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[1] THE SUPREME COURT OF APPEAL

[2] OF SOUTH AFRICA

[3] CASE NO: 320/06

Not Reportable

[4] In the matter between

[5] **ETHEKWINI METROPOLITAN UNICITY MUNICIPALITY (NORTH OPERATIONAL ENTITY)** *Appellant*

[6] and

[7] **PILCO INVESTMENTS CC** Respondent

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[9] Coram**:** Harms ADP, Van Heerden, Jafta, Combrinck et Cachalia JJA

[10] Heard: 3 May 2007

[11] Delivered: 29 May 2007

[12] ***Summary:Lease – interpretation of – lessee given only partial occupation of leased property – lessee obliged to pay rent, although entitled to a remission of rent proportional to its***

[5]

reduced use and enjoyment – failure by lessee to pay any rent, despite due demand – lessor entitled to cancel lease

[13] **Neutral citation: This judgment may be referred to as *Ethekwini Metropolitan Unicity Municipality v Pilco Investments CC* [2007] SCA 62 (RSA)**

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[15] **JUDGMENT**

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[17] **VAN HEERDEN JA:**

[18] The issue to be determined in this appeal is whether the appellant (the defendant in the court below) is liable to the respondent (the plaintiff in the court below) for damages on the basis of either breach of contract or delict. For the sake of convenience, I will refer to the parties by their appellation in the trial court.

[19] The plaintiff was the sole tenderer for the development of a recreational facility on certain property in Verulam in respect of which tenders had been invited by the Town Council of the Borough of Verulam, the predecessor in title to the defendant. The property in question, portion of Lot 7862 Parkgate, Verulam ('the property'), was zoned as a public open space, approximately 30 000m^2 in extent, and was going to be transferred into the name of the defendant. The defendant eventually became the registered owner of the property on 21 October 1994.

[20] On 30 August 1993 the defendant accepted a proposal by the plaintiff 'for the development of parks, recreational and sporting facilities' in respect of the property. The parties signed an agreement of lease of the property in October 1994. Building plans were submitted by the plaintiff and approved by the defendant on 12 December 1994, subject to the condition, inter alia, 'that liquor must not be sold or consumed outside the recreation club. The usage of this club must be restricted to members only.' The defendant also resolved 'that a new agreement be drawn and entered into'.

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[21] During February 1995, the parties duly concluded a new written lease agreement in respect of the property, thereby replacing the earlier lease. This new lease ('the lease') – that lies at the centre of the dispute between the parties – was to commence on 1 November 1994 and to continue thereafter for 30 years with an option to renew.

[22] The plaintiff's main claim was one for damages for breach of contract, arising from the defendant's alleged repudiation of the lease. Its two alternative claims were in delict. Counsel for the plaintiff did not really persist with these delictual claims before us. In any event, the negligence relied upon by the plaintiff in each of the (alternative) delictual claims consisted in an alleged breach by the defendant of duties allegedly flowing from specific terms of the lease. This being so, the decision of this court in *Lillicrap, Wassenaar & Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 474 (A) precludes such delictual claims being brought by the plaintiff against the defendant.[1]

[23] By agreement between the parties, the trial court (Van der Reyden J in the Durban High Court) was asked to make a ruling on liability only, with the issue of quantum standing over for later determination, if necessary.

[24] At the conclusion of the trial, the trial judge held in favour of the plaintiff in respect of its main claim based on repudiation of the lease. He accordingly issued a declaratory order 'that the plaintiff was entitled to resile from the lease agreement and that the defendant is liable to compensate the plaintiff for such

[1]See *Holtzhausen v Absa Bank Ltd* [2005] 2 All SA 560 (SCA) paras 6-7 and *Media 24 Ltd & Another v Grobler* 2005 (6) SA 328 (SCA) para 69-70.

damages as it may have suffered in consequence of the breach'. He also ordered the defendant to pay the plaintiff's costs, including the costs of two counsel. In the circumstances, he did not find it necessary to consider the arguments presented on the alternative delictual claims. With the leave of the trial court, the defendant now appeals against this judgment.

