IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

Case No: 5980/2011

In the matter beaten:

HANSCO MOTORS CC t/a	Applicant
and	
BP SOUTHERN AFRICA (PTY) LTD	1st Respondent
THE CONTROLLER OF PETROLEUM PRODUCTS	2nd Respondent

J U D G M E N T

SEEGOBIN J

INTRODUCTION

[1] The applicant is HANSCO MOTORS CC t/a HANSA MOTORS ("the applicant"). The first respondent is BP SOUTHERN AFRICA (PTY) LTD which will hereafter be referred to simply as "the respondent". Although the Controller of Petroleum Products was cited as the second respondent, no relief is sought against it nor has it participated in these proceedings.

[2] The relief sought by the applicant is the following:

"1. That this Honourable Court dispense with the usual forms and services provided for in the Uniform Rules and that this application be disposed with as a matter of urgency in terms of Rule 6(12);

2. That a *rule nisi* be and is hereby issued calling upon the first and second respondents and any interested parties to show cause, if any, on the day of 2011 why an order should not be granted, pendent lite, in the following terms:-

2.1 That the first respondent be and is hereby directed to comply with the mediation and arbitration provisions of the lease agreement and ancillary agreements entered into between the applicant and the first respondent on the 1st November 2008 and annexed to the applicant's founding affidavit marked "EYH1" ("the agreements") and the arbitration proceedings submitted to the second respondent in terms of section 12B of the Petroleum Products Amendment Act No 58 of 2003;

2.2 That the first respondent be and is hereby directed to continue to comply in all respects with the provisions of the agreements pending the determination of an action to be instituted by the applicant and the determination of this application and the mediation and arbitration proceedings in terms of the agreements and the determination of the arbitration proceedings submitted to the second respondent in terms of section 12B of the Petroleum Products Amendment Act No 58 of 2003;

2.3 That the costs of this application be paid by the first respondent and any other respondents which may oppose this application.

3. That paragraphs 2.1 and 2.2 hereof operate as interim orders with immediate effect;

4. Such further, other or alternative relief as this Honourable Court may

deem fit."

[3] The application which was launched urgently on 26 May 2011 and set down on 30 May 2011, was opposed by the respondent. Due to the apparent urgency of the matter the learned Acting Judge President was persuaded to afford the matter preference on the opposed roll on 1 July 2011.

[4] The respondent has not only opposed the application but has also filed a counter-application in which it seeks a declarator and an order evicting the applicant from the premises. The applicant's application (the main application) and the counter-application were argued together. There was no attempt on the part of the applicant to seek a stay of the counter-application nor was any case made out to convince the court that both applications ought not to be determined *pari passu*. The latter approach is generally favoured by the courts as being in the interests of the parties and the final and proper determination of all issues before it [*Truter v Degenaar* 1990(1) SA 206(T)*; Consol Ltd v Twee Jongegezellen (Pty) Ltd* 2002(2) SA 580(C) page 584, paras (18) – (19)]. This is the approach that I intend taking in this matter.

RELEVANT FACTUAL BACKGROUND

[5] The relevant facts giving rise to the application as well as the counter-application which are either common cause or not seriously disputed are the following:

[5.1] On 1 November 2002 the applicant and the respondent concluded a sub-lease agreement with regard to a petrol station.

[5.2] The signed agreement, as at the date of its conclusion, had a fixed term of two (2) years and nine (9) months to be calculated from the

commencement date, namely 1 August 2008. However, despite this and as will be seen later on, the applicant contended that the fixed term was in fact for five (5) years and not that recorded in the written agreement.

[5.3] The agreement of sub-lease would ordinarily terminate by effluxion of time on 31 May 2011.

[5.4] The applicant and the respondent also concluded, amongst others, a franchise agreement which was directly linked to the existence of the lease agreement and would terminate upon the termination of the sub-lease agreement.

[5.5] The lease agreement between the applicant and the respondent was also linked to the existence of a principal lease agreement concluded between the respondent and the owner (the Trust) of the leased premises.

[5.6] On 3 January 2011 the respondent addressed a letter to the applicant confirming that the agreements between the applicant and the respondent would terminate on the date as per the term of the agreement, namely 31 May 2011, and that such agreement would not be renewed, extended or relocated.

[5.7] On 9 March 2011, a period of two (2) months after receipt of the letter from the respondent dated 3 January 2011, the applicant for the first time reacts to the letter.

