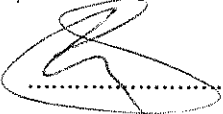


REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 35035 /2012

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3)	REVISED.
	
<u>8/3/2013</u>	

In the matter between:

Ferreira: Pereira Michael Sergio

Applicant

and

Q No More (Pty) Limited

First Respondent

Calicom Trading II (Pty) Ltd

Second Respondent

JUDGMENT

Mia AJ:

[1] The applicant seeks an order declaring the written lease agreement concluded between the first and second respondent void *ab initio*. The applicant is an adult male businessperson. The first respondent is a company duly registered and incorporated in accordance with the company laws of the Republic of South

Africa. The first respondent carries on business at 7 Bellairs Drive Mulbarton, Johannesburg. The second respondent is a company duly registered and incorporated in accordance with the company laws of the Republic of South Africa having its principal place of business at 8 Bellairs Drive, Mulbarton, Johannesburg.

[2] The purpose of the application according to the applicant is to obtain a declaratory type order in terms of which the final fate of the lease agreement concluded between the first and second respondents is determined. The order sought is that the lease agreement be declared void. The first respondent opposed the application and raised a number of defences including the validity of the agreement, waiver and estoppel.

[3] The second respondent was the owner of the property situated at 7 Bellairs Drive Mulbarton, Johannesburg also known as Stand 367, Mulbarton (the property). The first and second respondent entered into a lease agreement in relation to the above property. The lease provided that the lease would commence on 1 August 2008 and would run for a period of five years until 31 July 2013. The second respondent sold the property to the applicant in the beginning of March 2011 for the price of R1, 4 million. The property was transferred to the applicant on the 31 March 2011. The applicant then took over the rights and obligations of the second respondent in terms of the lease agreement. The first respondent then raised the issue that it was not given an opportunity to exercise the option it was given in terms of the lease to purchase the property before it was sold to the applicant.

[4] The relevant clauses in the lease agreement read as follows:

"4. PERIOD

Notwithstanding the date of these present, this Lease shall be deemed to have commenced on 1 August 2008 and shall be for a period of 5 years terminating on 31 July 2013.

.....

8. OPTION

....

8.3 The LESSEE is granted the option to purchase the premise during the currency of the lease agreement at the purchase price of R1900 000.00 excluding VAT. Should the LESSOR receive any other offer to purchase the premises the LESSEE shall have the first right of refusal in respect of such purchase.

....

24. CESSION AND SUBLETTING

.....

24.2 At any time during the currency of this lease the [LESSOR] shall be entitled to sell its property and to cede, assign and make over unto and in favour of any person or corporate body, its right, title and interest in and to this lease. In the event of such sale and cession, the LESSEE shall not be entitled to terminate this lease and the LESSEE shall be obliged to perform and carry out his obligations under and in terms of this lease as if the cessionary were the original landlord.

25. INDULGENCE"

Any relaxation or indulgence which the LESSOR/LESSEE may show the LESSOR/LESSEE shall not in any way prejudice his rights under this lease and, more particularly, no act of the LESSOR/LESSEE in accepting rent after due date or in accepting a lesser sum than the

amount of rent due shall be construed as waiver by the LESSOR/LESSEE of his rights under the lease.

.....

26. SOLE CONTRACT

This agreement shall be the whole and only contract between the LESSOR and the LESSEE and the LESSEE acknowledges that no statements or representations have been made to him by or on behalf of the LESSOR other than herein contained. Should any variations be required at any time during the currency of this lease, such variation shall only be binding on the parties if contained in writing and signed by the LESSOR and the LESSEE.

....

36. SPECIAL CONDITION

36.1 During the currency of this lease or any renewal thereof, the LESSOR grants the LESSEE a right of first refusal to purchase the leased premises on the basis that should the LESSOR receive an offer which is acceptable to him, the LESSEE shall have the right to match the terms and conditions of such an offer and shall exercise his right, in writing, within seven days of being notified by the LESSEE in writing of the terms and conditions of such offer, failing which the provisions of this condition shall lapse and be of no further cause or effect.

....

36.3 This lease agreement is subject to the signing of a surety document by the directors of the LESSEE company for the obligations of the LESSEE company and the lease will only come into effect once the LESSOR has received the duly signed documents from the directors."

