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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

BHYAT'S DEPARTMENTAL STORE (PTY) LIMITED — Appellant

and

DORKLERK INVESTMENTS (PTY) LTD. — Respondent

Coram: VAN BLERK, A.C.J., WESSELS, TROLLIP, RABIE et HOFMEYR JJ.A.

Heard: 8th September 1975

Delivered: 26th September 1975.

J U D G M E N T

VAN BLERK A. C. J.:

This is an appeal from a Full Bench decision of the Transvaal Provincial Division upholding a judgment of a single Judge of the Witwatersrand Local Division granting on motion proceedings at the instance

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of the respondent company, an order for the ejectment of the appellant company, and all persons holding through it, from stand no. 526 and stand no. 527 in the township of Boksburg.

The appellant company, the directors and shareholders of which are members of the Indian Group, on 16 September 1966 entered into an agreement of lease with a company, styled Moosa Bhyat (Proprietary) Limited, which will be referred to as the previous owner. By this lease the appellant as the lessee was given the right to occupy as from 1 August 1966 for a period of nine years and eleven months the buildings on stands 526 and 527. The building on stand 526 consisted of a "residential house" and the building on stand 527 was occupied as a shop by the appellant company. The dwelling house on stand 526 was occupied by a director of the appellant company, but was vacated during March 1972.

On 1 March 1971, in terms of a written agreement of sale entered into between the previous owner and the

respondent.....3/

respondent, the latter purchased from the former stands 526 and 527, but only on 3 November 1971 were the stands registered in the name of the respondent.

In its founding affidavit the respondent based its claim for ejectment on the ground that the appellant's occupation was unlawful due to the determination of the stands for occupation by members of the White Group in terms of the Group Areas Act No. 36 of 1966.

The appellant in its replying affidavit denied that there was such a determination and contended that the lease was valid and the occupation lawful. In its answering affidavit the respondent denied that the lease was valid. For the first time it alleged that the lease itself was invalid according to section 27 of the Act, and that was subsequently conceded by the appellant. In the court of first instance, however, it was contended on behalf of the appellant in accordance with what was alleged in its replying affidavit that the lease was valid and in the alternative

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it argued that the respondent made itself a party to the illegal contract of lease and that the parties were in pari delicto.

In this Court and also in the Court a quo, the only contention relied on by the appellant was that the respondent adopted and enforced the illegal lease, that by so doing it made itself an active party to the lease and therefore the maxim in pari delicto potior est conditio defendentis et possidentis should operate to prevent the respondent from obtaining an order of ejectment.

The appellant's contention is that it was established that the respondent was particeps criminis because at the time of entering into the agreement of sale the latter well knew that the lease was illegal and that thereafter with full knowledge of the facts it adopted and enforced the lease.

The deed of sale annexed to the respondent's answering affidavit provided that the latter's possession of the acquired stands would be subject to the rights of

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the appellant as an existing tenant. Joseph Kotwal (referred to as Kotwal) as a director of the respondent entered into the deed of sale on behalf of the latter as purchaser. From the warranties in clause 4 of the deed of sale it must have been clear to Kotwal (a) that the stands had been determined, in terms of the provisions of the Group Areas Development Act No. 69 of 1955 as amended, "affected property" falling within the White Group Area, (b) that the directors and shareholders of the appellant company were of the Indian Group and did not have permits to occupy the premises let to them and (c) that the appellant had no permit to occupy the stands after 31 March 1971. The deed of sale provided further that should the respondent seek to eject the appellant by reason of its unlawful occupation as from 1 April 1971 the seller (the previous owner) would indemnify the respondent for any claim against damages arising out of such ejectment.

In regard to the contention that respondent adopted

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and enforced the illegal lease appellant's counsel relied on the allegation in appellant's replying affidavit that on 3 or 4 November 1971 (the properties were registered in respondent's name on 3 November) respondent's collecting agents by letter advised the appellant of their appointment to collect on behalf of the respondent the rent payable in respect of the premises occupied by the appellant. Further to the letter a statement from the same agents was received by the appellant claiming R370-00 for the month of November 1971 and thereafter a second statement claiming R1200-00, was received by the appellant.

M.A.S. Bhyat, a director of the appellant, was the deponent of the replying affidavit. He stated that after the receipt of the accounts for rent Kotwal interviewed him and insisted on a rental of R1200-00 per month and intimated that, unless this was agreed to the appellant had to vacate the property before the end of the month, that is the end of November 1971. Kotwal in his answering

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affidavit denied this threat. He deposed that he was under the impression when respondent purchased the properties that it was entitled to eject all the tenants and that he advised the appellant that it could remain in occupation only if it paid R1200-00 a month, and if it was not prepared to pay such rental it could remain rent free on the premises until the end of December 1971, provided that it would agree to vacate the premises by this latter date.

