133/84
Case no 113/83
M C

PROTEA ASSURANCE COMPANY LIMITED

- and -

PRESAUER DEVELOPMENTS (PROPRIETARY) LIMITED

VIVIER AJA.

Case no 113/83
M C

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

PROTEA ASSURANCE COMPANY LIMITED ..... Appellant

- and -

PRESAUER DEVELOPMENTS (PROPRIETARY) LIMITED ..... Respondent

Coram: KOTZé, MILLER JJA et GALGUT, ELOFF, VIVIER AJJA.

Heard: 22 NOVEMBER 1984.

Delivered: 28 NOVEMBER 1984.

J U D G M E N T

VIVIER AJA :-

The respondent is the owner of a building known as the Bank of Lisbon and South Africa Building, situated on the corner of President and Sauer Streets, Johannesburg. In terms of a written contract of lease and addendum thereto, both documents signed by the lessee on 22 January 1974 and by the lessor on 31 January 1974, the respondent leased to the appellant the entire 10th floor and portion of the 11th floor of the said building for the period 1 March 1974 to 31 January 1984.

During the currency of the lease the respondent instituted an action in the Witwatersrand Local Division for the ejectment of the appellant from the said building, on the ground that appellant had breached the provisions

of clause 11 of the lease by effecting alterations or additions to the premises without respondent's prior written consent. Respondent alleged that in consequence of appellant's said breach it had cancelled the contract by letters dated 31 August 1981 and 23 September 1981 respectively. In the same action respondent also sought an ejectment order against the appellant in respect of certain parking bays used by appellant in the said building, on the ground that due notice to appellant to vacate the parking bays had been given.

The trial Judge, F.S. STEYN, J found that the appellant had not breached the provisions of clause 11 of the lease, and that respondent's purported cancellation of the lease agreement was not justified. With regard to the parking bays, STEYN J, held that appellant's

right / .....

right of occupation was subject to one month's notice to vacate, which had been duly given on 31 August 1981. The ejectment order sought in respect of the 10th and 11th floors of the said building was accordingly refused with costs, and an order was granted that appellant vacate the parking bays. Appellant noted an appeal against that part of the judgment and order of the Court a quo dealing with the parking bays, and respondent noted a cross-appeal against that part of the judgment and order dealing with the 10th and 11th floors of the said building. Appellant has since abandoned its appeal, so that only the issues raised by the cross-appeal remain for decision. For convenience I shall refer to the appellant in the main appeal as the defendant and to the respondent in the main

appeal as the plaintiff.

Before dealing with the merits of the cross-appeal, I must deal with a point in limine raised by counsel for the defendant that, by reason of the provisions of sec 20(4)(b) of the Supreme Court Act, No 59 of 1959, as replaced by sec 7 of the Appeals Amendment Act, No 105 of 1982, this Court has no jurisdiction to entertain the cross-appeal without the prior leave of the Court a quo, or the leave of the Appellate Division, which was, admittedly, not obtained.

Act 105 of 1982 came into force on 1 April 1983. The judgment of the Court a quo was delivered on 21 March 1983 and the defendant lodged its notice of appeal on 29 March 1983. There was accordingly a right to cross-

appeal in existence at the date of commencement of Act 105 of 1982. In terms of Rule 5(3) of the Appellate Division Rules the cross-appellant had 21 days, or such longer period as may on good cause have been allowed, to exercise that right.

Although notice of the cross-appeal was only lodged on 11 April 1983, it seems to me that the plaintiff's right to cross-appeal was, by virtue of sec 26 of Act 105 of 1982 not affected by the provisions of that Act.

Sec 26 of Act 105 of 1982 provides as follows :-

> "No provision of this Act shall affect an appeal or any proceedings in connection therewith noted in terms of any Act before the commencement of such provision, and any such appeal shall be continued and concluded in every respect as if this Act had not been passed."

The words "any proceedings in connection therewith" (compare the words "enige verrigtinge in verband daarmee" in the Afrikaans version) mean, in the context in which they are used, any step in connection with the appeal. The lodging of the notice of cross-appeal in terms of the said Rule 5(3), which is a step taken by the cross-appellant in response to receiving notice of appeal from the appellant, would clearly be such a proceeding in connection with the appeal. In my view, therefore, the words "any proceedings in connection therewith" in sec 26, are wide enough to include a cross-appeal. The appeal having been noted before the commencement of Act 105 of 1982, the cross-appeal is thus by virtue of sec 26 of Act 105 of 1982 not affected by the provisions of sec 20(4)(b) of Act 59 of 1959.

I proceed / .....

I proceed to deal with the merits of the cross-appeal. The sole issue for decision is whether the defendant breached clause 11 of the lease, the relevant portion of which provides that :-

> "The lessee shall not make any alterations or additions to the premises without the lessor's written consent."

The construction of clauses of this nature depends upon a consideration of the nature, effect and scope of the lease and the intention of the parties as gathered from the lease. As Vaughan Williams, LJ said in Bickmore v Dimmer (1903) 1 Ch 158 at 165 :-

> "We have to take into consideration the whole of the lease, and the purposes for which it was granted, and then to see what is the proper construction of the particular covenant."