[5.8] On 29 March 2011, the applicant attempted to invoke the mediation provisions in terms of the agreements.

[5.9] In the period between April 2011 and May 2011 various letters were exchanged between the attorneys representing the respective parties.

[5.10] On 14 May 2011 the applicant attempted to invoke the provisions of

section 12B of the Petroleum Products Act 120 of 1977 (the Act). Notice in terms of section 12B was served on the respondent on 20 May 2011 (i.e. eleven (11) calendar days before the expected termination of the agreement).

APPLICANT'S CASE FOR INTERIM RELIEF

[6] The applicant has raised three main grounds for the relief it seeks. These relate to:

a) the institution of an action by it for rectification of the lease agreement;

b) the invocation of the mediation and arbitration provisions in terms of the agreement; and

c) the Notice in terms of section 12B of the Act.

[7] A preliminary issue raised by the respondent in its opposition to the application concerns the issue of urgency. It is this aspect that I intend dealing with first.

URGENCY

[8] The respondent contended that no urgency whatsoever attached to this application and that on this basis alone the application should be dismissed. It submitted that any urgency which arose was self-created and stemmed from the applicant's own dilatory conduct in bringing the application at an earlier stage. This is especially so when one considers the following:

[8.1] On the applicant's own version the agreements between it and the

respondent were concluded during November 2008.

[8.2] The sub-lease agreement specifically records the duration of the lease to be two (2) years and nine (9) months.

[8.3] Had the applicant seriously believed that it had grounds to do so, it could have referred the section 12B Notice to the Controller of Petroleum Products (second respondent) at a much earlier stage.

[8.4] The applicant could have declared a "*dispute*" in terms of any of the clauses set out in the relevant agreements long before 23 March 2011.

[8.5] If the applicant genuinely believed that it had a valid and *bona fide* case for rectification, it could have instituted such proceedings much earlier.

[8.6] The respondent's letter of 3 January 2011 provided adequate notice to the respondent that the agreement was coming to an end and would not be extended or renewed.

[8.7] On the applicant's own version the first time it sought to take issue with the respondent was on 9 March 2011. On 29 March 2011 it attempts to declare a dispute, it lodges in terms of section 12B Notice in the middle of May 2011 and institutes its action for rectification in May 2011.

[8.8] The urgent application herein was launched on 26 May 2011 i.e. five (5) calendar days before the sub-lease was due to end. The matter was set down on 30 May 2011 i.e. one (1) day before termination of the sub-lease.

[9] It should be mentioned that while the issue of urgency was pertinently raised by the respondent both in its papers and in argument, the respondent failed to address the issue at all.

[10] It is trite that a party which claims that its rights are being infringed, is required to approach the court at the earliest possible opportunity for relief. It must not be dilatory in bringing the application and must show that its interests warrant an urgent hearing. [see: *Twentieth Century Fox Film Corporation and Another v Anthony Black Films (Pty) Ltd* 1982(3) SA 582(W) at 586 G]. Not only must an applicant show that unless urgent relief is granted it will not be afforded substantial redress in due course but it is also required to show that it suffered loss which justifies the bringing of an urgent application [see: *IL & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd and Another* 1981(4) 108 (C) at 110B and 114]. In the oft quoted *locus classicus* decision in *Schweizer Reneke Vleis Mkpy (Edms) Bpk v Die Minister van Landbou en Andere* 1971(1) PH F11 (T), Trengrove J (as he then was) held that a delay of one (1) month was sufficient to disallow an urgent application.

[11] In the present matter, the applicant waited until the eleventh hour before launching its application for interim relief. The timing of the application one day before the sub-lease was due to expire, was opportunistic and designed to gain the sympathy of the court. In my view, the conduct of the applicant constitutes an abuse of the process and for that reason alone the application falls to be dismissed. Notwithstanding my findings in this regard and for completeness of the judgment, I turn to consider whether the applicant has made out a case for the relief it seeks.