[5] The submission on behalf of the applicant was that the lease contained a suspensive condition in clause 36 which provided that the lease would only come into operation once a suretyship document was presented to the lessor. This suretyship document was never furnished by the first respondent. The suspensive condition was never fulfilled thus the lease agreement is void *ab initio*.

[6] Mr West appearing on behalf of the first respondent submitted that the deeming provisions in clause 4 of the agreement trounce the provisions of clause 36. The second respondent and the applicant conducted themselves in accordance with the lease agreement and accepted the benefit of the lease agreement in affording the use of the property against the rental paid. In view of the ambiguity of clause 4 and clauses 36.3 this Court is required to interpret the parties' intention. In doing so this Court has regard to the conduct of all the parties herein. It is clear that even though the second respondent did not receive the surety it permitted the first respondent to occupy the premises on 1 August 2008 against the payment of rental from 1 August 2008 until the premises were sold and ownership passed to the applicant.

[7] The second respondent did not demand the surety or request the first respondent to address the matter of the outstanding surety. Whilst the second respondent filed an affidavit stating that it did not intend to waive any of its rights and specifically the suspensive condition, it did not demand the surety or cancel the lease agreement at any stage after 1 August 2008. The conduct of the second respondent was to afford the first respondent the use of the premises for the duration

of the lease against payment of rental. The second respondent's conduct was thus to give effect to the lease agreement despite the non-fulfilment of the suspensive condition.

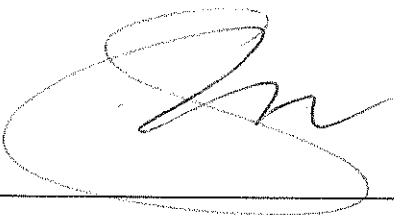
[8] The applicant's conduct also appears to have been to give effect to the lease agreement. There is no indication on the papers that the applicant demanded of the first respondent that it furnish a suretyship document as required by clause 36. The second respondent and the applicant were both in a position to request the suretyship document. The suretyship was intended to protect the Lessor (second respondent and the applicant) in the event of non-payment of rental by the first respondent. When reading clause 4 and clause 36 of the lease agreement and having regard to the conduct of the second respondent and the applicant, their conduct indicated that both gave effect to clause 4 of the lease agreement in terms of recognising that the lease came into operation on 1 August 2008. The applicant claimed rental and when same was not paid it proceeded with an application to evict the first respondent basing the cause of action on the existence of the lease agreement which was concluded between the first and second respondents and which the applicant took over as lessor in terms of clause 24 of the lease agreement. The applicant also relied on the termination of the lease agreement in the application to evict the first respondent. After having relied on its existence to claim rental and to evict the first respondent it now seeks to have the lease declared void *ab initio*.

[9] In interpreting the lease agreement and having regard to the conduct of the parties the existence of the lease agreement is clear. Our courts have been

reluctant to interpret a contract in a manner that renders it nugatory or would lead to an absurdity such as declaring a lease agreement void pending the fulfilment of a suspensive condition.(see *Kriel v Le Roux* [2000] 2All SA 65 (A) at 68C; *Van Jaarsveld v Coetzee* [1973] 3 All SA 285 (A)). The applicant alleges that a lease agreement was concluded, attaches a copy to its papers, and seeks to evict the first respondent based on the lease and the first respondent's non-performance in terms of the lease agreement. The first respondent took occupation on 1 August 2008 and paid rental to the second respondent and later the applicant until a dispute arose regarding the option available to the first respondent. I am not persuaded that the applicant has made out a case to support the relief sought in the notice of motion. There is no reason to deviate from the normal costs order.

[10] In light of the above the following order is granted:

1. The application is dismissed.
2. The applicant is to pay the costs.

A handwritten signature in black ink, consisting of a large, stylized 'S' followed by a cursive 'Mia'.

S Mia

**Acting Judge of the South
Gauteng High Court, JHB**

Counsel for the applicant:

Adv. B. Gradidge

Instructed by:

RE Harrison Attorneys

Counsel for the respondent:

Adv. H.P. West

Instructed by:

Martin Speier Attorneys