Case No 106/92
/MC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

Between

INTERNET CHARTER (PROPRIETARY) LIMITED Appellant

- and -

THE ADMINISTRATOR OF THE PROVINCE

OF THE TRANSVAAL First Respondent

CITY COUNCIL OF ROODEPOORT Second Respondent

THE TOWN COUNCIL OF KRUGERSDORP Third Respondent

CORAM: JOUBERT, VIVIER, EKSTEEN

F H GROSSKOPF JJA et KRIEGLER AJA.

HEARD: 10 MAY 1993

DELIVERED: 28 MAY 1993

J U D G M E N T

VIVIER JA.

VIVIER JA:

The appellant applied on notice of motion in the Witwatersrand Local Division for an order declaring that a valid long lease existed between it, as lessee, and the respondents, as lessor, in respect of hangar site no 6 ("site 6") at Lanseria Airport ("the airport"),and for an order enforcing execution thereof. It alleged that the lease was for a period of 25 years commencing on 1 January 1987 and terminating on 31 December 2011 and that its full terms and conditions were contained in annexure "D" to the founding affidavit. In a counter-application the respondents sought an order declaring that the appellant occupied site 6 under a tacit monthly tenancy. The matter came before STEGMANN J who dismissed the application and granted the counter-application, both with costs. With the necessary leave the appellant now appeals to this Court against

the judgment and orders of the Court a quo.

It appears from the papers that the negotiations between the parties for the conclusion of a lease in respect of site 6 commenced in early 1987 against the following background. At that time the appellant was carrying on the business of letting hangarage and office space on site no 28 at the airport. For that purpose it had on 25 March 1986 and in terms of a written cession, acquired the lessee's rights under a 25 year "written lease in respect of site no 28 on which a hangar had been erected. The appellant was anxious to obtain another site at the airport and to construct a hangar on it in order to expand the business it was doing on site no 28. It is quite clear that during negotiations between Mr Schwartz, representing the appellant, and Mr Van Eeden, the airport manager at the time, a lease of site 6 was offered to the appellant for a period of 25 years at a

rental of R268-75 per month and at a specified rate of escalation, which terms were accepted by Schwartz. Van Eeden further proposed that the respondents' standard agreement of lease for letting sites at the airport, which contained the usual provisions for the smooth functioning of the lease, be used for the purpose of preparing a formal lease.

The second and third respondents, together with the former statutory body, the Transvaal Board for the Development of Peri-Urban Areas (whose rights and obligations later devolved upon the first respondent in his official capacity), had during 1974 assumed control of the airport. A body known as the Lanseria Airport Management Board ("Lamb") had been established to manage and develop the airport, with two councillors from each of the said three local authorities serving thereon. Included in Lamb's powers was the power to let portions of the land constituting the airport.

Lamb appointed officials to manage the airport, one of whom was designated as the airport manager.

Following upon their negotiations Van Eeden during March 1987 forwarded to Schwartz for his signature Lamb's standard agreement of lease which had been duly completed in respect of site 6. Clause 1 of that document provided for the lease to commence on 1 January 1987 and to endure for a period of 25 years. Site 6 was duly identified according to a diagram annexed to the document. Provision was made for a rental of R268-75 per month and how this amount was to escalate. It was stipulated that the site had to be used for the erection of a hangar and purposes incidental thereto. Schwartz did not sign this document as he required certain minor amendments to it. For that purpose he prepared another document incorporating the amendments, which he signed and sent to Van Eeden. In the meantime the appellant

commenced paying the stipulated rental which it has done ever since, together with the required escalation. It took occupation of site 6 and constructed a hangar on it during 1988 at a considerable cost. According to Schwartz the hangar cost Rl,4m to construct whereas Mr Coetzer, who succeeded Van Eeden in September 1990 as airport manager, estimated the cost as between R250 000 and R500 000. The appellant has occupied the hangar since its construction.

The lease dispatched by Schwartz to Van Eeden was apparently mislaid in the latter's office and under cover of a letter dated 6 January 1989 Van Eeden forwarded another standard lease to Schwartz for his signature. Schwartz was requested to return the lease "for signature by my Board's representatives whereafter a copy would be forwarded to you". Instead of signing this document Schwartz forwarded another signed copy of the lease containing his amendments to Van Eeden

on 8 September 1989. The airport management, however, was still insisting upon a lease containing Lamb's standard provisions and under cover of a letter dated 16 February 1990 the assistant airport manager, Mr M J van Rensburg, forwarded yet another standard agreement of lease which had been duly completed to Schwartz for his signature. Schwartz did not sign this lease either.

After succeeding Van Eeden, Coetzer reaffirmed to Schwartz during October 1990 that Lamb would sign a written agreement of lease in respect of site 6 for 25 years at the agreed rental on its standard terms and conditions contained in the documents which had earlier been sent to him for signature. Consequently a further print out of the standard agreement of lease which had been completed in respect of site 6 was delivered to Schwartz for his signature during October or November 1990. This was

the document which was annexure "D" to Schwartz's founding affidavit. According to Coetzer, Schwartz indicated to him in January 1991 that he only required an alteration to the domicilium clause (clause 21) of annexure "D" before signing it. Coetzer agreed to the change whereupon Schwartz on 21 January 1991 signed the document and returned it to Lamb.

