THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No 373/95 In

the matter between:

LEON SWARTZBERG Appellant

and

LEON SWARTZBERG & COMPANY

(PROPRIETARY) LIMITED Respondent

CORAM: MAHOMED CJ, E M GROSSKOPF, NIENABER, HOWIE, JJA et

STREICHER AJA

HEARD: 20 FEBRUARY 1997 DELIVERED:

14 March 1997

J U D G M E N T

E M GROSSKOPF, JA

The appellant successfully sued the respondent in a magistrate's court for rental and certain ancillary amounts alleged to be due under a lease. An appeal to the Witwatersrand Local Division succeeded. With the leave of that court the appellant now comes on further appeal before us. The point for decision is whether the lease was still current during the month in respect of which the appellant made his claims.

The facts are as follows.

The appellant, to whom I shall for convenience refer as Swartzberg, is a businessman. Some years ago he started the respondent company. It was a merchant of plumbing materials, sanitary ware and ceramic wall and floor tiles. During 1983 Swartzberg and one Newfield sold the major shareholding in the respondent to Boumat Limited, a large public company listed on the Johannesburg Stock Exchange. Swartzberg stayed

on for a while as managing director of the respondent.

The respondent's business was carried on in premises hired from various private companies of which Swartzberg and Newfield were the shareholders. At the time of the take-over the new shareholders of the respondent wished to ensure security of tenure in these premises. A contract of lease was accordingly entered into between the lessor companies and the respondent. In the lower courts this lease was called the Bradmarc lease after one of the lessor companies, and I shall do likewise. The Bradmarc lease was deemed to have commenced on 1 March 1983 and was to continue for five years thereafter, terminating on 28 February 1988. The respondent was granted an option for renewal for a further period of five years, i e from 1 March 1988 to 28 February 1993, on certain conditions. This option was to be exercised by written notice given not later than 31 August 1987.

On 11 October 1983 a meeting of the respondent's board

of directors was held. Among the directors present were Swartzberg and two representatives of Boumat, namely messrs Brittan and Gevisser. These three persons were witnesses at the trial of this matter and I shall have more to say about them later. The minutes of the meeting record the following:

> "PREMISES
>
> Mr Swartzberg advised the meeting that he was currently building a warehouse on stand numbers 811, 812 and 813 New Doornfontein, Johannesburg. At a previous informal meeting the proposed warehouse was offered to the group on a lease to run concurrently with the existing lease. This offer was accepted by Messrs Brittan, Gevisser and Newfield on behalf of the group. Mr Swartzberg declared his interest in the project in that he personally is the owner thereof."

By "the group" was presumably meant the conglomeration of companies controlled by Boumat Limited, of which the respondent was one. However, it is clear that it was only the respondent which was interested in the warehouse premises. These premises adjoined the respondent's existing business.

On 7 May 1984 a lease was concluded between Swartzberg

and the respondent in respect of the warehouse premises. I shall refer to this lease as the Swartzberg lease, as was done in the courts below. The Swartzberg lease was deemed to have commenced on 15 April 1984 and was to "continue for a period of five years thereafter, terminating on 28th February 1989." It is to be noted that the termination date of 28 February appears to be somewhat anomalous - it is not exactly five years after the commencement date. The effect of picking this date was that the initial period of the Swartzberg lease terminated exactly a year later than the Bradmarc lease. In the Swartzberg lease, as in the Bradmarc lease, the respondent was granted an option to renew. In the Swartzberg lease this option was recorded as being for a period of five years, i e, from 1 March 1989 to 28 February 1994. The option was to be exercised by written notice given not later than 31 August 1988. These dates are all a year later than the corresponding dates in the Bradmarc lease.

In 1986 Mr M H Klitzner became joint managing director of the respondent. He had no knowledge of the conclusion of the various leases. In due course (presumably on or before 31 August 1987) he exercised the option to renew the Bradmarc lease. He did not at that stage know that the Bradmarc lease and the Swartzberg lease terminated a year apart.

