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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

PRITCHARD PROPERTIES (PROPRIETARY) LIMITED ..... Appellant

AND

BASIL KOULIS ..... Respondent

Coram: JANSEN, KOTZé, TRENGOVE, BOSHOFF, JJ A et CILLIé, A J A

Heard: 11 November 1985

Delivered: 2 December 1985

J U D G M E N T

CILLIé, A J A :

The respondent was the applicant in motion proceedings against the appellant in the Witwatersrand Local

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Division. The respondent applied for orders declaring the appellant's purported conversion of the long lease between the parties into a monthly tenancy as well as the appellant's notice to the respondent to vacate the leased premises, to be void and of no force or effect. In a counter-application the appellant applied for an order ejecting the respondent from the premises.

The declaratory orders were granted and the counter-application was dismissed with costs. (The judgment in this case is reported at 1984 (4) S A 327 (W)). On an application by the appellant leave to appeal to this Division was granted by the Court a quo.

At the hearing of the applications the following facts were common cause between the parties. In terms of a written contract the appellant was the lessor of

premises .... / 3

premises occupied by the respondent as lessee. This lease extended over a period of five years and was subject to renewal by the respondent. The respondent failed to pay the rent promptly on 1 October 1983 as he was obliged to do in terms of the contract; the rent was not paid until the fourth of the month. In a letter dated 5 October 1983 the appellant informed the respondent that the long lease was converted into a monthly tenancy and on 1 November he gave the respondent notice to vacate the premises by 1 December 1983.

In the Court a quo the issue between the parties was whether, in terms of clause 4 of their agreement, the appellant was obliged to give the respondent seven days' notice after the failure to pay the rent promptly, before

exercising .... / 4

exercising his rights to convert the lease and to give the respondent notice to vacate the premises. That was also the issue in this Court.

In reducing their contract to writing the parties used a printed form of four pages with spaces open for filling in necessary particulars. Apart from these particulars the document finally contained a number of additions as well as deletions of words and phrases. When the contract was signed by the parties all the particulars, additions and deletions were initialled.

The essential part of the relevant clause 4 of the contract is the following:

"4. If the Lessee fails to pay the rent or any other sum payable hereunder promptly on due date, or if the Lessee contravenes or permits the contravention of any one or more of the other conditions of the Lease and fails to remedy such ~~latter~~

breach .... / 5

breach within seven (7) days after the receipt of written notice calling upon him so to do (provided that the Lessor shall not be obliged, before exercising its right to cancel or vary the lease under this clause, to give such notice more than twice), or if the estate of the Lessee is placed under sequestration or in liquidation (whether provisional or final) or if the Lessee sustains a judgment of a competent court and fails to satisfy such judgment within seven (7) days, notwithstanding any previous waiver by the Lessor, the Lessor shall have the right, in addition to all other rights hereunder, (a) of declaring the Lessee to be subject to one month's notice by the Lessor and upon written notification to the Lessee to this effect this Lease shall immediately thereupon become terminable by the Lessor giving the Lessee one calender month's written notice terminating the same, but subject otherwise to the other provisions herein contained save for the cancellation of any option given to the Lessee herein; or (b) forthwith to terminate this Lease and of immediate re-entry and repossession of the premises, provided that the Lessee shall nevertheless remain liable for the payment of all rent and other monies that may or shall be owing under this Lease up to the date on which the Lessor regains possession of the premises, and also for all damages sustained by the Lessor by reasons of the Lessee's breach of contract. The Lessor may proceed by way of motion in any competent court to compel ejectment."

The only deletion from clause 4 was the last

word .... / 6

word of the fourth line in the quotation above, that is, the word between the words "such" and "breach". In his reference to this deletion the Judge a quo said:

> "This has been done by means of a manuscript horizontal line having been drawn through it. The word deleted is just visible, or at least is to be inferred as being 'latter'."

The crucial question was whether the Court should interpret the clause with or without reference to the word "latter" and its deletion. The Judge a quo decided that he should take into account the method and the result of the deletion, the word deleted and its meaning and also the inferences to be drawn from these factors. In the result he concluded that the parties intended by the deletion of the word that the provision for seven day's notice

after .... / 7

after a contravention of a condition of the lease, should also apply to the non-payment of rent on the due date. This finding resulted in the granting of the declaratory orders and the dismissal of the counter-application.

In his judgment the Judge a quo quoted from a paragraph in the speech of Lord Hagan in the House of Lords in the case of A J Inglis v John Buttery and Co. Appeal Cases 1877 - 1878 (3) 552 at p 571. I quote the same paragraph in full because it deals with problems and principles of construction which show a remarkable resemblance to the problems encountered in this case and to the principles which I think apply in our law. The paragraph reads:

> "With reference to the deleted words, it is of great importance to have it understood that there is no doubt on that point in the mind of any one of

your .... / 8

your Lordships. When those words were removed from the paper which had presented the full contract between the parties, they ceased to exist to all intents and purposes; and whether it was possible, as in point of fact it was, still to read them, in consequence of their simply having a line drawn through them, or whether they had been absolutely obliterated, appears to me not to make the smallest difference. The contract was complete after the deletion. The parties had had a confluence of will and purpose, and had come to an identity of decision, and the removal of the words took away from it any sort of qualification or condition which might have been previously introduced into it by them. It appears to me that if we yielded to the extremely able argument which was addressed to us on behalf of the Respondents, we should fall into the error, which has been forcibly denounced on both sides, of attempting to construe a contract, perfect in itself, by acts antecedent to it. The only effect of submitting the deleted words to the consideration of your Lordships would have been to shew what had been in the contemplation of the parties before the contract came to be completed. Such evidence appears to me to be inadmissible, and all the more so for this reason:- If the words were to be allowed to affect the minds of your Lordships in deciding the case, then, had they been obliterated altogether, you must of necessity have permitted that

secondary .... / 9

secondary evidence should be given of them. Now, that manifestly could not be done. There is no authority for it, and it is contrary to reason and principle. Therefore the deleted words will be very properly excluded from the grounds of your Lordships' decision."

After quoting this and other cases indicating a similar approach to the problems of this case, the learned Judge a quo says:

"There is a line of cases, however, to the opposite effect."

Among the cases then quoted there appears to be no binding South African authority and the learned Judge, in my view erroneously, followed the other "line of cases". Apparently the learned Judge came to the conclusion that the clause was capable of construction as it stood and that it could be construed in favour of the lessor, that is, that

he .... / 10

he was not obliged to give the lessee seven days' notice before converting the lease and terminating the contract. If this was his final view, I would have agreed with him. I am, however, not in agreement with his finding that, by reason of the deletion, he could draw an inference which led to a different conclusion.

Dealing with the word "latter" and its deletion the Judge a quo said:

> "I consider that regard can and should be had to it in interpreting clause 4 which, read in the light of the deletion, I find sufficiently ambiguous as to warrant and require this to be done. This may sound like creating an ambiguity where none exists in order to resolve it. I do not think so. The deletion is a fact of life immediately apparent to the reader of the document. To ignore it would be do adopt an ostrich-like attitude in conflict with principle (v) referred to earlier."

The .... / 11

The principle referred to by the learned Judge is:

"(v) In any event, circumstances emerging from the writing itself must at least be construed."

In my view the clear and uncontradicted circumstance which emerges from the writing itself is that the parties by their deletion of the word and their initialling of the deletion indicated unequivocally that the word deleted was to form no part of this contract and that the clause should be so construed. To draw any further inference from the word and its deletion would be erroneous. The fact that the word could still be deciphered cannot affect the clear and unmistakable indication of the parties' agreement and intention, namely that the word had been expunged and forms no part of the contract.

The next step in the interpretation of clause 4 is to consider it as part of the whole written contract.

In Swart en 'n Ander v Cape Fabrix (Pty) Ltd, 1979 (1) S A 195 (A) this step is described as follows by

Rumpff, C J .... / 12

Rumpff C J at p 202 B - C:

> "Wat natuurlik aanvaar moet word, is dat, wanneer die betekenis van woorde in 'n kontrak bepaal moet word, die woorde onmoontlik uitgeknip en op 'n skoon stuk papier geplak kan word en dan beoordeel moet word om die betekenis daarvan te bepaal. Dit is vir my vanselfsprekend dat 'n mens na die betrokke woorde moet kyk met inagneming van die aard en opset van die kontrak en na die samehang van die woorde in die kontrak as geheel."

It is only when the clause, considered in the light of the complete contract of which it is part, is ambiguous or cannot be construed that the Court may consider evidence of surrounding circumstances. Schreiner J A said the following in Delmas Milling Co Ltd v. Du Plessis, 1955 (3) S A 447 at p 454 F.

> "Where although there is difficulty, perhaps serious difficulty, in interpretation but it can nevertheless be cleared up by linguistic treatment this must be done .... If the difficulty cannot be cleared up

with .... / 13

with sufficient certainty by studying the language, recourse may be had to 'surrounding circumstances' i.e. matters that were probably present to the minds of the parties when they contracted (but not actual negotiations and similar statements). It is commonly said that the Court is entitled to be informed of all such circumstances in all cases (cf. Richter's case supra at page 69; Garlick v. Smartt and Another, 1928 A.D. 82 at p. 87; Cairns (Pty.) Ltd. v. Playdon & Co. Ltd., supra at p. 125). But this does not mean that if sufficient certainty as to the meaning can be gathered from the language alone it is nevertheless permissible to reach a different result by drawing inferences from the surrounding circumstances. Whether there is sufficient certainty in the language of even very badly drafted contracts to make it unnecessary and therefore wrong to draw inferences from the surrounding circumstances is a matter of individual judicial opinion on each case."

See also Wessels J A in Van Rensburg en Andere v Taute en Andere, 1975 (1) S A 279 at p 303 A.

When clause 4 is considered as part of the complete contract it seems to me to be unambiguous and

certain .... / 14

certain as well as reasonably capable of interpretation. It can be construed without seeking aid from circumstances outside the written contract and without relying on inferences to be drawn from the fact of the deletion and meaning of the word "latter".