Kotwal no doubt realised that, in view of the warranties set out in clause 4 of the deed of sale, the agreement of lease was to be regarded as terminated as provided in clause 23 of the lease. That would explain why he was under the impression that respondent could eject all the tenants. The lease was annexed to the founding affidavit. Clause 23 reads as follows:

> "The LESSOR and the LESSEE hereby agree that in the event of expropriation of Stand 526, 6 Eloff Street, Boksburg, and/or Stand.....8/

Stand 527, at 269 Commissioner Street, Boksburg, Transvaal, or in consequence of the operation of any other law the lease becoming invalid and the LESSEE being unable to lawfully occupy any portion of the leased premises, this lease will be regarded as binding for the remaining unaffected portion of the premises and the LESSEE will in such event not be entitled to claim any reduction in the rentals in terms of paragraph 3 hereof. The LESSOR and LESSEE hereby agree that in such event neither party will have any claim against the other. In the event of the affected portion being the residential premises situate on stand 526 at 6 Eloff Street, Boksburg, then and only in that

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event will the LESSEE be entitled to sub-let the said premises without the consent of the LESSOR to a person entitled in terms of the law to lawfully occupy such premises.

In the event of the total leased premises being altered by the Group Areas Act or any other legislation and the LESSEE being unable to lawfully occupy the said leased premises this lease will be regarded as terminated and neither party will have any claim whatsoever against the other arising from such termination."

The appellant's counsel submitted that Kotwal virtually attempted to blackmail the appellant and that the latter's refusal to pay the increased rent motivated the application for ejectment. Be that as it may, his conduct cannot be regarded as an adoption of the lease.

Kotwal.....10/

Kotwal was certainly entitled to negotiate with the appellant as a prospective tenant and to allow it to remain in occupation and pay rent provided the necessary permit to occupy were obtained. As the negotiations proved abortive the appellant was allowed as a matter of grace to occupy the premises till the end of November. Far from adopting the lease, when negotiations failed ejectment proceedings were instituted on 2 December.

With regard to the period preceding the registration of the title, it can be assumed in appellant's favour as contended that the respondent, when it purchased the properties, was aware of the illegality of the lease. But the mere fact that it bought the property subject to the lease which it knew was illegal does not make it a party to the illegality that tainted the lease. Normally when property subject to a lease is sold the purchaser must recognise the lease if the lessee is willing to pay rent. That is our law. But obviously the law would

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not require the purchaser to recognise an illegal lease. There is no proof that the respondent recognised the lease by receiving rent or claiming rent during the eight months preceding the registration of the respondent's title. On the contrary Kotwal deposed that he was under the impression that the respondent was entitled to eject all the tenants. On the appellant's own showing it did not pay rent to the respondent. M.A.S. Bhyat, as mentioned earlier, deposed that when on 3 or 4 November he received the letter from the respondent's collecting agents it was the first intimation to him that the properties had changed hands.

At a belated stage, for the first time in argument in the court of first instance, appellant's counsel contended in the alternative (if it was found that there was no valid lease) that the respondent with full knowledge of the facts adopted the illegal lease from which

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it was seeking to be released, and that therefore the par delictum rule should operate in the manner it was applied in the case of Jajhbay v. Cassim 1939 AD 537. This contention would seem to savour of an afterthought as the appellant in its affidavits did not allege any facts which would tend to show or from which it could be inferred that the respondent adopted and enforced an illegal lease. If the appellant at the stage it filed its affidavits contemplated or envisaged a genuine factual dispute of a kind that would involve the application of the par delictum rule, it would no doubt in compliance with procedural practice have raised the issue in its affidavits so as to afford its opponent an opportunity of meeting it.

The appellant failed to prove that the respondent in any way adopted and enforced the illegal lease.

The appeal cannot succeed. At the close

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of his argument the appellant's counsel asked, in the event of the appeal not succeeding, that the appellant be allowed three months time within which to vacate the premises. The court of first instance granted the order of ejectment simpliciter. No time within which to vacate was allowed. No argument was addressed to us on the question whether a court has a discretion to grant time within which to vacate. In Lovius & Shtein v. Sussman 1947 (2) SA 241 (O) at p 243 Van den Heever, J. found it difficult to appreciate how the court can, in the absence of any statutory provision, delay the enforcement of a legal right which it has found a plaintiff is entitled to.

In Potgieter and Another v. Van der Merwe 1949 (1) SA 361 (A) at page 374 Centlivres, J.A. after referring to a number of cases, in some of which orders of ejectment were granted simpliciter and others in which time to vacate was allowed, concluded by saying:

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> "It is, however, unnecessary for me to decide whether a Court of law has the discretion referred to, but may I add that in my view, if it has that discretion, it must exercise it judicially. It is open to question whether, assuming there is such a discretion, an appellate tribunal should, save in exceptional circumstances, grant a defendant against whom an order of ejectment has been made by an inferior court, time within which to vacate the premises."

On this approach, and also assuming, that this court has the necessary discretion, the appellant's case does not merit the concession asked for. By resisting the respondent's claim in three courts the appellant gained the advantage of remaining in possession for a period which is nearing the end of its fourth year.

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The appeal is dismissed with costs - including the costs of two counsel.

P J van Blerk

Van Blerk

A.C.J.

WESSELS J.A.)

TROLLIP J.A.)

Concur

RABIE J.A.)

HOFMEYR J.A.)