In 1988 the renewal of the Swartzberg lease came to be considered. At that time the respondent was contemplating opening a new branch in Midrand. If this were done the property let under the Swartzberg lease would no longer be required. During a meeting of the respondent's board on 19 August 1988 the renewal of the lease was discussed. At this time Swartzberg was no longer a director of the respondent company. One member of the board felt that the rent currently charged was excessive. Another considered that the respondent should swallow its pride and accept the new rental figure. Mr Gevisser suggested that Swartzberg be requested to grant an

extension of time for the renewal of the lease to enable him to negotiate with Swartzberg to accept a renewal for one year only. These various proposals came to nothing. In a letter dated 26 August 1988 Klitzner exercised the option "to renew the lease ... for a further period of 5 years commencing on the 1st March 1989".

After the exercise of the option there was a long and acrimonious dispute between the parties about the rental payable during the period of renewal. At the commencement of this dispute in 1988 Klitzner examined both the leases and noticed that they terminated a year apart. He considered it to have been bad business to enter into two leases in respect of adjoining premises used by the same undertaking but with different dates of termination. As far as he was concerned it was a fait accompli and he could do nothing about it.The dispute about the rental was eventually settled in July 1991.

According to Klitzner he happened to go through old

minute books of the respondent during 1992. He came upon the minute of the meeting of the Board on 11 October 1983 and noticed that the Swartzberg lease was "to run concurrently" with the then existing Bradmarc lease. He reported to Gevisser that the two leases did not run concurrently, as had apparently been contemplated in 1983. Gevisser said in evidence that this was the first time that he became aware of the different termination dates of the two leases.

On 18 February 1993 this issue was raised with Swartzberg. On that date the respondent's attorneys wrote to Swartzberg inter alia as follows:

> "From the information and documentation in our client's possession it is clear that it was always the common continuing intention of both yourself and our client that the [Swartzberg] lease would run concurrently with the Bradmarc lease. In view of the intention of the parties and the mutual error made by them our client is entitled to rectification of the lease to reflect that intention and is further entitled to vacate the premises as at 28 February 1993."

28 February 1993 was of course also the termination date

of the Bradmarc lease. In the result the respondent vacated both premises on that date.

The present action is for rent and other amounts due in terms of the Swartzberg lease for the month of March 1993. In accordance with its clear express terms the Swartzberg lease, after exercise of the option, terminated on 28 February 1994. Prima facie Swartzberg was accordingly entitled to payment of the amounts claimed. In resisting Swartzberg's claim the respondent relied firstly on rectification of the lease, and, in the alternative, on iustus error. In the view I take of this matter it is necessary to consider only the defence of rectification.

This defence is based on the following averments:

1. During the negotiations between Swartzberg and the respondent it was the continuing common intention of the parties that the Swartzberg lease and the Bradmarc lease would run concurrently and would

terminate on the same date.

2. The Swartzberg lease incorrectly records the common intention of the parties in that it provides that the initial period of the lease would terminate on 28 February 1989 instead of 28 February 1988 and that the option period would terminate on 28 February 1994 instead of 28 February 1993.

3. The incorrect dates were inserted into the lease as a result of a common error of the parties and they signed the lease in the bona fide but mistaken belief that the lease recorded the true agreement between the parties.

It was common cause in argument that proof of the above averments would establish a defence to Swartzberg's claim, and that the respondent was burdened with the onus of proof.

In seeking to discharge this onus the respondent relied

heavily on the minutes of 11 October 1983. It will be recalled that these minutes record a previous informal agreement between Swartzberg on the one hand and representatives of the respondent on the other to enter into a lease "to run concurrently with the existing lease." Gevisser and Brittan, who were present at this meeting, testified that it was always the intention that the two leases should terminate at the same time and that this was what was meant by the word "concurrently". Moreover, they said, there were good practical reasons for this. I deal with these reasons later.

Swartzberg did not dispute in his evidence that the use of the word "concurrently" in the minute was a correct reflection of what was said at the meeting, and at times he seemed to concede that it was. Indeed it was difficult for him to do otherwise - these minutes were read and confirmed without objection at the next board meeting, where Swartzberg

was present. Since Swartzberg was interested in the

transaction both as lessor of the property and as a director of the lessee it is reasonable to suppose that he would not have let an incorrect version of the informal agreement pass unchallenged. Swartzberg attempted to deal with this aspect of the case by asserting that "concurrently" did not bear the interpretation placed upon it by the respondent's witnesses, and that it did not relate at all to the duration or date of termination of the lease. I do not propose analysing his evidence in this regard which I have great difficulty in understanding. It is clearly specious.

