184/91

Case No 195/90

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

GENAC PROPERTIES JHB (PTY) LIMITED Appellant

and

NBC ADMINISTRATORS CC Respondent
(Previously NBC ADMINISTRATORS (PTY) LIMITED)

CORAM: BOTHA, HEFER, MILNE, VAN DEN HEEVER, JJA et NICHOLAS, AJA

HEARD: 12 November 1991

DELIVERED: 29 November 1991

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J U D G M E N T

NICHOLAS, AJA.....

NICHOLAS, AJA,

This appeal concerns the interpretation of a clause in an agreement of lease. The parties were Genac Properties Jhb (Pty) Ltd (a company in the General Accident group) as "the landlord" and NBC Administrators (Pty) Ltd (since re-named NBC Administrators CC) as "the tenant". The leased premises consisted of the total lettable area on the second floor of General Building, 110 Jorissen Street, Johannesburg. Clause 3 which was headed "PERIOD OF LEASE" provided that it should commence on 1 January 1986 and terminate on 31 December 1990. Clause 5 which was headed "RENTAL" stated that the "rental in respect of the premises shall be as set out in the table below", which provided for rentals increasing from R7 018,00 in the first year to R9 906,70 in the last year of the lease. The rental was payable monthly in advance to the landlord

at 8th Floor, General Building.

Clause 6 in Part B of the lease reads as follows:-

"6. MAINTENANCE AND RUNNING EXPENSES

6.1 For the purposes of this clause "The landlord's maintenance and running expenses" means the aggregate of all the landlord's actual and reasonable maintenance and running expenses, after the recovery of such expenses from tenants in the building, in respect of the property and the building in each of the financial years of the landlord, including, without limiting the generality of the aforegoing, the assessment rates payable in respect of the building and/or the property; any levies of whatever nature imposed in respect of the ownership of immovable property or the improvements erected thereon; the salaries and wages of the landlord's employees in or about or in connection with the building and/or the property, including, without limiting the generality of the aforegoing, security guards, cleaners, parking garage attendants and manager/supervisor/superintendent; the cost to the landlord of cleaning the building (whether contractual, statutory or otherwise); the premiums payable by the landlord in respect of the insurance of all

risks normally covered by owners of immovable property, including loss of rent, public liability and political riot cover on, in connection with or relating to the building for a total cover as the landlord may reasonably determine; the landlord's costs of maintaining and/or servicing the lifts and/or air conditioning in the building; the costs of electricity consumed on the property and in the building which is not contractually recoverable from tenants; the cost of water consumed on the property and in the building; an amount not exceeding 5% of the aggregate of all of the aforegoing expenses and costs.

6.2 With effect from the commencement date the tenant shall pay monthly in advance an amount equal to 11.3% of the landlord's estimate of the monthly maintenance and running expenses for each of the landlord's financial years as notified by the landlord to the tenant from time to time, it being recorded that the tenant's share of the estimated monthly maintenance and running expenses at the date of signature hereof is R1,50 per $m^2$ per month and that such amount shall be payable pending any variation thereof by the landlord.

6.3 Within a reasonable period after the end of each financial year of the landlord, the landlord shall determine the maintenance

and running expenses for that financial year and within thirty days after notice thereof has been furnished to the tenant, the tenant shall pay to the landlord any shortfall between the amounts paid by the tenant on account of such maintenance and running expenses and the tenant's shares of such expenses, and vice versa.

6.4 .....

6.5 .....

6.6 ....."

On 15 April 1987 the landlord issued a summons against the tenant out of the Witwatersrand Local Division in which it made various claims including claims for "maintenance and running expenses as defined in the agreement of lease". Further claims were later added by amendment. They included a claim for damages alleged to have been suffered as a result of the tenant's repudiation of the lease in December 1987.

In para 2(b) of its plea the tenant asserted -

"2(b) The lease is void for vagueness in that,

(i) the identity of the tenant;

(ii) the premises leased;

(iii) the plaintiff's maintenance and running expenses as defined in clause 6.1; and

(iv) the defendant's share of the plaintiff's maintenance and running expenses payable in terms of clause 6.3,

cannot be determined with reasonable certainty."

At the pre-trial conference it was agreed that:-

"3(a) The only issue to be decided by the Court is whether the lease is enforceable as contended for by the Plaintiff or whether it is void for vagueness and invalid as contended for by the Defendant in paragraph 3(b) **(sic)** of its plea."

Agreement was also reached on the amount to be awarded to the landlord if it should be found by the court that the lease was valid and enforceable. It was agreed finally that the original lease would be made available to the court at the trial and that no evidence would be led by either party. At the hearing the issues were still

further limited to those raised in paragraph 2(b)(iii) and 2(b)(iv) of the plea.

