G.P.-S.33967—1968-69—1,000. J. 219.

19/70

In the Supreme Court of South Africa.
In die Hooggeregshof van Suid-Afrika.

(APPELLATE Provincial Division.)
(Provinsiale Afdeling.)

Appeal in Civil Case.
Appèl in Siviele Saak.

SELBORNE FURNITURE STORE (PTY) LTD. *Appellant,*

versus

HENDRIK JACOBUS STEYN N.O. *Respondent*

Appellant's Attorney / *Prokureur vir Appellant* Israel S. & S.

Respondent's Attorney / *Prokureur vir Respondent* Lovius B.M. & C.

Appellant's Advocate / *Advokaat vir Appellant* C.S.M. Brink

Respondent's Advocate / *Advokaat vir Respondent* H.J.C. van Heerden

Set down for hearing on / *Op die rol geplaas vir verhoor op* 26-3-70

14.6.70

Steyn C.J. Botha, Wessels, Trollip JJ.A. et Rabie A.J.A.

9.45 am —— 11.00 am
(O.P.D.) 11.15 am —— 1.00 pm
2.15 pm —— 4.00 pm

C.A.V.

Notea 2-6-70 per Wessels J.A.:—
Interim Order on terms of writ..
Judgment
postea 1.9.70. Order as per
[illegible]

1. The order of the Court a quo, dismissing the application with costs, is set aside, and the following order substituted therefor:

"(a) At this stage no order is made on the application.

(b) The further hearing of the matter is stayed pending the joinder of all persons having a direct and substantial interest in the determination of the issues raised in the application.

(c) The applicant is granted leave to take such steps as are necessary to effect the joinder of the aforementioned persons by not later than 30 September 1970, after which date either party may set the matter down for further hearing."

2. The appellant is to pay the respondent's costs of appeal.

APPEAL COURT,
R, APPELHOF,
MFONTEIN.
-9- 1970

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ials.
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1-9-70

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION).

In the matter between:

SELBORNE FURNITURE STORE
(PROPRIETARY LIMITED) ..... APPELLANT.

AND

HENDRIK JACOBUS FREDERIK STEYN, N.O. ... RESPONDENT.

CORAM: STEYN, C.J., BOTHA, WESSELS, TROLLIP, JJ.A.
et RABIE, A.J.A.

HEARD: 26 May 1970. DELIVERED: 1 September 1970.

J U D G M E N T.

WESSELS, J.A. :-

The earlier history of this matter appears from the judgment of this Court which was delivered on 2 June 1970. Pursuant to that judgment the following order was issued, viz. :

> "The final judgment in this matter is to stand over so as to give Selborne an opportunity of ascertaining from the various parties above referred to whether they are prepared to file with this Court, through their own attorneys, a written consent to be bound by this Court's judgment, notwithstanding the fact that they have not been cited as parties. If

such consents are filed, a final judgment will be given without hearing further argument. If, however, no such consents are filed by 31 July next, or if at any time prior thereto Selborne's attorneys intimate in writing to the Registrar of this Court that such consents cannot be obtained, this Court will give directions as to the course the proceedings will then have to take."

The appellant has since filed documents from which it appears that the following parties consent to be bound by this Court's judgment, notwithstanding the fact that they have not been cited as parties, namely, Maroonie Habib Antonie and Sajax (Kroonstad) (Proprietary) Ltd. Mrs. B. Cohen (who is referred to in the above-mentioned judgment as Bertha Cohen) has, however, intimated that "she is not disposed to make a decision in the matter."

For the reason mentioned in the judgment of this Court delivered on 2 June 1970 it appears that Mrs. Cohen has such a direct and substantial interest in the issues which arose for determination by the Court a quo and by this Court that she should have been cited as a party when the proceedings were instituted. She did not waive her right to be so cited, and has not consented to be bound by any judgment that may be given. Her mere intimation of non-

intervention after receipt by her of notice of these pro-

3/ ...ceedings

ceedings cannot, without more, be treated as if it were a representation, express or tacit, that she will submit to, and be bound by, any judgment that may be given. (See, Amalgamated Engineering Union v. Minister of Labour, 1949(3) S.A. 637 (A.D.) at p. 662. It follows that, in the circumstances, the matter ought not to have proceeded to the stage of judgment in the Court a quo, and that it would not be proper for this Court to determine the issues which arise on appeal.

