Case No 386/92

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

O.K. BAZAARS (1929) LIMITED Appellant

and

GROSVENOR BUILDINGS (PTY) LIMITED First Respondent

B & K PROPERTIES (PTY) LIMITED Second Respondent

CORAM: E M GROSSKOPF, MILNE, F H GROSSKOPF, JJA et

HOWIE, VAN COLLER, AJJA

HEARD: 16 March 1993

DELIVERED: 1 April 1993

J U D G M

E N T E M GROSSKOPF, JA

This is an appeal from a judgment of MacArthur J in the Witwatersrand Local Division in which he ordered the appellant to pay rental in terms of a written lease. The issue between the parties was whether the lease had been lawfully cancelled. The court a quo held that it had not. The relevant facts are as follows.

On 21 March 1983 the appellant ("the tenant") hired a building from the respondents ("the landlord") in terms of a written lease for twenty years. The rental for the first year was a fixed sum per month. During the second to the fifth years the rental escalated at ten per cent per year. In the sixth and seventh years the escalation was 6,25 per cent per year. The rental for the eighth year was not fixed. In respect of that year the following provisions applied:

> "3.2 In the eighth year of this lease the rental payable shall be the market rental ascertained as provided hereunder or 125% of that payable in the last month of the seventh year, whichever is the lesser, provided that in no

circumstances shall the rental be less than that payable in the last month of the seventh year of the lease. 3.3 The market rental shall be ascertained as follows, namely -3.3.1 During the sixth month prior to the commencement of the eighth year the landlord and tenant shall endeavour to fix by agreement the monthly rental payable during the eighth year of the lease. If they are unable to agree each shall within the next month nominate a commercial property valuer practising as such in Johannesburg and the two said valuers shall then determine the said revised rental. If they are unable to agree they shall appoint a third such valuer to act as umpire and if they are unable to agree on an umpire the umpire shall be nominated by the President of the S.A. Institute of Valuers or his nominee and failing that appointment the matter will be referred to arbitration under the arbitration laws then in force in the Republic of South Africa. 3.32 If a party refuses to negotiate in the sixth month it shall lose its right to nominate a valuer or fails to nominate its valuer in the following month, the monthly rental in the eighth year shall be 125% of that payable in the last month of the seventh year of the lease. 3.3.3 If one party's valuer fails to nominate an umpire within seven days of being required so to do the monthly rental in the eighth year of the lease shall be that fixed by the other party's valuer not being more than the aforesaid maximum figure."

The eighth year would have commenced on 1 July 1990. On 7 December 1989 the landlord wrote to the tenant as follows:

> "Your attention is directed to Clause Number 3 of the Agreement of Lease, in terms of which a review of the rental for the period commencing 1 July 1990 falls due.
> Notwithstanding that inflation over the last 7 (seven) years has been in excess of 14% per annum and that rentals have escalated substantially during the past 4 (four) years, we are prepared to accept a 25% increase in the rental to R142 505,00 (ONE HUNDRED AND FORTY TWO THOUSAND FIVE HUNDERD AND FIVE RAND) per month commencing 1 July 1990.
>
> For both parties to obtain valuations and to appoint Arbitrators, will be time consuming and no doubt the end result will be the 25% increase which is the maximum permissible in terms of the Agreement of Lease. We look forward to your early comments."

A propos of this letter a meeting was held between the parties. The tenant's attitude, as confirmed in its letter of 28 December 1989, was that the market rental was much lower than that suggested by the landlord. The tenant considered that the monthly rental for the eighth year should

be the same as that payable in the last month of the seventh year, i e, that there should be no escalation.

The landlord replied on 19 January 1990. It commenced by saying: "The 25% increase due to ourselves, after seven years, is not negotiable". Thereafter the letter set out various reasons for considering that a substantial increase was justified. It concluded as follows:

> "We do believe that we will have very little difficulty in obtaining one or more reputable valuers to support our rental of R322 000,00 or thereabout. We believe you will have extreme difficulty in obtaining a reputable valuer to support your rental of R109 289,00. We repeat that the 25% increase is not negotiable. We are not being hard, difficult or unreasonable. We are merely taking into account all the concessions that are already included in the lease, the present market rental of which you are presently paying only one third, and the 'cheap' rental of R3, 91 per square metre that you are presently paying which is less than we are receiving for 5th rate industrial properties in rural areas.
> In conclusion, we beg you to allow 'common sense' to prevail and to save us both considerable unnecessary expense."

