It is argued on behalf of the Trust that at all material times Marius Wessels acted on behalf of the trust when so signed the Spar agreement and in fact P Kleovoulou was aware that Rollina Stores was to be turned into a Spar shop . This is denied by the said Kleovolou. It is argued on behalf of the trust that the denial of this fact constitutes a factual dispute which cannot be adjudicated on the affidavits before court. It is further argued on behalf of the respondent that the version of the respondents should be accepted as correct.

[12] It is my considered view that the fact of who the parties to the Spar agreement are, do not create a factual dispute which cannot be adjudicated on the documents before court. This agreement has been annexed to the affidavit for the perusal of the court.

[13] In the Spar agreement it is clear that Marius Wessels acted for 'the entity to be advised'. When Mr Wessels applied for membership of the Spar Guild of Southern Africa (Annexure AA4 to respondents affidavit), he did not purport to act on behalf of the

Trust in his application. He also did not purport to act on behalf of an entity to be formed or to be advised. When he applied for membership above, which fact he uses to fortify the fact that the Spar agreement had been concluded between the applicant and the Trust, he applied in his personal capacity. The reason for drawing this inference is the following:

[14] Annexure AA4 reveals that Applicant is Marius Wessels. Paragraph 1.2 of this annexure, deals with registration in the case of a company or a close corporation or identity number in the case of an individual or partnership. Mr Wessels supplied his identity number. Mr Wessels did not supply the registration number of the trust .One would have expected him to at least insert the registration number of the trust and not his identity number. Nowhere in the said application does he purport to act for the trust or for the entity to be formed.

[15] Furthermore, following the said application for membership, a membership agreement was entered into by and between the Spar Guild of Southern Africa (NPC) and Marius Wessels wherein he is referred to as a 'retailer member'. The word 'retailer member' has been defined in the said membership agreement. According to the membership agreement "a retailer member" means *"a member, so styled, of the Guild and the 'retailer member' means specifically the retailer member who is a party to this agreement".* Mr Wessels did not purport to act in a representative capacity of either the Trust or the "entity to be advised" or even still, for an entity to be formed when he so

applied for the membership. Nowhere in this application before me does Marius Wessels purport to act in order to protect the rights of an entity to be formed.

[16] Paragraph 5 of the application for membership clearly states that such retailer membership "cannot be sold or transferred". If such membership was thus granted to Mr Wessels in his personal capacity as it is, he can therefore not transfer it to the trust. Respondents contends that the applicant was aware that Marius Wessels was acting on behalf of the trust and later the trust was to be substituted by another entity. If it were so then in that case the Spar agreement could have simply been entered into by and between the trust and the Trust. Such did not happen. The Spar membership was therefore not for the trust.

[17] Nowhere in the documents filed is it alleged that such an 'entity to be advised' is the current lessee of the building in question. It is also clear that the trust is still carrying on business in the said premises on the same terms as in the original agreement. The trust still occupies the same space as previously leased as opposed to the increased space as set out in the Spar agreement. The trust is still paying the rental as agreed in the original agreement as opposed to an increased rental as set out in the Spar agreement.

[18] Clause 25(a) of the original agreement contains a non-variation clause which states that any variation to the said agreement shall be in writing and signed by the parties. When the Spar agreement

was signed, Marius Wessels signed on behalf of an 'entity to be advised'. He clearly did not sign on behalf of the trust. If it were not so, he could have indicated that he was signing on behalf of an entity to be formed.

[19] For the reasons set out above I am unable to find that the trust is one of the parties to the Spar agreement and consequently I cannot find that the Spar agreement has substituted the original agreement. It is my finding that the original agreement is, therefore, the current valid agreement between the parties.

[20] In view of my finding regarding the parties to the Spar agreement, it is in my view not necessary to adjudicate on the fulfilment or otherwise of the suspensive conditions as contained in that Spar agreement.

[21] I will now deal with original agreement. Clause 24 of the original agreement deals with **'change of ownership and renovation'**. It is argued on behalf of the trust that the applicant has no right to cancel the original agreement at all. Reliance for this assertion is based on clause 24(1) which provides thus:

> **"Should the lessor at any time during the currency of this lease sell the property of which the leased premises form part or should any of the holders of the shares in the lessor sell such of those shares with the result that the purchaser/s therefore acquire/s control of the lessor, then notwithstanding anything to the contrary elsewhere contained or implied herein, the lessor or the purchaser/s of such building, or the**

purchaser/s of the said shares shall not be entitled to terminate this lease."