In supplementary heads of argument filed by appellant's counsel it is submitted that the order of the Court a quo should be set aside, that appellant should be granted leave to join all persons who are directly and substantially interested in the results of the determination of the issues raised in the application, and to file such further affidavits as might appear to be necessary. In my opinion this relief should be granted. It was also submitted on appellant's behalf that the costs of appeal and the costs of the proceedings in the Court a quo should be ordered to be costs in the cause. In this regard reference is made to the order issued in Home Sites (Pty) Ltd. v. Senekal, 1948(3) S.A. 514 (A.D.). In that case,

however, it was found that there appeared "to be no good reason to attach more blame" to one party than to the other in regard to the wasted costs caused by the non-joinder of a necessary party. In my opinion that cannot be said to be the position in this case. Having regard to the nature of the legal issues appellant raised in regard to the relief claimed in the application, it was plainly under a duty at least to have cited Mrs. B. Cohen as a party. There was no corresponding duty on the respondent to have raised non-joinder as an issue in the proceedings. In addition, this Court heard argument on the merits of the appeal and, on the information before this Court, it appears that the appellant's prospects of success are of a somewhat slender nature. In my opinion, therefore, respondent is entitled to be awarded the costs occasioned by the appeal. In regard to the costs of the proceedings in the Court a quo, it is possible that questions regarding wasted costs might arise. In my opinion questions concerning the costs of those proceedings ought to be reserved for decision by that Court.

In the result it is ordered that:

1. The order of the Court a quo, dismissing the

application with costs, is set aside, and the following order substituted therefor:

"(a) At this stage no order is made on the application.

(b) The further hearing of the matter is stayed pending the joinder of all persons having a direct and substantial interest in the determination of the issues raised in the application.

(c) The applicant is granted leave to take such steps as are necessary to effect the joinder of the aforementioned persons by not later than 30 September 1970, after which date either party may set the matter down for further hearing."

2. The appellant is to pay the respondent's costs of appeal.

P.J. Rabie

STEYN, C.J.
BOTHA, J.A.
TROLLIP, J.A.
RABIE, A.J.A. } CONCUR.

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION).

In the matter between:

SELBORNE FURNITURE STORE
(PROPRIETARY) LIMITED ..... APPELLANT.

AND

HENDRIK JACOBUS FREDERIK STEYN, N.O. ..... RESPONDENT.

CORAM: STEYN, C.J., BOTHA, WESSELS, TROLLIP, JJ.A.
et RABIE, A.J.A.

HEARD: 26 May 1970. DELIVERED: 2 June 1970.

J U D G M E N T.

WESSELS, J.A. :-

With the consent of the respondent, the appellant appeals direct to this Court against the judgment of Hofmeyr, J., in the Orange Free State Provincial Division, dismissing with costs an application, instituted by appellant (as applicant) on notice of motion, in which the following relief was claimed, viz. :

".....an Order -----

(a) declaring that the sub-lease concluded between Applicant and Michael Antonie on the 24th January, 1967, was duly cancelled on the 27th December 1968

2/.....(b)

(b) ejecting Respondent and any persons claiming title to occupation through him from the shop premises No. 59, Cross Street, Kroonstad -

(c) Alternative relief -

(d) Costs of suit.

I shall hereinafter refer to the parties as Selborne and respondent respectively.

The facts, which are not in dispute, may be summarised as follows. One Bertha Cohen is, and was at all material times, the owner of three adjoining shop premises, referred to as Nos. 57, 59 and 61 Cross Street, Kroonstad. On 31 August 1965 Bertha Cohen and one Michael Antonie (as lessor and lessee respectively) executed a written agreement of lease in respect of the premises at Nos. 57 and 59 Cross Street. The lease was for a period of five years, commencing on 1 October 1965. The lease provided for an option to renew it for a further period of four years and eleven months. The following conditions, inter alia, were incorporated in the lease, viz. :

"8. THE LESSEE shall not have the right to carry on business in competition with the LESSOR'S other tenant carrying on business in the adjoining shop, which premises are also the property of the LESSOR.