The reasons why it was practical for the two leases to run concurrently were largely undisputed. Swartzberg admitted that one of the most attractive features of the premises let under the Swartzberg lease was the fact that they adjoined the existing business. As Swartzberg also admitted, the two departments of the respondent's business conducted on the

respective premises complemented each other and were integrated to the extent that they shared administration offices, computers and business machines, accounting systems, a fleet of trucks and even ablution facilities. It would accordingly have been undesirable for the two leases to terminate at different times.

I turn now to the lease itself. After the parties had concluded their negotiations Swartzberg was requested to have a written lease prepared. He instructed his attorney to attend to it. As already set out above, the lease as eventually drafted terminated a year later than the Bradmarc lease. To that extent it did not run concurrently with the Bradmarc lease. However, as also pointed out above, in one respect the Swartzberg lease was brought into line with the Bradmarc lease, namely the day and month of the termination, which was fixed as 28 February. No reason can be suggested for this other than that the parties did intend the two

leases to run concurrently, but that somehow a mistake crept in about the year.

Gevisser said in evidence that he must have read the document at the time of its conclusion since he had undertaken the negotiations which preceded it. He did not however appreciate that it purported to run for a year longer than the Bradmarc lease and would not have accepted the contract if he had realised this.

Gevisser did not sign the Swartzberg lease on behalf of the respondent since he was out of town' at the time. Brittan signed it. He did not read it carefully since Gevisser had approved it. He testified that he would not have signed if he knew that it did not run concurrently with the Bradmarc lease.

The above considerations seem to me to show conclusively that there was an intention, at least on the part of the respondent, that the Swartzberg lease should run concurrently

with the Bradmarc lease in the sense stated by the respondent's witnesses. The evidence of Gevisser and Brittan to this effect is confirmed by the probabilities as well as by the terms of the antecedent informal agreement, as set out in the minutes of the meeting of 11 October 1983. In my view their version accords with the normal meaning of "concurrently" in this context.

By the same token Swartzberg must have been of the same intention when the informal agreement was entered into and recorded in the minutes. His denial is based firstly on a spurious interpretation of the word "concurrently" to which I have already alluded. Later, under cross-examination, he stated for the first time that subsequent to the meeting of 11 October 1983 Gevisser insisted that the initial period of the Swartzberg lease should be five years with an option to renew the lease for a further five years. He was at sea in trying to indicate when and where this had happened, and

could not explain why he had not mentioned this to his legal representatives. In my view this evidence cannot be accepted.

If one rejects Swartzberg's evidence that he intended at all times to contract on the terms set out in the Swartzberg lease there are only two possibilities. The one is that Swartzberg also intended throughout that the two leases should run concurrently but that an error crept in during the drafting of the lease. It is easy to make an error as to the year of termination, and such an error could easily be overlooked. This is particularly so in the present case where the parties were, in effect, partners. They would be more inclined to assume that the lease would probably be in order.

The other possibility is that Swartzberg deliberately had a lease prepared which did not conform to the pre-existing arrangement. I need not consider the legal position if that had been the case since in all the circumstances it seems unlikely. At the time of the conclusion of the lease

the parties were on good terms. Swartzberg was a director of the respondent company and had an interest in its well-being. He would be taking a risk in trying to slip something past his fellow directors, and there would not appear to be any good reason for doing so. He had an interest as lessor in both properties. As such I would imagine that he might prefer having both properties becoming available for re-letting at the same time. This would give the lessors greater flexibility in letting them either singly or in combination. It seems to me therefore that, in all probability, both parties intended the two leases to be coterminous.