The tenant replied to this letter on 26 January

1990 expressing a willingness to negotiate further, but stating that further negotiations were not likely to result in agreement during the sixth month. The next step would therefore be the appointment of valuers and the tenant said that it would let the landlord know the name of its valuer in due course. The landlord replied as follows on 31 January 1990:

> "We acknowledge receipt of your Telefax dated 26 January 1990 and can only repeat the contents of our letter dated 19 January 1990. In the circumstances negotiations have come to a dead end."

On 8 February 1990 the tenant appointed its valuer. The landlord declined to appoint a valuer, and wrote to the tenant on 5 March 1990 to advise that the monthly rental as from 1 July 1990 would be R142 505, which represents a 25 per cent increase.

On 4 May 1990 the tenant replied to this letter inter alia as follows:

> "As you know, the lease was conditional upon the determination of the rent for the 8th year, in accordance with the special procedure prescribed in

> clause 3.3. You have prevented that rent from being determined by your failure to appoint a valuer in breach of your obligations in clause 3.3. We are accordingly entitled to terminate the lease with effect from the end of the 7th year, which will be 30th June, 1990, and to claim from you any damages which we suffer. We are now exercising that right of termination. So far as we are concerned the lease will terminate on that date."

After considering its position, the landlord wrote on 21 May 1990 through its attorneys. Its main contention is set out in paragraph 3.1 of the letter which reads as follows:

> "3.1 Clause 3.3.2 of the lease is clear and unambiguous and provides that: 'if a party ... fails to nominate its valuer in the following month, the monthly rental in the 8th year shall be 125% of that payable in the last month of the 7th year of the lease'. Accordingly in terms of clause 3.3.2 of the lease the monthly rental for the 8th year shall be 125% of that payable in the last month of the 7th year of the lease."

The letter further denies that the tenant had any right to cancel the lease. Without prejudice the landlord however offered to appoint a valuer. The tenant was not prepared to accept this offer, and wrote back on 30 May 1990

through its attorneys saying that as far as it was concerned, the lease had been terminated. Further correspondence between the parties is not material for present purposes.

In due course the landlord issued a notice of motion claiming payment of rental for the months of July to October 1990. Its case was based on the contract. It denied that the contract had been validly cancelled. The tenant filed an opposing affidavit, contending that the landlord's insistence on an incorrect interpretation of clause 3.3.2 of the contract had amounted to a repudiation of the contract which the tenant had accepted. In support of its case it relied on an interpretation of the contract. In the alternative the tenant contended that the contract should be rectified. The landlord filed a replying affidavit. As stated above, the court a quo gave judgment in favour of the landlord.

It will be necessary at a later stage to refer in some more detail to the contents of the affidavits as well as

to steps taken to resolve disputes of facts on the papers. It will be convenient, however, first to deal with the interpretation of clauses 3.2 and 3.3.

Clause 3.2 is clear and unambiguous. It provides that, in the eighth year, the rental payable "shall be the market rental ascertained as provided hereunder". The clause further provides a maximum (125% of that payable in the previous month) and a minimum (the rental payable in the previous month). Thus, in short, the rental in the eighth year is to be the market rental, subject to a maximum and a minimum.

Clause 3.3 is the provision laying down how the market rental is to be ascertained. In terms of clause 3.3.1 the parties must first try to reach agreement. If they fail to reach agreement "each shall ... nominate a commercial property valuer". The two valuers "shall then determine the ... revised rental". If they disagree they "shall appoint a third ... valuer to act as umpire". There are various

possibilities if they are unable to agree on an umpire. Failing all else the matter will be referred to arbitration.

Up to this stage the clauses present no problems. The tenant is to pay a market rental which is to be determined, subject to a maximum and a minimum, by agreement, and failing that by a determination by two valuers, with or without an umpire, and, if all else fails, by arbitration.

The difficulty in this case arises from clause 3.3.2. In so far as it is relevant for present purposes, the clause provides that if a "party" fails to nominate a valuer, the monthly rental in the eighth year "shall be 125 per cent of that payable" in the previous year. Taken literally, a "party" may be either the landlord or the tenant. If this literal meaning is correct, the position would be that if the landlord failed to nominate a valuer, it would automatically become entitled to the maximum rental which the valuers could have determined had they been appointed. In effect this means that if the landlord wants to get the maximum laid down in

the clause he must simply refuse to appoint a valuer. This is precisely what happened in this case. Indeed it is the landlord's contention that this is the true meaning of the contract. The intention was, it is alleged, that the landlord would be entitled in the eighth year to an escalation of 25 per cent.