9. THE LESSEE shall have the right to cede this Lease or sublet the premises hereby let, without the consent of the LESSOR, but he remains liable

for the due fulfilment of all the terms and conditions of this Lease by the sub-tenant, or by the Cessionary.

12. In the event of the rental being unpaid on due date and within fourteen (14) days thereafter or should the LESSEE commit a breach of any of the terms of this Agreement and fail to remedy such breach within a period of seven (7) days of him having received notice drawing his attention to such breach, the LESSOR shall have the right, but shall not be obliged, to cancel this Lease and to recover possession of the premises forthwith without prejudice to her right to recover any arrears of rental and other damages sustained by her."

At the time the abovementioned lease was executed, and thereafter until 19 October 1967, the shop premises at No. 61 Cross Street was occupied by a tenant who carried on business as a "baby and trousseau shop." The sale of "household linen" was "a material part" of the business being carried on in the shop. The terms of the lease between Bertha Cohen and the tenant are not set out in the record.

On 24 January 1967, Michael Antonie "ceded his right, title and interest as lessee of shop premises Nos. 57 and 59 under the said lease" to Selborne. On the same date, Selborne sublet to Michael Antonie the shop premises at No. 59 Cross Street. The terms and conditions of the cession as well as the sub-letting appear from a document annexed to the

affidavit filed in support of the notice of motion. The document is headed "Cession of Lease", and reads as follows, viz. :

"I, the undersigned,

MICHAEL ANTONIE,

do hereby cede, assign, transfer and make over unto and in favour of

THE SELBORNE FURNITURE STORE (PROPRIETARY) LIMITED,

a Company duly registered with limited liability and herein represented by BASIL KRETZMER, duly authorised thereto by a Resolution of Directors at a meeting held at Kroonstad on the 24th January, 1967, with effect from the 1st March, 1967, all my rights, title and interest as Lessee in and to the agreement of Lease signed by me at JOHANNESBURG on the 31st August, 1965, as Lessee and signed at JOHANNESBURG on the 31st August, 1965 by BERTHA COHEN (widow) as Lessor, in respect of the shop and Garage premises situated at erf No. 200, Cross Street, Kroonstad, known as 57 and 59 Cross Street, Kroonstad.

DATED at KROONSTAD this 24th day of JANUARY, 1967.

AS WITNESSES:

1. (Sgd) ??

(Sgd) M. ANTONIE.

2. (Sgd) M. du Toit

I, the undersigned,

BASIL KRETZMER

in my capacity as a Director of the SELBORNE FURNITURE STORE (PROPRIETARY) LIMITED, a Company duly registered with limited liability and duly authorised thereto by a Resolution of Directors of the Company dated at Kroonstad on the 24th January, 1967, and I, BASIL KRETZMER, in my private capacity as surety and Co-principal debtor for THE SELBORNE FURNITURE STORE (PTY) LIMITED, do hereby accept the above cession of the agreement of Lease entered into by and between BERTHA COHEN (widow) as Lessor and MICHAEL ANTONIE as Lessee in respect of the Garage and shop premises

5/.....situated

situated at 57 and 59 Cross Street, Kroonstad and I hereby agree on behalf of the said Company and in my private capacity as stated above :-

(a) To be truly and lawfully bound by all the terms and conditions of the aforegoing agreement of lease with effect from the 1st March, 1967 and I hereby declare that I am fully aware of all the terms and conditions contained in the said Agreement of Lease.

(b) I hereby let to MICHAEL ANTONIE certain shop premises situated at erf 200, Cross Street, Kroonstad, being the premises presently occupied by ANTONIE BROS. (PTY) LTD., dealers in motor spares and accessories at a monthly rental of ONE HUNDRED RAND (R100.00) for a period commencing on the 1st March, 1967 and terminating on the 30th September, 1970, on the same terms and conditions as contained in the said Agreement of Lease between BERTHA COHEN and MICHAEL ANTONIE.

(c) I agree to pay all costs and stamp duty in connection with this cession.