APPLICANT'S CLAIM FOR INTERIM RELIEF

[12] The applicant seeks interim relief *pendent elite*. It must therefore establish:

1) a clear right or, if not clear, that it has a *prima facie* right;

2) that there is a well-grounded apprehension of irreparable harm if

interim relief is not granted and the ultimate relief (by way of the summons issued) is eventually granted;

3) that the balance of convenience favours the grant of an interim interdict; and

4) that the applicant has no other satisfactory remedy. *(L F Boshoff Investment (Pty) Ltd v Cape Town Municipality; Cape Town Municipality v LF Boshoff Investments (_Pty) Ltd* 1969 (2) SA 256 (C) at 267B-E). Where the applicant cannot show a clear right, and more particularly where there are disputes of fact relevant to a determination of the issues, the Court's approach in determining whether the applicant's right is *prima facie* established, though open to some doubt, is to take the facts set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant should (not could) on these facts, obtain final relief at the trial of the main action. The facts set out in contradiction by the respondent should then be considered and if serious doubt is thrown upon the case of the applicant it cannot succeed. *(Webster v Mitchell* 1948 (1) SA 1186 (W); *Gool v Minister of Justice and Another* 1995 (2) SA 682 (C) at 688C-E; *LF Bashoff Investment (Pty) Ltd v Cape Town Municipality* (*supra* at 267E-G; *Beecham Group Ltd v B-M Group (Pty) Ltd* 1977 (1) SA 50 (T) at 55B-E).

In *Beecham Group Ltd v B-M Group (Pty) Ltd (supra)* the Court stated at 54E-G with regard to the various factors which must be considered:

'I consider that both the question of the applicant's prospects of success in the action and the question whether he would be adequately compensated by an award of damages at the trial are factors which should be taken into account as part of a general

discretion to be exercised by the Court in considering whether to grant or refuse a temporary interdict. Those two elements should not be considered separately or in isolation, but as part of the discretionary function of the Court which includes a consideration of the balance of convenience and the respective prejudice which would be suffered by each party as a result of the grant or the refusal of a temporary interdict.'

Where the applicant's right is clear and the other requisites of an interdict are present no difficulty presents itself granting an interim interdict. Where, however, the applicant's prospects of ultimate success are nil, obviously the Court will refuse an interdict (*Olympic Passenger Services (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D) at 383B-D; *Beecham Group Ltd v B-M Group (Pty) Ltd (supra* at 54H-55B).

[13] In *Ladychin Investments v South African National Roads Agency* 2001(3) SA 344 NPD at page 353G-H, the following was stated with regard to prospects of success and the balance of convenience:

> "The stronger the prospects of success, the less need for such a balance to favour the applicant; the weaker the prospects of success, the greater the need for the balance of convenience to favour him. By balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against the prejudice to the respondent if it be granted."

[14] Bearing in mind that the applicant seeks relief *pendent lite*, it is necessary to determine whether it has any prospects of success in respect of any future action (for rectification) and/or its claim for mediation or arbitration in terms of the lease agreement. Before considering these issues it is useful to set out the salient facts relied on by both parties.

APPLICANT'S CASE

[15] According to the applicant, the sub-lease was supposed to be for five (5) years and not for a period of two (2) years and nine (9) months as recorded therein. The sole member of the applicant is one Haffejee who avers that when he sought clarity from the respondent, he was informed by its officials that once the Head Lease was "*secured*", the remainder of the five (5) years would be added to the agreement which would allow the sub-lease to terminate on 31 July 2013 (paragraphs 13 and 14 of founding affidavit). Referring to the top left hand side of the front page of the agreements, the rental calculation sheet provided by the respondent and a letter (unsigned) allegedly received from the respondent on 9 July 2009, all of which reflect the 31 July 2013 as the expiry date of the sub-lease, the applicant contends that this is consistent with the representations made to it by the respondent's officials (paragraphs 15, 17 and 18 of the founding affidavit). The applicant accordingly contends that all of this constitutes a continuing common intention of the parties to terminate the sub-lease on 31 July 2013.

[16] On 29 March 2011 the respondent issued a notice in terms of which it purports to raise a dispute in terms of clause 39 of the Standard Terms and Conditions of the Sub-Lease and clause 28 of the Franchise Agreement.

[17] The applicant contends that the termination of the lease by the respondent in terms the letter dated 3 January 2011 constitutes "*an unfair and unreasonable contractual practice*" within the meaning of section 12B of the Petroleum Products Act. According to the applicant the respondents conduct is unfair for the following reasons, viz (a) the termination disregards the fact that over a period of twenty two (22) years the applicant has traded from the same premises and has built up a substantial good-will; (b) the termination is inconsistent with and contrary to the representations made by the respondent, in writing, that the termination date of the lease would be 31 July 2013, thereby creating a legitimate expectation of the same; (c) the termination does not provide the applicant

sufficient time to re-arrange its business affairs, and (d) the failure to renew, extend or relocate the agreement with the applicant is unreasonable.