The leased premises form part of a modern, high-rise building, constructed according to the so-called central core concept, intended for use, primarily, as office accomodation. In a building of this kind the central core contains the lifts, fire escape, services, airconditioning ducts and other facilities, leaving the entire area between the central core and the outside walls available for use by the owner or his tenants. Office space thus created could be used either according to the open plan system, in which no partitioning from floor to ceiling is used and a division of the open area is created by the use of furniture or screens, or according to the cellular system, in which the open space is divided into offices by the use of internal demountable partitions.

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The architect, Hoff, testified that the advantage of the central core system is that no brickwork or plastering is involved in the inside walls, so that the internal partitioning could easily be changed to suit the particular needs of individual occupants.

In clause 2 of the lease the leased premises are described as follows :-

> "The Lessor hereby lets to the Lessee which hires the entire 10th floor and portion of the 11th floor of the building known as Bank of Lisbon & South Africa Building, situate on the Cor. President & Sauer Strts., Johannesburg, measuring in extent 15 205 sq. ft. formerly occupied by Computer Sciences Sigma Limited and more particularly delineated coloured red in the plans attached (marked 'X' (10th floor plan) and 'Y' (11th floor plan) and initialled by the parties for identification and shall hereinafter be referred to as the 'leased premises')."

As only the changes effected by defendant on the 11th floor of the building were relied upon by plaintiff as a ground for cancellation, I need refer to that floor only.

The area delineated in red on the plan of the 11th floor shows a combination of the open plan and cellular systems. It depicts four offices created by the use of demountable partitions with the remainder of the area left as open plan. It was common cause at the trial that the partitions on the 11th floor, as depicted on the plan marked "Y", did not belong to plaintiff. These partitions had been erected by the previous tenant, Computer Sciences Sigma Ltd (CSSL). It was also common cause that the parties concluded the lease in the

knowledge that these partitions did not suit the defendant's requirements and would be removed and new partitions erected in order to meet defendant's needs. At the time the lease was negotiated by the parties, plaintiff's lease with CSSL still had until 1981 to run, and having already vacated the premises, CSSL was obviously anxious to be released from its obligations under its lease. In a separate agreement concluded with defendant, CSSL accordingly undertook to pay defendant the amount of R25 000,00 in order to provide its own partitioning and carpeting subject to the condition that defendant concluded a lease with plaintiff, thereby releasing CSSL from its lease. It was further agreed between defendant and CSSL that defendant would be responsible for dismantling the existing partitions. The agreement

arrived at between the defendant and CSSL is reflected in the lease between plaintiff and defendant, clause 31 of the lease providing as follows :-

> "It is furthermore recorded that the Lessee and Computer Sciences Sigma Limited, former occupants of the 'premises' have mutually agreed upon a formula insofar as payment for partitioning and carpeting etc., is concerned and that there is no obligation whatsoever upon the Lessor to either party in this regard. It is recorded, however, that the Lessee shall take over from Computer Sciences Sigma Limited all existing partitions and carpeting on the premises and the Lessee shall be responsible for the erection of any new partitioning and or removal of any of the existing partitioning as may be necessary."

In clause 31 of the lease, plaintiff thus acknowledged that it did not own the partitioning installed by CSSL on the 11th floor and that defendant could remove

it and install new partitioning at defendant's own cost. The clause also made it clear that there was no obligation upon plaintiff to provide or pay for any partitioning required by defendant.

From the aforegoing it is clear, in my view, that the demountable partitions erected by CSSL on the 11th floor, as depicted on the plan, marked "Y", did not form part of the leased premises and that it was never the intention of the parties that defendant would lease the 11th floor as subdivided by these partitions. All that was let on this floor was the open space, with its outer limits or boundaries depicted on the plan marked "Y". Within those boundaries, defendant was free to place its own partitions in the way which best suited

its own needs, subject, of course, to defendant not thereby breaching any of the conditions of the lease or municipal by-laws.

I proceed to consider the nature and extent of the alterations which have been made. The undisputed evidence for defendant was that, after the commencement of its lease, it initially changed the partitioning on the 10th floor only. Although this was done without the plaintiff's prior written consent, the plaintiff at no stage objected. The 11th floor was originally intended by defendant for future expansion and the partitioning on that floor, which it took over from CSSL, was left intact. Apart from a minor change during 1979, which was effected at plaintiff's request, when defendant was asked to give

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up a portion of the 11th floor in favour of another tenant, it was only in 1981, when defendant decided to sublet its portion of the 11th floor, that the partitioning left by CSSL on the 11th floor was removed and other demountable partitioning installed by defendant to suit the needs of its subtenant. These changes led to the said letters of cancellation. In the letter dated 31 August 1981, it was alleged that the partitioning installed by defendant was of a permanent nature and that it substantially altered the "structure, form and identity" of the premises. At the trial it was conceded by counsel on behalf of plaintiff that the partitioning was not of a permanent nature, nor did it alter the structure of the premises.