[25] In terms of the lease, the agreed rent in respect of the property was R2 050 per month, payable in advance. In the event of failure by the lessee to make payment of rent upon due date, or 'to implement each and every one of his obligations' in terms of the lease, written notice to remedy such breach within ninety (90) days had to be given by registered post to the lessee (clause 13).

[26] Clause 1 of the lease provided:

[27] 'Subject to the provisions of Clause 18 hereof,[2] the tenancy will commence from the 01 day of November 1994, notwithstanding the date of occupation and will continue thereafter [for] thirty (30) years with an option to renew.'

[28] In terms of clause 16 –

[29] 'It is a special condition hereof that in the event of the persons presently occupying the premises not vacating them by the date of commencement hereof, the Lessee undertakes to accept occupation from such later date as the premises are available. In this event the Lessee shall have no claim for damages or right of action against the Lessor and the Lease shall be deemed to commence as from the later date on which the premises become fully available for occupation, with the following conditions:

[2] It is common cause that the reference to clause 18 is incorrect and that the relevant clause is actually clause 16.

[30] (1) The boundary pegs being flagged and pointed out to the Lessee.'

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[32] The usage of the property was governed by clause 6 of the lease, which provided that:

[33] 'The property shall be used for recreational, kiosk and take-away purposes by the Lessee, and buildings shall be constructed on the said property for the above purposes and the following conditions will apply:

[34] a) Liquor must not be sold or consumed outside the recreation club;

[35] b) . . .

[36] c) . . .

[37] d) The usage of the club must be restricted to members only.'

[38] On 10 June 1997 the plaintiff applied for a licence in respect of the property to conduct business described by it as 'Entertainment – Disco. Action Bar. Sports Café. Indoor Entertainment. Playground Facilities.' This was followed by the plaintiff's issuing an invitation, presumably to residents of the Parkgate community and other potential patrons, to attend the opening of 'Club Chalice' on the property on Sunday, 15 June 1997.

[39] Shortly after the opening of Club Chalice, a complaint was lodged with the defendant by a resident of the Parkgate community, followed on 24 June by a petition signed by 47 residents complaining about high noise levels emanating from the 'disco' at the club; loud and abusive language; off-consumption of liquor; club patrons parking their vehicles in residents' driveways and on curbs

and driving while under the influence of liquor; and other forms of anti-social behaviour by club patrons. The petition resulted in an inspection by the defendant's building inspector of the building erected by the plaintiff on the property. The inspector found that the approved building plans had been deviated from in various ways and the plaintiff was required to submit amended plans to the defendant for approval. This the plaintiff did on 31 July 1997.

[40] On 23 September 1997, a letter was addressed by the defendant to the plaintiff (Annexure H to the plaintiff's particulars of claim), informing the latter that approval of its amended building plans had been refused for reasons which, for present purposes, need not be canvassed. This was followed, two days later, by a further letter (Annexure J to the particulars of claim), informing the plaintiff that it had contravened the Verulam Town Planning Scheme by operating a discotheque with food and alcohol for sale in a public open space. The plaintiff was required to terminate this usage of the property within seven days, failing which it would be guilty of an offence under the Town Planning Scheme and liable to incur certain fines.

[41] In the meantime, on 11 September 1997, the defendant's attorneys sent a registered letter to the plaintiff, pointing out that the plaintiff had failed to pay any rent in terms of the lease and that it was at that stage in arrears to the tune of R74 784. With reference to clause 13 of the lease, the plaintiff was called upon to remedy its breach within 90 days by paying the arrear rent, failing which the defendant would cancel the lease and institute action in the magistrate's court for recovery of all arrear rent and other amounts due by the plaintiff. The

plaintiff failed to pay any amount and, on 15 December 1997, the defendant instituted action against it in the Verulam Magistrate's Court, claiming confirmation of its cancellation of the lease, payment of the total arrear rent then due (R89 995) and ejectment of the plaintiff from the property. The litigation in the magistrate's court was eventually transferred to the High Court and resulted in the proceedings which gave rise to the present appeal.