DATED at KROONSTAD this 24th day of JANUARY, 1967.

AS WITNESSES:

1. (Sgd) H. Gersohn
2. (Sgd) A. van Niekerk

(Sgd) B. KRETZMER
p.p. THE SELBORNE FURNITURE STORE (PTY) LTD.

As surety and co-principal debtor:

(Sgd) B. KRETZMER."

On 18 April 1968 Selborne, and on 13 June 1968 Michael Antonie, exercised their respective rights of renewal under the abovementioned lease and sub-lease.

On a date subsequent to 13 June 1968, Michael

Antonie "granted occupation" of the premises at No. 59 Cross Street to one Maroonie Antonie. Thereafter Maroonie Antonie "granted occupation" of the said premises to a person (or firm) referred to simply as Sajax. The terms upon which Maroonie Antonie and Sajax were "granted occupation" are not set out in the abovementioned affidavit, because the deponent was unaware thereof. It was, however, stated that the basis upon which Maroonie Antonie and Sajax became successive occupiers of the premises in question is not material because they "could not acquire greater rights as against" Selborne than those conferred under the sub-lease to Michael Antonie.

The next event in chronological order is the execution during February 1968 of an agreement of lease in terms of which Bertha Cohen let the shop premises at No. 61 Cross Street to Selborne. The terms of this lease are not set out in the record. It is stated that after the execution of the lease, Selborne carried on a "Soft Goods" business on the premises and that "a material part" of that business "included the sale of household linen." It is not disclosed in the record whether the shop premises in question was occupied or not

7/.....during

during the period from 20 October 1967 to February 1968, i.e., the period from the termination of the lease of the tenant, who carried on business as a "baby and trousseau shop," to the execution of the agreement of lease between Bertha Cohen and Selborne.

On or about 30 September 1968 (i.e., after the date on which Selborne commenced carrying on a "Soft Goods" business at No. 61 Cross Street) Sajax commenced trading "as a linen house" in the shop at No. 59 Cross Street, "and its business in that shop included, inter alia, the sale of household linen". As at 31 October 1969, Sajax was still carrying on such business.

Selborne considered that Sajax was carrying on the abovementioned business in contravention of clause 8 of the agreement of lease between Bertha Cohen and Michael Antonie, which was incorporated in the agreement of sub-lease between Selborne and Michael Antonie, and on 1 October 1969 caused a letter to be addressed to Michael Antonie, calling upon him to "remedy the breach" by Sajax within seven days in accordance with clause 12 of the aforementioned lease.

It is stated that inasmuch as Michael Antonie "failed to remedy the breach", Selborne cancelled the sub-lease between it and Michael Antonie on 27 December 1968. It is also stated that Michael Antonie has not recognised the cancellation, that he disputes Selborne's right to cancel the sub-lease and "has continued to allow Sajax to trade" as a linen house.

On or about 17 April 1969, the estate of Michael Antonie was sequestrated, and the respondent was duly appointed as trustee, in which capacity he was cited as respondent in these proceedings. After his appointment, respondent exercised his right to continue the sub-lease in terms of section 37(2) of the Insolvency Act, 1936. Thereafter respondent also disputed Selborne's right to cancel the sub-lease, contending that the trading by Sajax in the shop in question did not constitute a breach of the terms of the aforementioned clause 8.

The respondent filed an affidavit in which he stated that he opposed the grant of the relief claimed. It also appears from his affidavit that during October 1969, acting in his capacity as trustee, he purported to cede and assign the insolvent estate's rights and obligations under the agreement

of sub-lease between Selborne and Michael Antonie to Maroonie Habib Antonie. I take it that the last-mentioned name and Maroonie Antonie refer to the same person.

In dismissing the application with costs, the Court a quo held that, upon the true construction of clause 8, it was only intended to restrain the lessee from carrying on business in the shops at Nos. 57 and 59 Cross Street in competition with Bertha Cohen's "other tenant", who was carrying on business in the shop at No. 61 Cross Street at the time the lease was executed.