A comparison between the document sent to Schwartz for his signature in March 1987 and annexure "D" reveals that the material conditions had remained exactly the same. Certain minor provisions had been omitted and others added, and although it is not clear who had effected these alterations it can safely be accepted that they had been done on the authority of Lamb.

During 1990, and unbeknown to the appellant, the respondents commenced negotiations with a consortium for the sale of the airport,culminating in

the conclusion of a written agreement of sale on 23 March 1991. In clause 30 thereof it was recorded that the respondents had entered into certain lease agreements in respect of sites and offices at the airport which were identified in annexure "H" to the contract of sale. Annexure "H" reflects a lease of site 6 to the appellant as one of a large number of 25 year leases which the respondents had concluded with various tenants. The expiry date of the lease of site 6 and the rental therefor stated in annexure "H" correspond with the terms of annexure "D". In the contract of sale the respondents undertook to cause all these 25 year leases (which were required- to be notarially executed) to be executed and registered. In an affidavit filed on behalf of the respondents Van Rensburg claims to have prepared annexure "H" in error but his explanation is so clearly untenable that it can, in my view, be rejected on the papers (Plascon-

Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623(A) at 635 B-D).

It is . significant that none of the respondents who signed the contract of sale has filed an affidavit to support Van Rensburg's claim that the appellant's agreement of lease in respect of site 6 ought not to have been included in annexure "H". The respondents were certainly alerted to the issue by a fax sent by appellant's attorney to their attorney on 19 March 1991, i e four days before the deed of sale was signed, in which it was claimed that a valid lease for 25 years existed in respect of site 6 on the terms and conditions contained in annexure "D". The respondents' reply, dated 21 March 1991, contained no denial of the alleged lease, and it was only after the contract of sale had been signed that the respondents repudiated the lease. In my view the conclusion is inescapable, particularly if regard is had to the

correspondence which_ passed between the attorneys acting for the parties, that this attitude was inspired by the purchasers of the airport.

The respondents' case is that during the negotiations between the parties in early 1987 a monthly lease of site 6 at the aforesaid rental was arrived at by words or conduct. This was the basis upon which the Court a quo granted the counter-application. The respondents' case is further that no informal agreement of lease for 25 years was ever concluded between the parties; that neither Van Eeden nor Coetzer in any event had any authority to conclude - such a lease and finally that the parties agreed that there should be no binding 25 year lease on the terms and conditions set out in annexure "D" until that document had been signed by both parties.

When considering the relationship which existed between the parties in early 1987 it is

important to bear in mind that Lamb's objective at all relevant times clearly was to enter into a 25 year lease in respect of site 6 for the purpose of the construction of a hangar thereon. To that end site 6 was surveyed and a diagram prepared. It was expressly stated in the subsequent documents that site 6 had to be used by the appellant for the construction of a hangar thereon. It can safely be accepted that Lamb was aware of the nature of the appellant's business at the airport viz that of letting hangarage and office space on site no 28; that it wanted to extend its business to site 6 and that it would be quite unthinkable for the appellant to construct a hangar and to conduct its business on site 6 if it only had a monthly tenancy. It is clear, therefore, that neither party contemplated any other lease than one which was to endure for 25 years. In my view the issue of the airport managers' authority to negotiate a

25 year lease, as opposed to a monthly lease, does not arise. Lamb itself wanted a 25 year lease and made that intention clear to the appellant in a number of ways, quite apart from what was conveyed to Schwartz by Van Eeden or Coetzer. It allowed the appellant to occupy site 6 and to construct a hangar on it; it accepted payment of the escalated rental; it authorised the dispatch of a number of its standard leases, duly completed, to be sent to the appellant for signature and it authorised the amendments which were made to these documents from time to time, some of which I have referred to above. The fact that the rental was to escalate yearly is itself an indication that a long lease had been agreed upon. A provision for a yearly escalation of rental in a monthly lease would be unusual. In my view, accordingly, the Court a quo erred in finding that no more than a monthly lease had been agreed upon during early 1987. It

should have found that a binding agreement of lease had then been concluded by which Lamb had let to the appellant site 6 for a period of 25 years at a rental of R268-75 per month which was to escalate at the rate agreed upon.

It is clear that both parties desired a formal lease to be drawn up containing Lamb's usual provisions for the smooth working of the lease, and that negotiations took place on minor points. Lamb wanted the formal lease to include its standard terms and conditions whereas the appellant wanted those altered. That both parties wanted a document prepared and duly executed is understandable.- It would have facilitated the respondents' task of complying with the procedural requirements of sec 79(18) of Ordinance 17 of 1939. It would also, if registered, have served to protect the appellant's rights. For any lease to be valid against a creditor or successor

under onerous title of the lessor for a period longer than ten years after having been entered into, it had, in the absence of knowledge, to be registered against the title deeds of the leased land (sec 1(2) of Act 18 of 1969) . In order to be registerable it had to be notarially executed (sec 77(1) of Act 47 of 1937).