[22] Clause 24(1) of the original agreement deals with circumstances where the building is being sold or alienated. In this dispute before me, there is no talk of the sale or alienation of the building. Applicant's case is based on termination of the agreement on the basis that it wants to bring about substantial renovations to the building as envisaged in clause 24(2) of the original agreement. Clause 24(1) of the original agreement in my view only reiterates the common law principle of *huurgat voor koop*. This clause essentially asserts that sale or any kind or alienation of the building to a third party shall not divest the lessees of their rights to continue with the lease. Reliance by the trust on clause 24(1) of the original agreement to assert that applicant shall not be entitled to terminate the original agreement in circumstances where applicant wishes to conduct substantial renovations to the building is, therefore, misplaced.

[23] There have been arguments on the documents regarding the exercise of the right of first refusal by the respondents to be the anchor tenant. Much argument centred on when notice was given to the respondents to exercise such a right and within what period such a right should be exercised. Numerous correspondences were exchanged between the parties and such correspondences were attached to the affidavits as annexures. Clause 24(4) of the original agreement provides as follows:

"The lessee will have first right of refusal *to <u>be the anchor tenant</u> (my emphasis)*, and has to be exercised with 60(sixty) calendar days of such written notice from the lessor. The lessor however has the right to withdraw this right of refusal if the lessee cannot obtain financing or be approved by an accredited franchisor within 60(sixty) calendar days."

[24] It is clear that clause 24(4) pertains to an anchor tenant in the new building or in a building to be renovated. This right, the lessee does not acquire in the original agreement as an anchor tenant but as a lessee in the original agreement he acquires the right ***to be the anchor tenant*** in a building to be renovated or built. It is, therefore, not a requirement where termination was envisaged on the ground as indicated by the applicant to have even given notice to the respondent to exercise their right of first refusal. It would actually be absurd that any owner of a building would be required to obtain permission from a tenant in order to renovate or enhance the value of his building. If it were so, it would also set the owner at the mercy of a tenant where he wanted to renovate his building as the lessee may simply exercise his right and refuse any attempt at renovations and or enhancement of the property.

[25] Clause 24(2) of the original agreement provides that:

"Should the lessor at any time during the currency of this lease decide-

(a) to demolish the building for any reason whatsoever, or

(b) to substantially renovate the building and /or the leased premises for any reason whatsoever, then notwithstanding anything to the contrary contained or implied in the lease, the lessor shall be

> **entitled to terminate this lease on not less than 3(three) calendar months' notice given in writing to the lessee. The decision of the lessor's architect as to what constitutes substantial renovations to the building and/or the leased premises for the purposes of (b) above shall be final and binding upon the lessee."**

[25] Careful reading of clause 24(4) of the original agreement stipulates two jurisdictional requirements which must be satisfied before the said clause is invoked, namely,

- a decision by the applicant to renovate the building substantially; and
- a decision by the architect of the lessor as to what constitutes substantial renovations.

[26] It is not in dispute that it had always been the intention of the applicant to renovate the building herein substantially. Respondent does not dispute that a decision was taken by the applicant to renovate the building. Respondent also indicates that since 2014 the applicant had mooted the idea of renovating the building. The building is about 60 years old. It is also not in dispute that the architect of the applicant certified that substantial renovations will be done on the leased premises.

[27] The respondent, however, over and above the concession that the applicant had always mooted the idea of renovating the building substantially goes further to say that applicant had always further indicated that it did not have the necessary finance to carry out the renovations. It is in the light of this alleged lack of

finance that the respondents argue that the termination of this original agreement is *mala fide* as applicant has no money to carry out the envisaged substantial renovations.

[28] Numerous correspondences were directed to the applicant by the respondents attorneys requesting proof that applicant had the necessary funds to effect the necessary substantial renovations. Applicant did not supply the said proof as requested. When this application was launched, in its founding affidavit applicant fleetingly mentioned that it had the necessary finance to proceed with the renovations and according to the applicant, the only reason that renovations could not be started with was that the respondent was still in occupation of the premises.

[29] It is pertinently clear that when the applicant launched these proceedings the question of the applicant's ability to effect the renovations was going to be an issue. It is a normal rule of practise that an applicant must stand and fall by his founding affidavit. The general rule is that the applicant must set out his facts in a complete way and has to make out his case in his founding affidavit and he may not introduce new matter in his replying affidavit. The stating of bald and unsubstantiated allegations of fact in the founding affidavit are done at the peril of the applicant as he runs the risk that the amplification of same may be refused in the replying affidavit by the court and the court may order that such should be struck off. In such a case, however, the court has a discretion to allow such new matter to

be introduced in the replying affidavit. This rule, therefore, is not inflexible.