At the outset of the hearing of the appeal, this Court mero motu raised the question whether the order made by the Court a quo (and also the order which this Court is asked to substitute therefor) may not affect third parties, not before the Court, and, if so, whether it would be proper for this Court to determine the issues which now arise for consideration. In raising the question, this Court had in mind the possibility that, in view of what is stated in the founding affidavit and in the respondent's replying affidavit, any one or more of the following parties might have such a direct and substantial interest in the results of a decision

on the issues which arise for determination, that it might not be proper to reach a decision without hearing them or, at least, without this Court being satisfied that they are willing to be bound by the judgment without being joined as parties, namely, (1) Bertha Cohen (inasmuch as the interpretation of clause 8 of the lease, which was incorporated in the sub-lease between Selborne and Michael Antonie, may involve a definition of her rights under the clause in question), (2) Sajax (depending upon whether Sajax is still in occupation of the premises), (3) Maroonie Antonie (by virtue of the cession and assignment of the sub-lease effected by respondent during October 1969) and (4), if Sajax is no longer in occupation, the party (if any) now in occupation.

Respondent at no stage raised the question of non-joinder. Mr. van Heerden, who appeared for respondent, intimated that respondent declined to raise the question of non-joinder as an issue on appeal, but added, correctly so, that the position of a third party cannot be prejudiced by the consensus of the litigants before the Court that they do not wish that party to be joined. (Amalgamated Engineering Union v. Minister of Labour, 1949(3) S.A. 637(A.D.) at p. 649).

11/.....Having

Having regard to the circumstances in which Mr. Brink, for Selborne, was called upon to deal with the question raised by this Court, he was granted leave to submit additional arguments in writing. Mr. van Heerden intimated that he did not intend replying thereto. Thereafter, both counsel addressed the Court on the merits, whereupon judgment was reserved.

Mr. Brink has since then filed additional heads of argument, in which he deals only with the position of Maroonie Antonie (with reference to such rights as might have been acquired from Michael Antonie) and Sajax ("or any present occupant of Shop 59"). It is submitted by him that this Court can infer from the information contained in the papers that Maroonie Antonie and Sajax (or "the present occupant") were simply sub-lessees of Michael Antonie, and that Selborne was, therefore, not required to join them as parties. For this latter proposition reliance is placed on the judgment in Ntai & Others v. Vereeniging Town Council and Another, 1953(4) S.A. 579 (A.D.). It is my impression that Ntai's case is distinguishable, but I do not regard it as necessary to deal with

the effect of that judgment. The inference contended for by Mr. Brink may possibly be justified, but that does not appear to be the question. The substantial question is whether it is proper for this Court to proceed to draw an inference as to their rights, without giving them an opportunity of being heard in regard thereto. The more so, since the information in the record regarding the nature of their rights as successive occupiers of the premises in question is so lacking in preciseness and particularity, that any inference drawn must of necessity be largely based on speculation.

In my opinion it would not be proper not to afford Bertha Cohen, Maroonie Antonie, Sajax (or "the present occupant") the opportunity of being heard, should they desire to avail themselves of such an opportunity. I have already set out above the nature of the interest which each one of them appears to have in the decision of the issues raised for determination, particularly so in the case of Maroonie Antonie who, by virtue of the cession and assignment effected by respondent prior to the institution of the motion proceedings, and on the assumption that the sub-lease was not validly cancelled, became

Selborne's sub-lessee.

In the circumstances, and for the reasons which influenced that Court, I propose to follow the course adopted in the Amalgamated Engineering Union case (supra at p. 663).

The final judgment in this matter is to stand over so as to give Selborne an opportunity of ascertaining from the various parties above referred to whether they are prepared to file with this Court, through their own attorneys, a written consent to be bound by this Court's judgment, notwithstanding the fact that they have not been cited as parties. If such consents are filed, a final judgment will be given without/hearing further argument. If, however, no such consents are filed by 31 July next, or if at any time prior thereto Selborne's attorneys intimate in writing to the Registrar of this Court that such consents cannot be obtained, this Court will give directions as to the course the proceedings will then have to take.

P.J. Rabie

STEYN, C.J.
BOTHA, J.A.
TROLLIP, J.A.
RABIE, A.J.A. } CONCUR.