Following upon the conclusion of the informal lease in early 1987 Lamb over a lengthy period of time consistently held out to the appellant that it would execute a formal document containing its standard terms and conditions. One such document after the other was sent to the appellant for signature. So, for example, in Van Eeden's letter dated 6 January 1989 to which I have already referred, the appellant was requested to sign the document which was sent to him under cover of that letter and to return it for signature by Lamb's representatives.

The question is whether, as was contended

for on behalf of the respondents, the parties agreed that they would not be bound unless or until a written lease had been executed. Mr Slomowitz, who appeared on behalf of the respondents, conceded that the onus of proving this rested on the respondents. This concession was, in my view, correctly made. See Goldblatt v Fremantle 1920 AD 123 at 128-129 and Woods v Walters 1921 AD 303 at 305-306. In the latter case INNES CJ said at p 305 that the mention of a written document during the negotiations will be assumed to have been made with a view to convenience of record and facility of proof of the verbal agreement come to, unless it is clear that the parties meant that the writing should constitute the contract.

Nothing has been placed before us to show that Lamb's object in preparing annexure "D" and submitting it to the appellant for signature was to achieve anything more than to afford facility of proof

of the letter's acceptance of its standard terms and conditions contained therein. Mr Slomowitz relied on clause 1 of annexure "D" which provided that the lease "shall be subject to the registration of this contract against the title deed of the property concerned". This clause was clearly intended for the benefit of the lessee and did not require writing or registration as a condition precedent to its validity inter partes. That it was not so intended nor understood appears clearly from the documentation dealing with the registration of the lease of site 28. This lease contained a clause similar to clause 1 of annexure "D". By the end of March 1991 this lease had still not been registered despite the fact that the appellant had obtained cession of the lessee's rights and obligations five years before on 25 March 1986. That notwithstanding, the validity of the lease of site 28 was never in issue and was acknowledged by the

respondent in correspondence and in the deed of sale of the airport concluded on 23 March 1991.

Mr Slomowitz further relied on clauses 8, 11, 12 and 19 of annexure "D". Clause 8 requires the lessor's consent in writing to a sublease or cession; clauses 11 and 12 require written notice of cancellation by the lessor and in terms of clause 19 any variation of the lease has to be in writing. All these clauses would seem to be consistent with an object merely to facilitate proof of the terms and conditions contained in annexure "D" and it is not at all clear that the parties thereby intended that writing was a condition precedent to the validity of the lease.

If one looks at the conduct of the parties the matter is placed beyond doubt by the respondents' admission in signing, the deed of sale to the effect that a valid agreement of lease for 25 years in respect

of site 6 existed on the terms and conditions set out in annexure "D". In all the circumstances I am of the view that the respondents have failed to discharge the onus of proving an agreement that there would be no binding lease on the terms and conditions set out in annexure "D" until the due execution of that document. When Schwartz signed annexure "D" and returned it to Lamb the parties had reached complete agreement on every point which they had intended to embody in the . lease, and a valid lease was thereby concluded. The execution of the formal document was not a condition precedent to its validity, but was clearly a contractual- obligation under the informal contract. The respondents were therefore not entitled to refuse to sign annexure "D" and the Court a quo should have ordered specific performance of the obligation to sign and to register the lease. See Woods v Walters, supra at p 309.

It remains to deal with the costs of the appellant's application that the matter be remitted to the Court a quo for the hearing of further evidence. In my view no reasonably sufficient explanation has been furnished by the appellant why the evidence which it was sought to lead was not led at the trial. It follows that the application could not have succeeded and the appellant must accordingly bear the respondents' costs of opposition to it.

In the result the appeal succeeds. It is . ordered:

(1) That the appeal be allowed with costs, such costs to include the costs of two counsel.

(2) That the order of the Court a quo be set aside and there be substituted the following:

"An order is granted:

(a) Declaring that there is a valid and binding agreement of lease between

the parties on the terms contained in annexure 'D' to the founding Affidavit;,

(b) Directing the respondents to sign the agreement of lease which is annexure 'D' to the founding affidavit and to do all things necessary to cause such lease to be registered as a long lease;

(c) Directing that in the event of one or more of the respondents failing to sign annexure 'D' by 31 July 1993, the sheriff is authorised and directed to sign the agreement of lease on their behalf;

(d) That the costs of the application be paid by the respondents;

(e) That the counter-application be dismissed with costs."

(3) That the appellant's application for the matter to be remitted be refused with costs, such costs to include the costs of two counsel.

W. VIVIER JA.

JOUBERT JA)
EKSTEEN JA) Concur.
F H GROSSKOPF JA)
KRIEGLER AJA)