In his judgment the learned judge **a quo** held **inter alia** that -

> "... if the provisions of clause 6 are regarded as provisions relating to the payment of rental ... these provisions and the whole lease are invalid."

He made an order dismissing the landlord's claims with costs, including the costs of two counsel. The landlord now appeals with the leave of the trial court.

Counsel for the tenant summarized his submissions in the first paragraph of his heads of argument:

> "1. It is submitted that clauses 6.1 and 6.3 of the lease are void for vagueness in that the quantification of the individual expenses enumerated in clause 6.1 [is] left entirely in the air and cannot be determined with reasonable certainty. In addition the amount of such expenses in the final analysis is left to the lessor for it is the lessor which determines 'in its sole discretion'...precisely which expenses will be incurred and whether or not the lessor

> acts alone or with third parties with which it deals, the lessee has absolutely no say in the selection of such third parties or the eventual amount of the expenses to be incurred."

Clause 6.1 is a definition clause. It defines "the landlord's maintenance and running expenses" as meaning -

> "... the aggregate of all the landlord's actual and reasonable maintenance and running expenses ... in respect of the property and the building in each of the financial years of the landlord..."

There follow, "without limiting the generality of the aforegoing", eight specific categories of expenses. The list ends with a ninth item - "an amount not exceeding 5% of the aggregate of all the aforegoing expenses and costs" - which is not itself a category of expenses, but is in the nature of a surcharge.

Clause 6.2 provides for monthly payments in respect of the landlord's maintenance and running expenses

equal to 11.3% of the landlord's estimate of the monthly maintenance and running expenses in respect of the property and the building for each financial year as notified by the landlord to the tenant from time to time. These are provisional payments which are subject to adjustment under clause 6.3.

In terms of clause 6.3 the landlord is required to determine the actual maintenance and running expenses for each financial year, as defined in clause 6.1, and to give notice to the tenant of such determination. The tenant must then pay to the landlord any shortfall between the actual and estimated expenses, or the landlord must pay to the tenant any excess of the estimated expenses over the actual expenses, as the case may be.

It is basic to the tenant's argument that the amounts payable in terms of clause 6 constitute rent. This was contested by counsel for the landlord. He

pointed to the fact that the parties had dealt with rental in clause 5 of the lease. In my opinion, however, the answer depends not on what the parties chose in their contract to call rental, but on whether the amounts payable by the tenant in terms of clause 6 are rent within the legal meaning of the word.

COOPER, **The South African Law of Landlord and Tenant**, p.37, gives the following definition:

> "Rent, **merces**, is the consideration which the parties agree the lessee shall give the lessor for the use and enjoyment of the property let."

This accords with judicial definitions. "Rent is a **quid pro quo** paid by the lessee for the use of the article let." (**Neebe v Registrar of Mining Rights** 1902 TS 65 at p.86 per WESSELS J; see also **Uitenhage Divisional Council v Port Elizabeth Municipality** 1944 EDL 1 at p.10). "Die woord 'huurgeld' (rent) het 'n bepaalde betekenis. Dit is die vergoeding of beloning wat 'n huurder aan 'n verhuurder

betaal of gee vir die gebruik van die verhuurde eiendom." (**Nelson v Botha** 1960(1) SA 39(0) at p.44 B-C per DE VILLIERS J.)

Usually, a lease provides for rent in one specified amount. In arriving at that amount, the lessor ordinarily takes into account his required return on capital invested and the expenses to be incurred. There is, however, no reason why instead of a provision for rent in a specific amount, the parties should not agree on a dichotomy into separate components.

I am inclined to think that that is what was done in the present lease. Clause 6 deals with the expenses component and Clause 5 deals with "rental." Together they constitute the **quid pro quo** for the use and enjoyment of the property let. It is not necessary, however, to express a firm opinion on this point, and I shall assume, in favour of the tenant and against the landlord, that the

amounts payable by the tenant under clause 6 are a component of the rent.

It is a general principle of the law of contract that contractual obligations must be defined or ascertainable, not vague and uncertain. Cf **Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Limited** 1986(2) SA 555(A) at 574 D-E.

More specifically, there can be no valid contract of sale, unless the parties have agreed, expressly or by implication, upon a purchase price.

> "They may do so by fixing the amount of the price in their contract or they may agree upon some external standard by the application whereof it will be possible to determine the price without further reference to them. There can be no valid contract of sale if the parties have agreed that the price is to be fixed in future by one of them." (**ibid** B-C per CORBETT JA).