[42] According to the plaintiff, the abovementioned letters annexed to its particulars of claim as Annexures H and J constituted a repudiation by the defendant of the lease, which was accepted by the plaintiff. The plaintiff allegedly conveyed such acceptance to the defendant 'by relinquishing possession of the property and building to the defendant' sometime in mid-1998.

[43] The defendant denied that Annexures H and J constituted a repudiation by it of the lease, contending that these letters were simply intended to notify the plaintiff that it was breaching the lease by using the property for an unlawful purpose not intended thereby, and to require the plaintiff to comply with its lawful obligations in terms of the lease. The defendant alleged, in turn, that it was the plaintiff who had 'breached and repudiated' the lease, inter alia by failing to pay any rent and, when sued by the defendant for arrear rent, by pleading that the agreement of lease had never commenced and was 'of no force and effect'. The defendant claimed to have cancelled the lease by instituting the abovementioned action in the Verulam Magistrate's Court in December 1997.

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[44] It is common cause that, despite having taken occupation of the property in late 1994, building the structure on the property, and conducting the club business thereon (albeit only for a limited period of time), the plaintiff never paid any rent whatsoever in respect of the property. Its excuse for not doing so was that, until June 1997, approximately 3000 to 4000m^2 of the property had been occupied by another person who was using this portion for making pre-cast concrete fencing and, further, that the boundary pegs had never been pointed out to it by the defendant as required by clause 16 of the lease.

[45] Counsel for the plaintiff conceded before us that the boundary pegs stipulation in clause 16 of the lease was not a 'suspensive condition' in the sense that non-compliance therewith suspended the commencement of the lease itself. However, counsel contended that, although the plaintiff had indeed taken occupation of the property in late 1994, its obligation to pay rent was suspended until such time as the person making pre-cast fencing on a portion of the property vacated this portion *and* the boundary pegs were pointed out to the plaintiff. According to counsel, this contention was borne out by a proper interpretation of clause 16, read together with clause 1, of the lease agreement.[3] In other words, counsel submitted, the word 'tenancy' in clause 1 of the lease and the word 'Lease' in clause 16 had to be interpreted to mean the lessee's obligation to pay rent and not the lease itself.

[46] The technique of interpretation of written contractual documents consistently adopted by the South African courts was summarised by Joubert

[3]For the wording of the relevant parts of clauses 1 and 16, see para [9] above.

JA in *Coopers & Lybrand & Others v Bryant* 1995 (3) SA 761 (A) as follows (at 767E-768E):

[47] 'According to the "golden rule" of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument … The mode of construction should never be to interpret a particular word or phrase in isolation (*in vacuo*) by itself … The correct approach to the application of the "golden rule" of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:

[48] 1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract …;

[49] 2) to the background circumstances which explain the genesis and purpose of the contract, ie to matters probably present to the minds of the parties when they contracted …;

[50] 3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions.'

[51] Applying this approach to clause 1 of the lease, the 'grammatical and ordinary meaning' of the word 'tenancy' in the phrase 'the tenancy will commence' is the lease itself, not the obligation to pay rent. This is borne out by the rest of clause 1, in particular the phrase 'the tenancy . . . will continue thereafter [for] thirty (30) years with an option to renew'. Moreover, clause 2 of the lease provides that '[t]he Lessee [shall] commence the project within six (6) months.' To make sense, this clause must be read as referring to a period of six

months calculated from the date of the commencement of the lease, certainly not from a date of commencement of the obligation to pay rent.