The court in the case of **Sherperd v Mitchell Cotts Seafright (SA) (Pty) (Ltd**) 1984(3) SA 202 at 205 paras E-G said the following:

"The general rule on which the appellant relied, that in motion proceedings an applicant has to make out his case in founding affidavit and that he may not introduce new matter in his replying affidavit, is well established. I need only refer to authorities such as *Mauerberger* v *Mauerberger* 1948 (3) SA 731 (3) at 732 *Titty's Bar and Bottle store (Pty) Ltd v ABC Garage (Pty) Ltd and Others* 1974 (4) SA 362 (T) at 368B-369A; *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635-636F. This rule is however, not an absolute one, In *Bayat and Others v Hansa and Another* 1955 (3) SA 547 (N), Caney J said at 553D:

'... that it applies save in exceptional circumstances.'

And, in the case of *Registrar of Insurance v Johannesburg Insurance Co Ltd* (1) 1962 (4) SA 546 (w), Hiemstra J at 574 A-B emphasised that :*'since rules of procedure are made to facilitate litigation, they are always subject to the overriding discretion of the Court',*

It may in an appropriate case allow an applicant to introduce new matter in his replying affidavit."

[30] The court in the case of **Shepherd v Tuckers Land and Development Corporation** (Pty)(Ltd) 1978(1) SA 173 (W) at 177G- 178A said the following:

"...... all the essential averments must appear in the founding affidavits for the Courts will not allow an applicant to make or supplement his case in his replying affidavits and will order any matter appearing

therein which should have been in the founding affidavits to be struck out. (*See Herbstein and Van Winsen at 75). In Titty's Bar and Bottle Store (Pty) Ltd and others* 1974 (4) SA 362 (T) Viljoen J 368 stated:

'It has always been the practise of the Courts in South Africa to strike out matter in replying affidavits which should have appeared in petitions or founding affidavits, including facts to establish locus standi or the jurisdiction of the Court. See Herbstein and Van Winsen Practise of the superior Courts of South Africa 2nd ed at 75, 94. In my view the practise still prevails'.

This is not, however, an absolute rule. It is not a law of the Medes and Persians. The Court has discretion to allow a new matter to remain in a replying affidavit giving the respondent the opportunity to deal with it in a second set of answering affidavits. This indulgence, however, will only be allowed in special or exceptional circumstances."

[31] As indicated above this rule of our civil procedure to allow a new matter in certain circumstances to be raised in a replying affidavit is not cast in stone. It appears from the replying affidavit of the applicant that a loan in the amount of R20, 475,000 was approved by Nedbank on the 23th OCTOBER 2015. It also appears from the replying affidavit that applicant accepted the said financial assistance on the 28th OCTOBER 2015. This information should have ideally been included in the founding affidavit but it was not. At the end of the day there are only two jurisdictional requirements as indicated in paragraph [25] above in. order to invoke clause24 (4). Applicant contended that it had financial backing to effect the substantial renovations and it only gave more information regarding the said financing. Also of importance

when these proceedings were launched, such financial assistance had already been approved and accepted. For this reason I cannot strike off the information contained in the replying affidavit concerning proof of financial assistance as I do not believe that it will prejudice the respondent. I accordingly find that the applicant has the necessary financial backing to effect substantial renovations to the Shumans Building.

[31] Respondent further contends that applicant only targeted him and does not intend to evict the other tenants. In support of this contention an affidavit of one of the tenants to the building was annexed to the opposing affidavit. If one has regard to paragraph 8.8 of the applicant, it indicates that notices are going to be given to all other tenants. It appears to me that at the time of the issue of this application such notices had not been given but same were given at a later stage as it appears on annexures to the replying affidavit.

[32] I accordingly cannot find that the applicant acted mala fide when he gave notice of the termination of the original agreement to the respondent.

[33] Applicant has duly acted properly by giving respondents three calendar months' notice of termination of the agreement.

I accordingly make the following order:

1. It is declared that the lease agreement dated the 15th OCTOBER 2008 and subsequently renewed, is a valid agreement between the parties;

2. It is declared that the agreement aforesaid was validly terminated and or cancelled;

3. It is ordered that the respondent or any other person and/entity occupying the premises known as Shop 1, Shumans Building, Jasmyn street 1, Wilgehof BLOEMFONTEIN , on the ground of any right or title of the respondent evict the said premises on or before the 19th March 2017;

4. The Sheriff of this court is hereby authorised to evict the respondent or any other person occupying the premises herein aforementioned by virtue of any right of title of the respondent if the order in paragraph 3 above is not complied with;

5. Respondent is ordered to pay the costs of this application.

P. MOLITSOANE AJ

For the Applicant:	Adv. HJ Benade
Instructed by:	SYMINGTON & DE KOK NELSON MANDELA DRIVE BLOEMFONTEIN
For the Respondent:	Adv. GV Maree
Instructed by:	WESSELS ATTORNEYS c/o STANDER & PARTNERS VICTORIA STREET WILLOWS BLOEMFONTEIN