REPUBLIC OF SOUTH AFRICA

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

CASE NO: A5017//17

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

4 JULY 2018 **FHD VAN OOSTEN**

In the matter between

AUCKLAND PARK THEOLOGICAL SEMINARY **FIRST APPELLANT**
WAMJAY HOLDING INVESTMENTS (PTY) LTD **SECOND APPELLANT**

and

UNIVERSITY OF JOHANNESBURG **RESPONDENT**

J U D G M E N T

VAN OOSTEN J:

Introduction

[1] At issue in this appeal is the validity of the first appellant's cession to the second appellant, of its rights in a notarial lease agreement, concluded with the respondent. After conclusion of the trial, the court a quo (Victor J) gave judgment in favour of the

respondent (UJ) in ordering the eviction of the appellants from the leased premises and the cancellation and deregistration of the notarial long term lease agreement (the lease agreement). The appellants' counterclaim was dismissed with costs. The appeal is directed against the whole of the judgment and the order granted and is with leave of the court a quo.

Background facts

[2] The facts of this matter are relatively uncomplicated and largely common cause. The determination of the core issue in this matter, in essence calls for an interpretation of the lease agreement in the light of the surrounding circumstances at the time. These are the facts relevant to the issue: A contractual relationship between UJ and the first appellant (ATS) had existed since 17 June 1993, which was when an academic co-operation agreement was concluded between them. UJ was the owner of immovable property at its campus in Auckland Park. In terms of the lease agreement, concluded on 6 December 1996, ATS leased a portion of the immovable property from UJ for a period of 30 years, renewable for further periods of 30 years after expiry of the initial lease. The rental was a one-off payment of R700 000. Approval of the transaction by the Minister of Education was required in terms of the then Rand Afrikaans University Act, 51 of 1996, which was granted on 18 June 1996.

[3] On 3 December 2011 UJ, as it was entitled to do, gave ATS one year's notice of the termination of the co-operation agreement. On 28 March 2011 ATS and the second appellant (Wamjay), without notice or reference to UJ, concluded a written cession agreement in terms of which ATS ceded to Wamjay its rights (and not obligations) in the lease agreement (the lease rights) for a consideration of R6.5 million. Wamjay's purpose in obtaining the lease was for the purpose of constructing and operating a pre-primary, primary and high school on the leased premises with an Islamic ethos. On 13 October 2011 a notarial deed of cession of long lease was registered in favour of Wamjay.

[4] On 5 October 2012 UJ's attorneys cancelled the lease agreement on a number of grounds only one of which was pursued in the court a quo, which was that ATS had

repudiated the lease by ceding the lease rights to Wamjay, on the basis that ATS was *delectus personae* in relation to the lease.

[5] As a result of the repudiation and cancellation of the lease agreement, UJ instituted action against ATS and Wamjay for their eviction from the leased premises and the cancellation and de-registration of the lease agreement.

The judgment of the court a quo

[6] In upholding the claim of UJ, the court a quo interpreted the wording of the lease agreement in regard to tertiary education, and in view thereof, considered the intended use of the leased premises by Wamjay, which it concluded was not to erect a 'university type of educational facility'. The learned judge a quo proceeded to consider the principal and crucial issue which was whether the lease rights were personal or *delectus persona,* which would have disentitled ATS from ceding those rights to Wamjay.

[7] The court a quo considered the issue on an interpretation of the lease agreement within the statutory framework, the relationship between the parties to the co-operation agreement and certain material contextual facts arising from the evidence adduced and concluded that the lease 'is indeed one which was personal to the Theological College (ATS)'.

[8] The conduct of ATS in ceding the lease rights and selling the property to the various developers, the court a quo finally held, constituted a repudiation of the lease agreement, which was accepted and the lease agreement duly cancelled.

The minority judgment of Wright J

[9] I regret that I am unable to agree with the 'difficulty with the lease itself' as expressed by Wright J in paragraph 13 of his judgment. When this 'difficulty' was put to counsel in argument before us, they both, in my view quite rightly so, retorted that this point was not raised at any time either in the trial or thus far in the appeal. Had it been raised, counsel correctly contended, it could and would have been dealt with. It is further significant that no notice of this point, which was raised by way of surprise by Wright J in argument before us, was given to the parties prior to the hearing of this appeal. The point raised does not arise nor is it incidental to any of

the issues raised in and dealt with by the trial court, or addressed by counsel in their heads of argument. It is my respectful view that points such as this, should be brought to the attention of counsel well in advance of the hearing of the appeal, which will avoid the element of surprise, the inevitable prejudice that may result to both parties in the appeal and ultimately a failure of justice. The law reports are replete with judgments of the Supreme Court of Appeal where the court properly informed the parties of a new point to be raised at the hearing of the appeal and affording the opportunity to respond by way of supplementary heads of argument. There is no reason why this salutary practice followed by our highest courts, should not have been adopted concerning the point raised by Wright J in this appeal.