In **Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd** 1991(1) SA 508(A) HOEXTER JA said at 514 G-H.

> "It is no doubt a general principle of the law of

> obligations that, when it depends entirely on the will of a party to an alleged contract to determine the extent of the prestation of either party, the purported contract is void for vagueness. Obvious examples of the application of the principles are afforded by the law of sale. If, for example, it is left to one of the parties to fix the price the contract is bad."

It was held by the full bench of the Transvaal Provincial Division in **Erasmus v Arcade Electric** 1962(3) SA 418(T) that a contract to sell for a reasonable price is invalid (see p.419G-420B). There is, however, no unanimity on the point. Differing views have been expressed in decided cases, and in text-books on the law of sale and other academic writings. See for example MACKEURTAN, **Sale of Goods in South Africa** 5th ed p.18 ("The law on the point cannot be regarded as settled"); and KERR, **The Law of Sale and Lease,** p.27 ("Whether or not the formula 'a reasonable price' is acceptable is debatable.")

The learned judge **a quo** conceived that he was bound by **Erasmus v Arcade Electric.** He went on to deal

with the application of the principle to contracts of lease. He said that "the Roman-Dutch authorities treat the need for certainty (which includes **certum est quod certum reddi potest**) about the rental in leases in the same way as the need for certainty about the price in sales", and concluded that "the rule in regard to certainty of the rental in contracts of lease is as strict as the rule in regard to the certainty of price in contracts of sale..."

There is no general agreement that a lease for a reasonable rent is invalid. The question is moot. See the discussions by KERR, **op cit** at pp.174-176, and COOPER, **op cit**, p.51.

It is difficult to see on what principle a sale for a reasonable price, or a lease for a reasonable rent, should be regarded as invalid. MYBURGH J said in **Adcorp Spares PE Ltd v Hydromulch Ltd** 1972(3) SA 663(T) at 668 F-G that in his view an agreement to pay a fair and reasonable

price was too uncertain to give rise to a valid contract of sale, and he posed a series of questions:-

> "What is the true meaning of a fair and reasonable price? Who must determine it? How is it to be calculated? These are all questions which in the ultimate result will depend on the opinion of some undetermined person or persons. What is to happen if they differ? ..."

But as Professor Zeffert pointed out in a note ("Sales at a Reasonable Price") in (1973) 90 SALJ 113.-

> "While it is clear law that the price will not be certain if it has either to be fixed by the parties themselves in the future, or by an unnamed third party, ... it does not follow that there cannot be a sale at a reasonable price: that which can be reduced to certainty is certain and an agreement to pay a reasonable price may be capable of being reduced to certainty if the court is able to determine what is reasonable in the circumstances of a particular agreement."

There is authority in this court for the view that where there is an agreement to do work for remuneration and the amount thereof is not specified, the law itself provides that it should be reasonable. See **Chamotte (Pty) Ltd v**

**Carl Coetzee (Pty) Ltd** 1973(1) SA 644(A)at p.649 C-D, citing **inter alia Middleton v Carr** 1949(2) SA 374(A). See also **Inkin v Borehole Drillers** 1949(2) SA 366(A). In other jurisdictions it is not considered that a contract of sale for a reasonable price is too vague to be enforced. Sec 8(2) of the English **Sale of Goods** Act 1979 states that where the price is not determined as mentioned in sec 8(1) the buyer must pay a reasonable price; and what is a reasonable price is a question of fact dependent on the circumstances of each particular case. This was also the rule at common law. (**Benjamin's Sale of Goods.**, 3rd ed. para 179). And in the United States of America it is stated in **Corbin on Contracts** (para 99) that an agreement to pay a "reasonable price" is sufficiently definite for enforcement.

It is not, however, necessary to decide the question in this appeal. The reason is that Clause 6 does

not provide for payment by the tenant of a reasonable amount in respect of the landlord's maintenance and running expenses. The word "reasonable" is used in relation to the actual expenses, and its use in that context does not create uncertainty. The actual expenses are readily ascertainable from the landlord's financial records. Whether they are reasonable is also capable of objective ascertainment. The cases are legion in which awards for damages have included medical expenses reasonably incurred by the plaintiff as a result of physical injury. See CORBETT and BUCHANAN, **The Quantum of Damages**, Vol 1 pp.37-38. And where a claim includes the cost of repairing damage caused to a motor car,

> "The wrongdoer is required to pay for the repairs which are rendered necessary in consequence of the damage and it follows, I think, that the plaintiff must prove not only what repairs are necessary but what the reasonable cost of effecting them would be..."

