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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE Number: 2024-065062

(1) REPORTABLE: NO

(2) OF INTEREST TO THE JUDGES: NO

(3) REVISED: YES

DATE: 22 May 2025

SIGNATURE:

In the matters between:

FRENCH RIVIERA INVESTMENTS (PTY) LTD

Applicant

and

FTX INVESTMENTS(PTY)LTD

Respondent

JUDGMENT

H F JACOBS AJ:

[1] On or about 15 May 2019, FTX¹ sold Erf 6[...]², on which the Wilgeheuwel Shopping Centre is situated, to Riviera³, as a going concern. At the time of the sale,

¹ The Respondent

there were lease agreements, with the tenants of Wilgeheuwel Shopping Centre. On 12 June 2024, Riviera instituted this application, claiming the following relief in its notice of motion:

"TAKE NOTICE that FRENCH RIVIERA INVESTMENTS (PTY) LTD (hereinafter called the Applicant) intends to make application to this court for a declaratory order to the following effect:

- (1) That the Applicant be paid Tenants deposits by the Respondent within 3 calendar days of date of the order and*
- (2) Costs of suit."*

[2] FTX delivered its answering affidavit, deposed to by Mr Moodley, on 8 July 2024. On 20 August 2024, Riviera delivered its replying affidavit and a notice in terms of Rule 28 recording its intention to amend its notice of motion, the body of which reads as follows:

"1. By deleting prayer 1 of the Notice of Motion and replacing same with the following prayer:

- 1. It is declared that clause 11.3 of the Sale Agreement read with clause 1.4.2.3 of the Adjustment Account Annexure to the Sale Agreement does not permit the set off of any tenant's arrear indebtedness against any other deposit than such arrear tenant's own deposit."*

[3] FTX objects to the proposed amendment on the following terms:

"1. The Applicant seeks to amend the relief sought in its Notice of Motion without supporting such relief with the requisite allegations in the Founding Affidavit;

- 2. The proposed amendment sought by the Applicant does not disclose a cause of action alternatively the proposed amendment sought seeks to introduce a new cause of action."*

² Erf 6[...] Strubensvalley, Extension 3 and Erf 1[...] Wilgeheuwel, corner Kruggerand Road and Florin Road, Wilgeheuwel

³ The Applicant

[4] Riviera's notice of motion and notice of amendment claim declaratory relief. I first refer to the legal principles applicable to declaratory orders.

DECLARATORY ORDERS

[5] Section 21(1)(c) of the Superior Courts Act, 10 of 2013, reads as follows:

"21 Persons over whom and matters In relation to which Divisions have jurisdiction

(1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power-

(a)

(b)

*(c) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination."*⁴

[6] It has been held that the two-stage approach should be applied when a court is asked to issue a declaratory order. First, the court must be satisfied that the applicant is a person interested in an "existing, future or contingent right or obligation", and then, if satisfied on that point, the Court must decide whether the case is a proper one for the exercise of the discretion. During the first stage, the focus is solely on establishing that the necessary conditions precedent for exercising the discretion exist. Once satisfied that those jurisdictional conditions have been proved, it has to exercise the discretion by deciding whether to refuse or grant the

⁴ The section differs little from Section 19(1)(a)(iii) of the Supreme Court Act, 59 of 1959

order sought. The second stage involves consideration whether or not to grant the order.⁵

AMENDMENTS OF A NOTICE OF MOTION

[7] The principles governing the granting or refusal of amendments have been established in several cases. The general practical rule is that amendments will always be allowed unless the amendment is made *mala tide* or unless it will cause an injustice to the other side that cannot be cured by an appropriate order for costs. It must be determined what the interests of justice demand.⁶

THE FACTS

[8] I will now turn to the facts. The agreement of sale between FTX and Riviera is not in dispute. The interpretation of that agreement and its application, particularly clauses 11.3 and 1.4.2.3, along with the Adjustment Account, are in dispute. FTX contends that the founding affidavit of FTX is so scant that, if the amendment is allowed, there will not be a case made for the relief sought.

[9] In my view, the common cause facts demonstrate a legal connection between Riviera, FTX, and the tenants that could lead a court to conclude that Riviera has established itself as an "interested person" within the meaning of that term in section 21 of the Superior Courts Act. The discretion a court may have to exercise regarding the balance of the dispute, including the issue of extinctive prescription for which FTX bears the burden, necessitates that FTX be permitted to present evidence in response to the notice of motion that Riviera seeks to introduce after FTX has filed its answering affidavit. I therefore concur with Mr Ferreira SC that, should the amendment be permitted, a postponement should ensue to allow FTX to respond. Mr Potgieter SC may be correct in asserting that the entire issue hinges on a mere

⁵ See *Cordiant Trading CC v Daimler Chrysler Financial Services* 2005 (6) SA 205 SCA at [17] - [18]; *Competition Commission v Hosken Consolidated Investments Ltd and Another* 2019 (3) SA 1 (CC) at (27); *Pasiya and Others v Lithemba Gold Mining (Pty) Ltd and Others* 2024 (4) SA 118 (SCA) at [43]

⁶ See *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at [9]; *Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd Intervening)* 1994 (2) SA 363 (C) at 369; *Sebenza Forwarding & Shipping Consultancy (Pty) Ltd v Petroleum Oil and Gas Corporation of SA (Pty) Ltd t/a Petro SA and Another* 2006 (2) SA 52 (C) at 57-58

interpretation of written instruments, which can be resolved by applying common sense, and that the position taken by FTX amounts to sheer opportunism. Both counsels' submissions have merit. In my view, it is in the interest of justice to grant the order set out below, which will enable the court dealing with the matter to exercise unfettered discretion when considering the substantive relief and the issue of costs.

[10] Under the circumstances, I grant the following order:

[10.1] The applicant's amendment set out in its notice dated 2 August 2024 is granted, and the application is postponed *sine die*;

[10.2] The costs of the amendment and the costs of the enrolment and hearing during the week of 12 May 2025 are reserved for determination with the main application; and

[10.3] The respondent is granted leave to deliver a further affidavit to deal with the amendment, if so advised, within 15 days from the date of this order.

HF JACOBS
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Heard on: 14 May 2025

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Date of Judgment: 22 May 2025