RESPONDENT'S CASE

[18] The case made out by the respondent both in its opposition to the main application and in its counter-application is that a Principal Lease Agreement (the principal lease) commencing on 1 July 2005 was concluded between it and the owner of the property, namely the trustees for the time being of the Kathrada Property Trust (the Trust). In terms of the provisions of clause 7.2 a preferential right to occupy the leased premises as the sub-tenant of the respondent was granted to one Muhammed Iqbal Goolam Nabee Kathrada (Kathrada) with effect from 1 July until 31 December 2016.

[19] According to the respondent, a meeting was held on 19 July 2006 with Haffejee, wherein the latter was informed about the terms of the principal lease and more importantly, that the applicant's franchise agreement would not extend beyond June 2011. Haffejee himself subsequently met with Kathrada who confirmed that the sub-lease and franchise agreement would not be extended as he intended exercising his preferential right to conduct the filling station business himself. While previously the standard period of the sub-lease between the applicant and the respondent was always three (3) years, the current sub-lease concluded in November 2008 (the commencement date being 1 August 2008) was for a period of two (2) years and nine (9) months. On 20 October 2010 Kathrada, in writing, confirmed that he wished to exercise the preferential right afforded to him in terms of the principal agreement.

APPLICANT'S CLAIM FOR RECTIFICATION

[20] In order for the applicant to establish that it has prospects of success in its claim for rectification, and accordingly a *prima facie* right, it must show the

following, namely:

a) an agreement that was reduced to writing;

b) that the written agreement does not correctly reflect the common intentions of the parties;

c) an intention to reduce the agreement to writing;

d) a mistake in drafting the written agreement, and

e) the actual wording of the agreement.

(see: *Von Ziegler v Superior Furniture Manufactures (Pty) Ltd* 1962(3) SA 399 T).

[21] Bearing in mind that the primary objective of rectification is to ensure that the written agreement reflects the true or common intention of the parties thereto, the *onus* rests on the party that claims rectification to establish the requirements set out above. (see *Tesven CC v SA Bank of Athens* 2000(1) SA 268 (SCA); also: *Benjamin v Gurewitz* 1973(1) SA 418 (A) at 428).

[22] With regard to the requirement set out in (b) above, it is necessary to establish the common continuing intention of the parties as it existed when the agreement was reduced to writing (see: *Meyer Merchants Trust Ltd* 1942 AD 244; also: *City Council of the City of Durban v Rumdel Construction* (1977) 3 All SA 20 (D).

[23] In so far as the requirement in (d) above is concerned, the mistake could be as a result of either a *bona fide* mutual error or an intentional act of the other party.

[24] The alleged representation relied on by the applicant in its founding affidavit,

is in the following terms: *"… assured that upon 'securing' the Head Lease that First Respondent would provide me with the 'balance' of the five year period …*". According to the applicant, it was only then and as a result of the alleged representation and "*assurance*", that it signed the agreement.

[25] In my view, on the evidence of the applicant alone it is clear that whatever representations may or may not have been made, there was no actual agreement reached between the parties. No subsequent contract was in fact entered into to extend the term of the lease agreement. Therefore the applicant cannot establish that there was an error common to both parties resulting in the written contract not reflecting their true intention. Thus the applicant is not able to establish *prima facie* a 'clear right' in terms of the established legal principles relating to rectification of a contract. The evidence of the first respondent strongly contradicts any assertion of the alleged representation and discloses the applicant's futile attempts to obtain another sub-lease agreement and the refusal to grant the same. The principal lease, the securing of which was contingent to the extension of the sub-lease in question (according to the alleged representations made to applicant), had already been concluded and applicant had been notified of its contents, as far as they concerned it, prior to the conclusion of the sub-lease agreement. Furthermore, both parties are barred from making any variations to the contract other than in the manner prescribed in the non-variation clauses. An evaluation of applicant's prospects of success in the action for rectification accordingly leads me to the conclusion that the balance of convenience does not favour the applicant in this regard.

MEDIATION/ARBITRATION INVOLVING AN ALLEGED CONTRACTUAL DISPUTE

[26] Clause 39 of the sub-lease records that:

> Any dispute, question or difference arising at any time between the parties to this Agreement out of or in regard to any matters arising out of; or the

> rights and duties of any of the parties hereto; or the interpretation of; or the termination of; or any matter arising out of the termination of; or the rectification of this Agreement; this Agreement, shall in the first instance be submitted to and decided by mediation on notice given by either party to the other of them in terms of this clause.