(**Scrooby v Engelbrecht** 1940 TPD 100 at p.102 per

RAMSBOTTOM J). In such cases the courts have experienced no difficulty in applying the concept of a reasonable cost.

It was argued on behalf of the tenant that Clause 6 was invalid on another ground, namely that it left the determination of the amount payable to the discretion of the landlord. The learned trial judge agreed. He said that an analysis of Clause 6.1 showed that, provided expenses were actually and reasonably incurred, the lessor could without reference to the tenant determine the amounts recoverable under Clause 6. The question, which he regarded as crucial, was whether this feature invalidated the lease. He considered that it did -

> "Thus, whether one concludes that the lessor is ultimately free to determine the amount of the maintenance and running expenses, or that the lessor determines the said amount together with a third party or third parties whom he, without the consent of the lessee, selects, the result is that legally there is no valid determination of the rental."

It is a truism that the nature and amount of the expenses incurred in carrying on a business are determined by the person who operates it. See **Port Elizabeth Electric Tramway Co v C.I.R.** 1936 CPD 241: "...businesses are conducted by different persons in different ways" (at p.245); "...one man may conduct his business inefficiently or extravagantly, actually incurring expenses which another man does not incur..." (at p.244).

This, however, has nothing to do with the validity of the lease. It is question-begging to say that provided the expenses are actually and reasonably incurred, the landlord can without reference to the tenant determine the amounts recoverable under Clause 6. The first qualification is that the expenses should be actually incurred. The amount of these, it is true, is within the control of the landlord. The second qualification is that such expenses should be reasonable - reasonable, that is,

in relation to both the nature of the expenses and their amount. That is something which is to be objectively ascertained and is not subject to the will or whim of the landlord. It is therefore wrong to say that under Clause 6 the landlord determines the amount of the expenses.

The last submission on behalf of the tenant was that the final item in Clause 6.1 (which provided for the addition of "an amount not exceeding 5% of the aggregate of all the aforegoing expenses and costs") left the determination of the ultimate amount of the expenses component to the discretion of the landlord. This discretion he could exercise "capriciously without reference to any ascertainable factors or to an external standard" and the clause was in consequence invalid.

The contrary argument by counsel for the landlord was that on a proper construction the final item meant that the agreed rate for the surcharge was 5%, but that

the landlord was free to apply a lower percentage if he wished.

If the item is reasonably capable of the interpretation contended for by the landlord's counsel, that interpretation is to be preferred to one which would render the lease invalid. See **Soteriou v Retco Poyntons (Pty) Ltd** 1985(2) SA 922(A) at 931 G-H, where it was said:

> "The Courts are 'reluctant to hold void for uncertainty any provision that was intended to have legal effect', (**Brown v Gould** 1972 Ch 53 at 56-58). LORD TOMLIN said in **Hillas & Co Ltd v Arcos Ltd** 1932 All ER Rep 494 (HL) at 499 H-I that:
>
> > '... the problem for a Court of construction must always be so to balance matters that, without the violation of essential principles, the dealings of men may as far as possible be treated as effective, and that the law may not incur the reproach of being a destroyer of bargains.'..."

Adopting this approach, I consider that the construction urged by the landlord's counsel is to be preferred (Cf.

**Public Carriers Association and Others, v Toll Road Concessionaries (Pty) Ltd and Others** 1990(1) SA 925(A) at 953).

My conclusion is that the lease is valid and enforceable. Consequently effect should be given to para 3(b) of the minutes of the pre-trial conference -

> "3(b) It was recorded that the parties agree that if the Court should find that the lease is valid and enforceable then the Plaintiff is entitled to judgment against the Defendant in the sum of R120 000,00 in respect of Plaintiff's various claims. This amount shall be fixed and no further interest shall accrue thereon. In the event, however, of Plaintiff obtaining judgment against the Defendant, Plaintiff will be entitled to interest on the amount of R94 665,59 calculated at the rate of interest prescribed in terms of the Prescribed Rate of Interest Act 55 of 1975 from date of judgment to date of payment".

The appeal is upheld with costs including the costs following upon the employment of two counsel. The order made by the court **a quo** is set aside and there is

substituted therefor -

"Judgment for the plaintiff for -

a) Payment of the sum of R120 000,00;

b) Interest on the amount of R94 665,59 calculated at the rate of interest prescribed in terms of the Prescribed Rate of Interest Act 55 of 1975 from date of judgment to date of payment.

c) Costs including the costs of two counsel."

H C NICHOLAS AJA

BOTHA, JA )
HEFER, JA ) Concur
MILNE, JA )
VAN DEN HEEVER, JA )