The only feature which would appear to militate against this conclusion was the subsequent behaviour of the respondent. As I have mentioned, the Bradmarc lease was duly renewed by Klitzner in 1987. There is no reason to doubt his evidence that he was ignorant of the history of the matter and did not know that the two leases were intended to run

concurrently. However in 1988, when the Swartzberg lease,

according to its terms, came up for renewal there was a great deal of discussion about the matter in which Gevisser participated. It seems strange that he never realized that, according to his version of the events, there was something wrong in the two leases not being renewed at the same time. This problem was, however, never put squarely to him in cross-examination. What was probed was that the Bradmarc lease had then already been extended to 28 February 1993, whereas the respondent was reluctant to extend the Swartzberg lease beyond 1989. What then had happened to the need for concurrency, the cross-examiner asked. Gevisser's answer was that the respondent was contemplating moving to new premises and wanted to limit its obligations in New Doornfontein, an area which had deteriorated since 1983. There is no reason to reject this explanation.

Despite the lack of cross-examination it does seem

strange that Gevisser was not alerted to the discrepancy between the two leases in 1988. However, he testified on oath that he did not realise it. The discussions, and the subsequent dispute about the rental, did not relate directly to the different terms of the leases. It is also perhaps understandable that Klitzner, when discovering in 1988 that the two leases were not coterminous, did not immediately mention this to Gevisser. It was not directly in issue at the time. It must also be borne in mind that Gevisser was, in 1983, executive deputy chairman of Boumat Ltd, a company with approximately sixty operating subsidiaries of which the respondent was one. At the time of the trial in 1994 he was still an executive director of Boumat. According to his evidence he was extremely busy. It is understandable that he might not have realized the significance of the fact that the two leases were renewed at different times. In all these circumstances there is in my view no reason to reject this

evidence of Gevisser and Klitzner. No adverse findings about

their credibility were made by the trial court.

In sum I consider that the probabilities arising from the subsequent events are not sufficient to overturn the conclusion that the parties did indeed intend, when concluding the Swartzberg lease, that it would run concurrently with the Bradmarc lease. I also consider that, as a result of a common error between the parties, the lease did not reflect this intention. Accordingly the facts relied upon by the respondent in support of its plea of rectification have in my view been established.

On behalf of Swartzberg counsel argued that the intention of the parties should be reassessed at the time when the option was exercised in 1988. The true position seems to me to be as follows. If the lease is to be rectified as claimed by the respondent, i e, to provide that the initial period ended on 28 February 1988 and the period of

renewal on 28 February 1993, such rectification would

determine the meaning and effect of the lease for as long as it remained in force. The purpose of rectification is to substitute the true intention of the parties for the error contained in the written document. See Meyer v Merchants' Trust Ltd 1942 AD 244 at 254. It follows that the exercise of the option in August 1988 was not in time to secure the renewal of the lease on 28 February 1988. The lease consequently terminated on the latter date. The respondent nevertheless stayed in occupation with the consent of the lessor, Swartzberg, after the termination of the lease. Then the respondent purported to exercise the option in August 1988. This was a year too late, but Swartzberg purported to accept it. The respondent remained in occupation until 28 February 1993.

What does one make of these facts? Firstly, they cannot give rise to a reversal of the rectification so as, in

effect, to reinstate the written contract as the parties'

true bargain. As stated above, once the contract is rectified its content is determined for its entire duration. The purported exercise of the option in August 1988 could conceivably be interpreted as a late exercise of the option laid down in the true (ie, rectified) contract which was accepted by Swartzberg, but then the renewal would, in terms of the rectified contract, have terminated on 28 February 1993. This would not assist Swartzberg. Alternatively, the conduct of the parties, including the respondent's remaining in possession after termination of the lease, and the purported exercise of the option, could conceivably have given rise to a new contract. Swartzberg does not, however, rely on any contract other than the Swartzberg lease. If his case had been that the Swartzberg lease had come to an end on 28 February 1993 and that he and the respondent had concluded a new lease terminating on 28 February 1994, he would have

had to allege and prove such a new agreement. He has not done so, and the possibility of such a new contract has not been canvassed in the proceedings at all. There is consequently no warrant for our finding on appeal that such an agreement has been established.

To sum up, I consider that the respondent's plea of rectification was established. It follows that the court a quo was correct in allowing the appeal from the decision of the magistrate's court.

The appeal is dismissed with costs including the costs of two counsel.

E M GROSSKOPF, JA

MAHOMED, CJ
NIENABER, JA
HOWIE, JA
STREICHER, AJA
Concer