[10] The short answer to the difficulty articulated by Wright J is that upon renewal of the lease for a further period of thirty years, it was at least implicit in the lease agreement that the Minister's consent was necessary. I do not agree, as held by Wright J, that this clause is so integral to the lease agreement that it cannot be severed from the remainder thereof. The consent of the Minister, in any event, was a statutory requirement and compliance therewith required, notwithstanding the agreement between the parties. The absence of an express provision in the lease agreement relating to this requirement in the event of a renewal of the lease, cannot and does not affect its validity.

Discussion: The merits of the appeal

[11] The reasoning and findings of the court a quo cannot be faulted. I accordingly only consider it necessary to add a few remarks in support of the conclusions reached.

[12] The issue whether the lease rights are *delectus personae,* brings to the fore the fundamental question whether all leases, by their inherent nature, are not to be considered personal? As the facts of this matter clearly show, the choice of a lessee by a lessor in the decision to conclude a lease agreement, is generally personal. Factors such as the nature of the property let, the purpose for which the property is let and the personal circumstances of the lessee are vitally important to the landlord's decision to conclude a lease with that particular lessee. It may well

become necessary to reconsider the general statement by Greenberg JP in in *Boshoff v Theron* 1940 TPD 229 at 303-304:

> 'In the ordinary obligations owed by a lessor...it can make little difference to the lessee who his lessor is, insofar as his legal rights are concerned…[because] as regards the lessor there is ordinary no *delectus personae*; the property itself generally affords the lessee sufficient security for the performance of the lessor's obligations. The position may be different for an obligation on the lessor which calls for some special quality on his part…'

Addressing this proposition in argument, counsel were inclined to agree but in view of the findings in both the court a quo and of this court, I need not say anything more on this aspect.

[13] There are several pointers to the personal nature of the lease rights. In addition to those mentioned by the court a quo, the motivation of UJ in support of the application for consent to the Minister, is instructive:

> 'The Apostolic Faith Mission (ATS) urgently needs property, in the vicinity of our university to build their Theological College. The students will come from multi-cultural backgrounds and the College will be responsible for the training of all future pastors of the Apostolic Faith Mission of South Africa. They have identified property owned by our university as the most suitable site for erecting their Theological College. We would like to extend a helping hand to them by letting this property to them over a period of thirty years.'

[14] The use of the property as defined in clause 8.1 of the lease agreement, and heavily relied upon by the court a quo, was 'vir opvoedkundige, godsdienstige en aanverwandte doeleindes, oprigting van kampus vir onderwys, onderrig, navorsing opleiding, kantore en studentefasiliteite'. To read into this clause the purpose for which Wamjay intended to use the leased property, is contrived and artificial.

[15] Finally, it is of vital significance that UJ and ATS were clearly operating in tandem and their functions and goals intertwined. As much is readily apparent from the provisions of the co-operation agreement: both institutions provided higher education for students; students at the ATS would eventually obtain a university

degree in theology and interaction was provided for in regard to curriculum courses offered, representation on faculty level and at the senate of UJ. Again, the pre-primary, primary and high school facilities planned by Wamjay, cannot be reconciled with these provisions. Some attempt was made to make much of the co-operation agreement having been cancelled prior to the conclusion of the cession agreement. It is short-lived: the intention of the parties at the time of entering into the lease agreement and having regard to the consent granted by the Minister on the facts and motivation provided in support of the application, constitute decisive considerations. I merely need to add this absurdity flowing from the cession, if upheld: ATS's cession of the lease rights to Wamjay would have resulted in Wamjay becoming the holder of those rights, juxtaposed to ATS remaining bound by the obligations under the lease agreement. This proposition understandably so, counsel for the appellants, wisely, did not attempt to support.

[16] For all these reasons I conclude that the appeal must fail.

Order

[17] In the result the following order is made:

1. The appeal is dismissed.
2. The appellants shall pay the costs of the appeal, such costs to include the costs consequent upon the employment of two counsel where so employed.

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FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

I agree.