[27] The declaration of a dispute in terms of Clause 39 of the sub-lease and Clause 28 of the franchise agreement relates to "*the dispute, question or differences in regard to the termination of the lease or any matter arising out of the termination of the lease on the 31 May 2011*" (page199). The reasons advanced for the dispute are firstly related to whether or not the respondent actually represented that it could extend the agreement; thus creating a legitimate expectation on the part of applicant. The evidence on the papers points to a number of instances where the applicant was specifically told that there would be no renewal, despite his attempts to obtain the same. Secondly, the other grounds in sum assert that the failure of the first respondent to enter into a further sub-lease and franchise agreement (upon the expiry of the present contract) constitutes an unfair or unreasonable contractual practice by the first respondent.

[28] In my view, a valid dispute can only arise if the commencement date, duration or normal termination date was not expressly and in plain language specified. In the instant matter the commencement date is specified as being 1 August 2008 while the duration of the lease is specified as being two (2) years and nine (9) months.

[29] I accordingly hold that the applicant has also on this ground failed to show that it has any prospects of success and accordingly has failed to establish a *prima facie* right entitling it to any relief. On this ground as well as the application for interim relief falls to be dismissed.

SECTION 12B OF THE PETROLEUM PRODUCTS ACT

[30] In its referral notice in terms of section 12B of the Act, the applicant avers that the termination of the agreements between it and the respondent amounts to an unfair and unreasonable contractual practice. The relevant portion of section 12B reads as follows:

> "The Controller of Petroleum Products may on request by a licensed retailer alleging an unfair or unreasonable contractual practice by a licensed wholesaler, or vice versa, require, by notice in writing to the parties concerned, that the parties submit the matter to arbitration…" (my emphasis),
>
> And
>
> "An arbitrator contemplated in subsection (2) or (3) – shall determine whether the alleged contractual practices concerned are unfair or unreasonable and, if so, shall make such award as he or she deems necessary to correct such practice…"

[31] There are no reported judgments on the interpretation or effect of section 12B. In order to determine whether the conduct of the applicant can be classified as an "*unfair or unreasonable contractual practice*", it is necessary to ascertain the intention of the legislature by looking at the ordinary, literal and grammatical meaning of the words as they appear in the section. No reason exists to look outside the words used in the Act as the ordinary meaning thereof would not lead to any absurdity nor result in any incongruities. This view finds support in the unreported decision of Boruchowitz J in the matter of *Engen Petroleum Ltd v Thlamo Retail* (SGJ) case no.43846 which was referred to by *Mr Van der Walt* on behalf of the respondent herein. I am no doubt in full agreement with the interpretation placed on the words in section 12B by the learned judge who held as follows:

a) "Contractual" means "that pertaining or relating to" a contract.

b) “Practice” means “an ongoing action, or habitual doing.”

c) The arbitrator may determine whether an ongoing practice in the performance of an existing agreement or contract is unfair or unreasonable.

d) The arbitrator is empowered to make an award necessary to correct an unfair or unreasonable practice in the context of an existing agreement and ongoing business relationship.

e) The arbitrator may not make or stipulate the terms of a new contract.

f) The arbitrators powers do not go beyond determining how an existing contract is to be implemented.

g) The exercising of a legal right to terminate a contract is not a “contractual practice” but a single juristic act intended to terminate an agreement.

h) It is beyond the powers of the arbitrator to permit holding over where there is no contractual right to occupy.

i) It is beyond the powers of the arbitrator to stipulate the terms of a new agreement as this would violate the most fundamental principles of freedom of contract.

[32] The current dispute between the parties in the present matter concerns the termination of the sub-lease agreement and the franchise agreement by effluxion of time. In line with the interpretation placed on the provisions of section 12B and the clear intention of the legislature in this regard, no arbitrator, in my view, has the power to deal with this issue.

[33] Section 12B relates to an unfair contractual practice and cannot be used to circumvent specific unambiguous contractual terms, such as duration. The contract was for a fixed term of two (2) years and nine (9) months and upon the lapse of the time the contract ceases to exist. The applicant is not alleging that while the contract is in existence the first respondent is acting in a manner that is unreasonable or unfair, nor does the applicant allege that the contract itself is unfair. The complaint relates to the failure of the respondent to conclude another sub-lease contract with the applicant once the current contact has expired.