In terms of clause 4 certain occurrences are divided into four separate groups. The first is the lessor's failure to pay on due date "the rent or any other sum payable" in terms of the contract. The second is if the lessor "contravenes or permits the contravention" of other terms of the contract. The third is if the lessee "is placed under sequestration or in liquidation (whether provisional or final)." The fourth is the lessee's failure to satisfy a judgment against him by a competent court. These groups are, in my

view .... / 15

view, independant and separate from one another for the following reasons.

The description of the four groups all start with the word "if" in the first case and "or if" for the three other groups. They are separated by commas, except for the last two which can, in any event, not be confused with each other.

Although the first two groups are both related to breaches of the contract it is important that the first group refers only to amounts which have to be paid on a determined "due date", while the second group refers to breaches of "any one or more of the other conditions of the lease". In my view this description with the words "other conditions" excludes breaches where a due date of performance

had ..... / 16

had been fixed. This conclusion is emphasized by the fact that in the case of a breach in the second group provision is made for a notice giving a period of seven days to remedy "such breach".

Thirdly, if any one of the groups is removed from the group of four the truncated clause would still be capable of a reasonable interpretation which will not, in respect of any of the remaining groups, differ from the interpretation given to them in the complete clause. In my view this indicates that it was intended that the four groups were to be separate and independent.

Finally, it is an important feature of the grouping of occurrences that each group contains either in the grouping itself, or in the rest of the contract, its

own .... / 17

own provisions for the time to elapse (if any) after the occurrences and before the lessee may exercise his right to convert the contract and terminate the lease. The position of each group will be considered separately.

As far as the first group is concerned the first occurrence is when the lessee fails to pay the rent "promptly on due date". What the due date is, appears from clause 3 of the contract. That clause provides that the rent shall be "payable in advance on the first day of each month". It is also provided that payment of the rent shall be made at the office of the lessor's agent.

In respect of a failure by the lessee to pay "any other sum payable hereunder promptly on due date" reference should be made to clause 15(2) of the contract.

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The clause provides that the lessee shall pay an amount to the lessor each month for the electricity, water and gas used by him. The amount is to be calculated by the lessor and it is provided that

> "Electricity, water and gas consumption accounts .... shall be payable on presentation."

Clause 25(1) of the agreement deals inter alia with services rendered by the lessor to the lessee such as the cleaning of the building. In paragraph (2) of the clause reference is made to a certificate by the lessor's agents or auditors of the amount due by the lessee. Paragraph (3) reads as follows:

> "Any amount due by the Lessee to the Lessor in terms of paragraph (1) hereof shall be payable within 7 (seven) days after delivery to the Lessee of a written notice advising the Lessee thereof or in the event of a dispute arising, shall be payable within 7 (seven) days after the delivery to the Lessee of the certificate

referred .... / 19

referred to in paragraph (2) hereof."

In these instances the parties agreed on a definite or ascertainable time of payment.

The second group contains the contraventions, or permission to contravene, "other conditions" of the contract. The lessor may convert the long lease and terminate the resulting lease if the lessee

> "fails to remedy such breach within 7 (seven) days after the receipt of written notice calling upon him to do so."

This group therefore contains its own provisions relating to the time which must elapse before the lessor may exercise his rights of conversion and termination. It is not necessary to deal with the reason why notice should be given in these cases: it may be mentioned, though, that notice

would .... / 20

would only be fair to the lessee because it is possible that he may unwittingly be contravening a condition or he may be unaware of a breach by one of his employees in circumstances in which he may be regarded as having permitted the contravention.

Reference is made in conclusion to the third and fourth groups although they are not concerned with payments of money or breaches of contract, but because in both cases the time when the lessor may exercise his rights are contained in the description of the group. In the third case the lessor may act as soon as the order for the lessee's provisional or final sequestration is made. In the second group the lessor can convert or terminate the contract if the lessee does not satisfy the judgment against him within

seven .... / 21

seven days.

The parties provided meticulously for the times of payment of certain sums which would become payable by the lessee to the lessor. It seems in a high degree unlikely that the lessor would then, in general terms, give the defaulting lessee an extention of seven days to pay amounts already due in terms of the agreement. There is no indication in the contract that the clear and distinct stipulations applying to one specific group of events with reference to payments of amounts and the result of non-payment or late payment, are to be affected by provisions logically applicable to another distinct group of events.

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In the light of these considerations I have come to the conclusion that the issue must be resolved in favour of the appellant. Clause 4 of the contract as construed above does not require the lessor to give the lessee who has failed to pay the rent promptly on due date, seven days notice to pay before

> "declaring the lease to be subject to one month's notice by the lessor"

and to give such notice. In the Court a quo, therefore, the application for the declaratory orders should have been refused and the counter-application for ejectment should have been granted.

The appeal is allowed with costs and the order of the Court a quo is altered to read:

1. .... / 23

1. The application is dismissed with costs.

2. The counter-application succeeds and orders are made in terms of paragraphs 1 and 2 of the Notice of Counter-Application.

P M CILLIé, A J A

TRENGOVE, J A concurs.