This contention seems to me to be wholly at variance with the contract as a whole. The provisions which I have discussed above render it abundantly clear that, in the eighth year, the tenant would pay a market rental ascertained in terms of the contract, and that there would not be a fixed escalation as in the previous years. If the parties had intended an automatic escalation of 25 per cent, they would have said so, as they did with respect to previous years. There would then have been no need for any of the provisions relating to a market rental and its manner of ascertainment. Of course, even if a 25 per cent escalation had been agreed to, the landlord would have been entitled to take less, but

it was hardly necessary to spell that out in the contract. Moreover, the parties would hardly have provided an elaborate procedure of agreement, valuation and even arbitration to fix a market rental to cater for the possibility that the landlord might, for some whim of his own, want to accept less than he was entitled to.

One must also have regard to the context of clause 3.3.2. It does not profess to lay down what the rental would be in the eighth year. That is done by clause 3.2, which provides that it is to be a market rental. Nor does clause 3.3.2 lay down how a market rental is to be ascertained. That is done by clause 3.3.1, which prescribes the procedures to be followed. Clause 3.3.2 only comes into play if some of the prescribed procedures fail. It seems bizarre to suggest that the parties would have used this as a setting for a provision laying down a rental to the exclusion of everything that preceded it.

In view of all these considerations the word

"party" in clause 3.3.2 cannot, I believe, be accorded its natural meaning. In the context the parties must have intended the provision to apply to one party only, namely the tenant. The clause would then serve as a useful encouragement to the tenant to co-operate in the fixing of a market rental. It is true that, on this interpretation, there is no corresponding encouragement for the landlord. This might be a lacuna in the contract, or the parties may have intended to distinguish in this respect between the landlord and the tenant for reasons that are not readily apparent. However, if this is an anomaly in the contract, it is a minor one. It relates to a small sub-division of the procedure laid down for the ascertainment of a market rental. There would in my view be no justification to avoid this anomaly by interpreting the contract in a sense that would entirely subvert the manner in which the rental for the eighth year was to be determined.

The Court a quo, in coming to a contrary

conclusion, relied on the following passage in the judgment of Diemont J A in South African Warehousing Services (Pty) Ltd and Others v South British Insurance Co Ltd 1971 (3) SA 10 (A) at p 18 F - H:

> "A business contract is no different from any other contract; it has no special virtue and no presumptions or suppositons to distinguish it from any other contract. (See John H. Pritchard & Associates (Pty) Ltd. v. Thorny Park Estates (Pty) Ltd., 1967 (2) SA 511 (D) at p. 515). Moreover a Court of law must necessarily hesitate to set itself up as an arbiter of business efficacy. It may well be that a contract on the face of it appears foolish, but the parties may have information which throws a different light on the transaction. They may be prepared to take risks which to the uninitiated appear unwarranted; there may be factors of which the Court has no knowledge and which, if known, would discourage it from criticising the contract. There is also a further qualification to this rule of construction and that is that, even if the bargain does appear to be foolish, the Court will give effect to the intention of the parties, without attempting to redraft the agreement so as to render it less foolish, provided it is satisfied that that was their agreement:
>
> > 'There are, however, contracts, although I think very few, in which the parties use clear and unambiguous language which plainly means that the parties intend to enter into a ridiculous bargain. In such cases the Courts will give effect to the expressed intention of

> the parties, however absurd the consequences may be'.
>
> (Per SALMON, L.J, in A. L. Wilkinson Ltd v Brown, supra at p. 514)."

This passage, with respect, is beside the point. The prime reason why the landlord's interpretation cannot in my view be accepted is not that it is foolish, or that it lacks business efficacy, but that it is repugnant to clause 3.2 and to the whole scheme of ascertaining a market rental laid down in the contract.

For the reasons I have given, I consider that "a party" in clause 3.3.2 should be interpreted as referring only to the tenant. It was not disputed in argument that such a result could legitimately be reached by a process of interpretation if the parties' intention appeared clearly enough from the contract as a whole. See Gravenor v. Dunswart Iron Works 1929 AD 299 at p. 303; Scottish Union & National Insurance Co. Ltd. v. Native Recruiting Corporation Ltd. 1934 AD 458 at pp. 465-6; Swart en 'n Ander v. Cape Fabrix (Pty) Ltd. 1979 (1) SA 195 (A) at p. 202 C. In view

of this conclusion it is not necessary to consider the tenant's claim for rectification.