_____
Z CARELSE
JUDGE OF THE HIGH COURT

DISSENTING JUDGMENT

WRIGHT J

1. The present respondent university, UJ owns certain immovable property at its Auckland Park campus. On 25 April 1996 it requested the permission of the Minister of Education to lease out a portion of its property for 30 years "*to the advantage of the state, the community and the students.*" Permission was required under section 4(2) of the Rand Afrikaans University Act 51 of 1966 which Act was repealed on 2 November 2001 by section 26 of the Higher Education Amendment Act 23 of 2001 read with the schedule to that Act.

2. On 18 March 1996 the Minister granted permission to UJ to let the property for 30 years • *for the purposes of developing these properties.*"

3. In December 1996 UJ and the present first appellant the Auckland Park Theological Seminary concluded a written lease. UJ would let the property to the Seminary for 30 years for a once off rental of R700 000. Under clause 5.2 read with clause 5.5 the Seminary had the right to renew for a further 30 years without paying any further rent.

4. Under clause 8.1 the premises would be used by the Seminary for educational religious and related purposes and the establishment of a campus for teaching, research, training, office and student facilities. Under clause 8.2 the Seminary had the right to build buildings, constructions, facilities, improvements and to effect landscaping with a view to enjoying the property as it was entitled to do under clause 8.1.

5. Under clause 11 in the event of either party breaching the lease the other party could, after giving 30 days' notice, cancel the lease.

6. Under clause 16.1 neither side waived any right by not insisting timeously on its rights.

7. On 28 March 2011 the Seminary, without reference to UJ, concluded a written cession agreement with the present second appellant, Wamjay Holdings Investments (Pty) Ltd. UJ ceded to Wamjay its rights, but not its obligations under the written lease for the sum of R5 500 000. Under clause 2.7 the rights ceded to Wamjay included the right to renew the written lease for a further 30 years. Under clause 6.2 Wamjay acknowledges that its use of the property is limited to

educational, religious and related purposes ,and to the erection of a campus for education, training, research, offices and student facilities.

8. It came to the attention of UJ on 31 August 2012 that the Seminary had purported to cede its rights under the written lease to Wamjay. UJ had learnt at the same time that Wamjay had submitted plans to the local authority for approval in which plans Wamjay contemplated the building of pre-primary, primary and high school facilities. UJ had also learnt that Wamjay, with the knowledge of the Seminary, had conducted extensive landscaping and earthworks on the property and had cut down trees of historic significance.

9. UJ saw this conduct by the Seminary as a repudiation of the written lease and on 5 October 2012 UJ's attorneys sent a letter to the Seminary cancelling the written lease on the ground of repudiation. To the extent that either the Seminary or Wamjay occupied the property they were ordered to vacate immediately.

10. UJ brought an action to evict the Seminary and Wamjay and UJ sought too an order that the Registrar of Deeds cancel the registration of the written lease. The Seminary and Wamjay counterclaimed for a declarator that the written lease and the written cession are valid.

11. The matter came before Victor J who granted an order for the eviction of the Seminary and Wamjay and ordered the Registrar of Deeds to cancel the registration of the written lease. The counterclaim was dismissed.

12. The Seminary and Wamjay appeal with the leave of my learned sister. There is no cross-appeal.

13. I have difficulty with the written lease itself. The request to the Minister made no reference to the right of a potential lessee to renew at all, let alone for 30 years. The Minister's permission cannot be interpreted to include a right vesting in UJ to allow a lessee the option to renew at all, let alone for 30 years. In my view, for this reason alone the written lease was invalid and any subsequent purported cession was consequently also invalid. The 30 year option clause is so integral to the lease between UJ and the Seminary that it cannot be severed from the balance of the agreement.

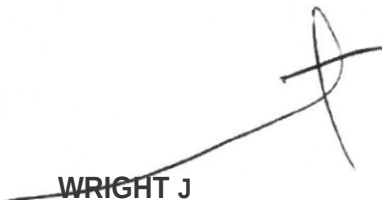
14. If I am wrong and the written lease is not invalid for the reason I have given, then in my view the Seminary repudiated the written lease. if not by concluding the cession with Wamjay without the permission of UJ, then by the Seminary together

with Wamjay, attempting to build pre-school primary and high school facilities on property clearly meant, by the Minister and by UJ and the Seminary when they concluded the written lease, to be used for tertiary education.

15. An argument by the Seminary and Wamjay that certain conduct of UJ amounted to a waiver of its rights founders on the provisions of clause

16. I would have suggested the following order.

a. The appeal is dismissed with costs, including those of two counsel where so employed.
b. The appellants are jointly and severally to pay the costs of the respondent.



WRIGHT J

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Date of Hearing:	6 June 2018
Date of Judgment:	2 July 2018

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DATE OF HEARING ***6 JUNE 2018***
DATE OF JUDGMENT ***4 JULY 2018***