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The demountable partitioning erected by defendant during 1981 on the 11th floor consisted of light material boarding, fitted to the acoustical ceiling and the floor by screws. The acoustical ceiling is a perforated type of fibre board which is suspended below the concrete. Hoff testified that the 11th floor, like other floors in a central core building, is constructed on a modular basis, so that the aircon= ditioning, lighting and power outlets are co-ordinated onto a square pattern in relation to the central core and the outside windows. As long as partitioning is placed on a module the power and other services are not interfered with. It is clear from Hoff's evidence that the partitioning in question does not interfere with any of the said services and that it can easily be removed with

hardly any trace. Hoff said that the holes left by the screws in the acoustical ceiling are not noticeable among the other random holes, and the holes left in the floor are covered by the carpet.

The partitioning erected by defendant on the 11th floor had the effect of creating five offices where there had previously been four, and creating a further office near the kitchen. Although the plan which depicts the changes in the demountable partitioning effected by defendant also shows that one door was removed and two new ones installed in the fire corridor, there is no evidence to show when, and by whom, these changes to the fire corridor were effected. It certainly cannot be assumed that they were brought about by defendant. No

mention was made of any changes in the fire corridor in the said letters of cancellation.

In construing the words "any alterations or additions" in clause 11 of the lease, it is clear that some limitation must be put upon these words. If the words were to be given their literal meaning, without any qualification, it would lead to absurd results and would just about render it impossible for defendant to carry on its business on the premises. It would mean, for example, that plaintiff's written consent would be required whenever defendant wanted to lay a new carpet or fit an electrical socket in the wall. It would also mean that plaintiff could defeat the whole scope and purpose of the central core, open plan design by withholding its consent

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to the erection of any internal demountable partitions. It seems to me that this would be an impossible construction.

The need to place a restrictive construction on clauses of this kind, has generally been recognised by the courts. In Bickmore v Dimmer, supra, it was held that the erection of an advertisement outside a watch-maker's shop (a large clock supported by iron stays bolted into one of the stones of the front wall) which had the effect that, in order to restore the structure to its former condition, it would not be sufficient to plug the holes but would require replacing the stone, was no breach of a clause in a lease prohibiting alterations without the lessor's consent. It was held that the word "alteration" must be limited to something which altered the

form or structure of the building.

In Joseph v London County Council (1914) 3 LT 276 it was held that the erection of an electric sign used for advertising, hung from the upper part of the building by steel bands fixed to the stonework of the building and supported by struts screwed into the wood-work of the windows, which could be removed in a few hours without damage to the fabric, was not a breach of a provision in a lease not to alter the elevation of the building. ASTBURY J held at p 277 that the prohibition referred to an alteration in the fabric of the building and not to an alteration in appearance caused by "temporary advertisements and frameworks which can be removed at any time, leaving the structure the same as before".

In White v Ryan (1932) IR 169 it was held, following the decision in Bickmore v Dimmer, that the introduction of trade fixtures and fittings which were necessary for the purpose of converting the premises for the carrying on of the tenant's business, and which *in no way damaged the premises or altered its form or* structure, fell outside a clause in the lease prohibiting any alterations in or additions to the premises without the written consent of the landlord. See also The Gresham Life Assurance Society Ltd. v Ranger (1899) 15 TLR 454 and Hyman v Rose (1912) AC 623 at 632.

A restrictive interpretation of the words "any structural alteration" in a lease, was also given in Less and Another v Bornstein and Another 1948(4) SA 333(C), SEARLE J holding (at p 339-340) that the

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words must be limited to alterations or additions which are permanent in nature and which alter the form or structure of the premises, as opposed to mere superficial or surface changes.

Returning to the present case, I find it unnecessary to determine the exact limitation to be placed upon the words "alterations or additions" in clause 11 of the lease. It is sufficient for present purposes to say that, having regard to the scope and purpose of the lease, the nature of the demountable partitioning in question, the non-permanent function it was intended to serve, the fact that it in no way changed the structure or form of the building and the fact that it could easily be removed without damage to the

building (these are all factors to be taken into account - the list is not exhaustive), the changes effected by defendant on the 11th floor of the building do not constitute such "alterations or additions". The defendant, accordingly, did not breach clause 11 by erecting the partitioning in question on the 11th floor of the building.

I am furthermore of the view that the plaintiff, in any event, expressly authorised the defendant in clause 13 of the lease to install the partitioning in question. That clause contains no time limit within which the new partitioning had to be installed. Nor is there any limitation imposed as to the nature or specifications of the new partitioning.

For these reasons I am of the view that plaintiff was not entitled to cancel the lease and that the Court

a quo correctly refused to grant the ejectment order.

The cross-appeal is dismissed with costs.

W. VIVIER, AJA.

KOTZé JA.)
MILLER JA.) Concur.
GALGUT AJA.)
ELOFF AJA.)