It is appropriate at this stage to return to the affidavits filed in this case. The tenant's opposing affidavit dealt with both aspects of its case, viz interpretation and rectification. The tenant said that the reference to "a party" was a manifest typographical error - the intention of the parties when entering into the lease was that it would be the tenant who would be penalised by having to pay the maximum rental in the eighth year of the lease if it attempted to frustrate or delay the procedural mechanisms provided for in claims 3.2 and 3.3 of the lease for the determination of the rental in the eighth year. In its replying affidavit the landlord denied the tenant's allegations. It stated that clause 3.3.2 was deliberately inserted to give the landlord an unconditional right to opt for a 25 per cent increase in the rental in the review year so as to enable it to be compensated to some extent for the

monetary erosion that had taken place as a result of the fact that the escalation rate in the previous years was much less than the inflation rate, and to provide for the possibility that the same might happen in future years. Concerning rectification the landlord said:

> "I deny that clause 3.3.2 of the lease falls to be rectified in the manner set out by the Respondent. This lease agreement was the subject of at least ten drafts all of which were meticulously scrutinized by MB GORDON HOOD, MR MELVILLE PELS of the Respondent who is a trained lawyer, and by MR CHARLES VALKIN of the Respondent's attorneys of record. They were well aware of the provisions of this clause, and the fact that it correctly reflected the parties' intention as aforesaid when the lease was signed."

In view of conflicts of fact in the affidavits, the parties agreed that the matter be referred to oral evidence on the following points: "(a) Whether the term 'a party' in clause 3.3.2 of the

agreement of lease was a typographical error.

(b) Whether clause 3.3.2 of the agreement of lease

failed to reflect the common intention of the

parties and thereby falls to be rectified.

(c) Whether the applicant repudiated the agreement of lease.

(d) Whether the respondent elected to cancel the lease, and did in fact cancel the lease.

(e) Whether the respondent thereafter waived its right to rely on any such cancellation."

However, when the matter came before MacArthur J, no oral evidence was led which is of any relevance for present purposes. The evidence related only to the time when the premises were vacated by the tenant and the status of certain sub-leases which it had entered into. This evidence had a potential bearing on issues (d) and (e). In the result Mr. Nugent, who appeared for the landlord at the hearing before us, did not rely on these sub-leases or other acts of holding-over by the tenant and nothing more need be said about it.

The failure by the parties to lead oral evidence on

the material issues did however have the effect that the disputes of fact on the affidavits remained unresolved. Mr. Nugent contended that in these circumstances the uncontradicted evidence of the landlord concerning the purpose which clause 3.3.2 was intended to serve could be used for the purpose of interpreting the clause.

Now, in the first place, it is not correct to say that the landlord's evidence was uncontradicted. The landlord's replying affidavit created a conflict of fact on what the parties' intention was with regard to clause 3.3.2. Neither party availed itself of the right to resolve this conflict by leading oral evidence. And, even on the papers, the landlord's version in its affidavit seems to be inconsistent with some of the correspondence.

But, be that as it may, I do not think in any event that this evidence could be used to interpret the contract. The principles concerning the use of extrinsic evidence in the interpretation of written contracts are fairly well

settled. In the present case it is not contended that there were any surrounding circumstances or background circumstances (see Total South Africa (Pty) Ltd v Bekker N 0 1992 (1) S A 617 (A) at p 624F to 625A) which may affect the meaning of clause 3.3.2. The evidence which is tendered is evidence of the parties' alleged actual intention, presumably as manifested in their negotiations. It is clear that evidence of what passed between the parties on the subject of the contract is only admissible as a last resort when a sufficient degree of certainty as to the right meaning cannot be reached in any other way. See Delmas Milling Co Ltd v Du Plessis 1955 (3) S A 447 (A) at p 454F to 455C, Societe Commerciale De Moteurs v Ackermann 1981 (3) SA 422 (A) at p 428D. In my view the present is a case, in the words of Schreiner J A (Delmas Milling at 454F), where although there is difficulty, perhaps serious difficulty, in interpretation, it can nevertheless be cleared up by linguistic treatment. There is accordingly no call to have regard to extrinsic

evidence. And the fact that the evidence might be admissible for the purposes of rectification of the contract, and could in theory shed light on the true intention of the parties, cannot in my view make any difference.

From what I have said it follows that the landlord was not entitled to adopt the course it did, i e, to refuse to appoint a valuer and then to demand payment based on an escalation of 25 per cent. The question which now has to be answered is whether this amounted to a repudiation entitling the tenant to cancel the contract.