[34] Evidence of alleged representations made about the extension of the contract are refuted by evidence tendered by the respondent to the effect that at the time of the signing of the sub-lease contract the applicant was well aware that there would be no further renewal. The dates depicted on the front or cover page of the agreement and on the rental calculation sheet are explained as clerical errors on the part of the respondent. At no time is it alleged that there was a meeting of the minds creating a further agreement which extended the expiry date of the contract. Any variation of the sub-lease or franchise agreements is strictly governed by non-variation clauses. That being the position the applicant had sufficient time to re-arrange its business affairs. Failure to enter into a further agreement is not related to the practice of the respondent in terms of the contract in question and as such cannot be raised as a matter which falls within the ambit of section 12B.

[35] In as much as the applicant has failed to show that he has a *prima facie* right to rectification, it has also failed to establish *prima facie* that it is entitled to resort to arbitration on grounds of unfair contractual practices on the part of the respondent either in terms of clause 39 (of the sub-lease) and clause 28 (of the franchise agreement) or in terms of section 12B of the Petroleum Products Amendment Act.

[36] In my view, the applicant is only entitled to tenancy and occupation as a

result of the sub-lease which exists between it and the respondent. This agreement has now come to an end by effluxion of time. On the other hand, the respondent is contractually bound in terms of the principal lease agreement between it and the Trust to allow Kathrada undisturbed occupation of the site by 1 July 2011. The respondent runs the risk of a claim for damages should it fail to comply with its obligations in this regard. To allow the applicant to continue occupying the premises would assist the applicant to hold over. The result and prejudice to the respondent in these circumstances outweighs any prejudice which the applicant claims. I accordingly find that the balance of convenience clearly favours the respondent. For all of these reasons the applicant has not made out a case for any relief.

RESPONDENT'S COUNTER APPLICATION

[37] The full relief claimed by the respondent in its counter application is the following:

> "1. An order declaring that the sub-lease agreement between the applicant and the first respondent (annexure "EYH1" to the founding affidavit of the applicant), has terminated due to the effluxion of time.
>
> 2. An order directing the applicant to forthwith, but by no later than 7 days after the granting of this order, vacate the premises described in the sub-lease agreement concluded between applicant and first respondent.
>
> 3. An order authorizing the Sheriff of this Honourable Court to evict the applicant, should applicant fail to comply with the order set out in paragraph 2 above."

[38] It is clear from the express terms contained in the sub-lease agreement that the termination date was the 31 May 2011. The applicant's contentions to the contrary in this regard are without foundation. I find it quite extraordinary that the applicant on the one hand contends that the lease agreement would terminate in

2013 and yet on the other was prepared to approach the court on 30 May 2011 for urgent relief. It is clear, in my view, that the applicants continued tenancy of the premises after 1 June 2011 is illegal.

[39] The applicants contentions that the inclusion of a preferential right in the principal lease is *contra bonos mores* and accordingly unlawful, are, in my view, ill-conceived and without any merit whatsoever. The respondent had every right to afford the Trust, being the owner of the site, a preferential right to operate a service station if it wanted to. The applicant was no doubt aware of the inclusion of the preferential right in the principal agreement as he made various attempts to persuade Kathrada not to exercise the right.

[40] I accordingly find that the conduct of the applicant constitutes an illegal holding over. It follows therefore, in my view, that the respondent has a clear right to a declaratory order and to an order for the eviction of the applicant from the said premises.

ORDER

[41] For all the reasons set out herein, I grant the following order:

a) The applicant's application is dismissed with costs.

b) It is hereby declared that the sub-lease agreement between the applicant and the first respondent (annexure "EYH1" to the founding affidavit of the applicant), has terminated due to the

effluxion of time.

c) The applicant is ordered forthwith, but by no later than seven (7) days after the granting of this order, to vacate the premises described in the sub-lease agreement concluded between applicant and first respondent.

d) Should the applicant fail to comply with the order set out in paragraph (c) above, the Sheriff is authorized and directed to evict the applicant.

e) The applicant is ordered to pay the costs of the counter-application.

Date of Hearing	:	1 June 2011
Date of Judgment	:	12 August 2011
Counsel for Applicant	:	Advocate S Edwards
Instructed by	:	M B Pedersen & Associates
Counsel for 1st Respondent	:	Advocate CG van der Walt
Instructed by	:	Eversheds Attorneys

		c/o Thomlinson Mnguni James
Counsel for 2nd Respondent	:	Not represented