At the outset I should emphasize that clauses 3.2 and 3.3 are very important provisions of the contract. Although they refer specifically to the eighth year, the manner of their implementation will be felt for the remainder of the contract's duration. The rental for the eighth year forms the basis of that for the ninth to the fourteenth years. In those years there are fixed escalations, as there were in the first seven years (clause 3.4). The amounts

payable in those years will accordingly depend on the rental fixed for the eighth year. Then, in respect of the fifteenth year, the provisions of clauses 3.2 and 3.3 will apply mutatis mutandis (clause 3.5). The interpretation now placed on these clauses will accordingly determine also the fixing of the rental in the fifteenth year. And, in the sixteenth to twentieth years there is again a fixed escalation based on the amount determined in the fifteenth year. The interpretation of clause 3.3.2 will therefore affect the rental payable until the contract terminates.

I should at this stage deal with an argument by the landlord which sought to minimise the importance of the provisions of clause 3.3. If no market rental is fixed in terms of clause 3.3, so it was argued, the effect would be that the minimum rental would be payable in terms of the proviso in clause 3.2. The tenant would therefore not be prejudiced if the landlord failed to co-operate in fixing a market rental. I am not sure exactly where this argument

takes the landlord since its main claim has always been for the maximum rental, and it only claimed the minimum in the alternative. Consequently, even if this argument is correct, the landlord consistently demanded more than it was entitled to. However, in any event I do not think the argument is sound. Clause 3.2 requires the fixing of a market rental. The proviso lays down that the rental shall not be less than that payable in the last month of the previous year. This defines the minimum which may be determined by the process of ascertaining a market rental. It does not deal with the consequences which would ensue if the process were either not commenced or were aborted. These consequences would be that the parties would be left to their ordinary legal remedies except where the contract provided otherwise. And, in view of what I have said above, there is no provision in the contract dealing specifically with a failure by the landlord to nominate a valuer in terms of clause 3.3.1.

The conduct upon which the tenant relies as a

repudiation was the refusal by the landlord to co-operate in the fixing of a market rental (and, in particular, its breach of its obligation to nominate a valuer) and its insistence on the payment of a rental which was not in accordance with the contract. The test to determine whether conduct amounts to a repudiation has been stated as being "whether fairly interpreted it exhibits a deliberate and unequivocal intention no longer to be bound" (see Street v Dublin 1961 (2) SA 4 (W) at p 10B), a formulation which has often been followed, also in this court. See, e g, Inrybelange (Eiendoms) Bpk v Pretorius en 'n Ander 1966 (2) SA 416 (A) at p 427A, Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou 1978 (2) SA 835 (A) at p 845 A-B and Culverwell and Another v Brown 1990 (1) SA 7 (A) at p 14 C. However, the intention not to be bound does not postulate that the party concerned subjectively wishes to terminate the contract nor need it relate to the contract as a whole. As stated in Van Rooyen's case (supra) at p 845H to 846A:

"Om 'n ooreenkoms te repudieer, hoef daar nie ...

> 'n subjektiewe bedoeling te wees om 'n einde aan die ooreenkoms te maak nie. Waar 'n party, bv, weier om 'n belangrike bepaling van 'n ooreenkoms na te kom, sou sy optrede regtens op 'n repudiering van die ooreekoms kon neerkom, al sou hy ook meen dat hy sy verpligtinge behoorlik nakom."

See also Tuckers Land and Development Corporation (Pty) Ltd v. Hovis 1980 (1) SA 645 (A) at p. 653 B-E.

In the present case the landlord refused to comply with the provisions relating to the fixing of a market rental in the eighth year. As I have indicated above, these provisions were of vital importance in fixing the rental for the remaining period of the lease. In the circumstances of this case I consider that this amounted to a repudiation. The tenant was entitled to accept the repudiation and cancel the contract, and indeed it purported to do so. The landlord contended at one stage, but no longer does, that, even if there had been a repudiation, the purported acceptance and cancellation were ineffective. This contention was rightly abandoned. In my view the contract was lawfully terminated on 30 June 1990 and the tenant was not obliged to pay rental

after that date. It follows that the order against it was in my view wrongly granted.

The appeal is allowed with costs, including the costs of two counsel. The order of the court a quo is set aside and replaced with the following: The application is dismissed with costs, including the costs of two counsel.

E M GROSSKOPF, JA

MILNE, JA
F H GROSSKOPF, JA
HOWIE, AJA
VAN COLLER, AJA Concur