[52] Properly interpreted, clause 1 thus provides that the lease will commence from 1 November 1994, notwithstanding the date of occupation of the leased 'premises'. This is, however, made 'subject to the provisions of clause 16'. In terms of the latter clause, in the event of the persons occupying the premises (ie the person making pre-cast fencing on a small portion of the property) at the time of conclusion of the lease not vacating the premises by 'the date of commencement hereof' (ie 1 November 1994, as stipulated in clause 1), the lessee undertakes to accept occupation of the premises from such later date as 'the premises are available'. In this event (delayed occupation), the lessee has no claim for damages or 'right of action' against the lessor and the lease shall be deemed to commence (and, of course, the obligation to pay rent will only run) from the later date on which the premises become 'fully available for occupation', with the further 'condition' that the boundary pegs be flagged and pointed out to the lessee. The corollary of this is that, notwithstanding the provisions of clause 1, the lessee is not *obliged* to take partial occupation of the premises and can delay taking occupation and being obliged to pay rent until such time as the premises are totally vacated and the boundary pegs have been flagged and pointed out to it. The delayed occupation provision in clause 16 is thus for the benefit of the lessee. It does not follows that if the lessee *chooses* not to delay taking occupation, but instead takes partial occupation of the premises long before the occurrence of these two events and commences

'the project' referred to in clause 2, the commencement of the lease and of the obligation to pay rent is still delayed. In such event, the lessee must be taken to have waived the benefit of clause 16. This was what happened in the present case when the plaintiff took occupation of the property in late 1994 and built its structure on the property. That despite the continued presence on the property of the person making pre-cast fencing and the continuing failure by the defendant to flag and point out the boundary pegs.

[53] It follows that, upon taking occupation of the property in late 1994, the plaintiff became obliged to pay rent to the defendant, as stipulated in clause 1 of the lease. Of course, because the plaintiff was, until early June 1997, deprived of the use of that portion of the property which was being used by the person making pre-cast fencing, the plaintiff would be entitled to a remission of rent over the period in question, proportional to its reduced use and enjoyment of the property.[4] If the amount to be remitted was capable of prompt ascertainment, the plaintiff could have set this amount off against the defendant's claim for rent; if not, the plaintiff was obliged to pay the full rent agreed upon in the lease and could thereafter reclaim from the defendant the amount remitted.[5] As was pointed out, albeit *obiter*,[6] by Nienaber JA in *Thompson v Scholtz* 1999 (1) SA 232 (SCA) at 247A-D:

[4]See in this regard, W E Cooper *Landlord and Tenant* 2ed (1993) 200; A J Kerr *The Law of Sale and Lease* 3ed (2004) 350.
[5]Kerr loc cit. See also J N Piek & D G Klein ''n Huurder se aanspraak op vermindering van huurgeld terwyl hy in besit van die huursaak is' 1983 (46) *THRHR* 367, especially at 381-2.
[6]The case did not involve a lease, being concerned with the payment of occupational interest in terms of a sale of property where the seller had failed to give the purchaser complete occupation of the property purchased pending transfer thereof to the latter, but nevertheless attempted to claim the full occupational interest agreed upon between the parties.

[54] 'Where a lessee is deprived of or disturbed in the use or enjoyment of leased property to which he is entitled in terms of the lease, either in whole or in part, he can in appropriate circumstances be relieved of the obligation to pay rental, either in whole or in part; the Court may abate the rental due by him *pro rata* to his own reduced enjoyment of the *merx.* This is true not only where the interference with the lessee's enjoyment of the leased property is the result of *vis major* or *casus fortuitus* but also where it is due to the lessor's breach of contract, eg because the leased property is not fit for the purpose for which it was leased or, as in this case, because the performance rendered by the lessor is incomplete or partial … The lessee would be entirely absolved from the obligation to pay rental if he were deprived of or did not receive any usage whatsoever. That would simply be a manifestation of the *exceptio* [*non adimpleti contactus*], more particularly of the first proposition in *B K Tooling* [*B K Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A)] (cf *Fourie NO en 'n Ander v Potgietersrus Stadsraad* 1987 (2) SA 921 (A)).'

[55] As the plaintiff's non-payment of rent *was* thus a breach of the lease, and as it failed to remedy this breach upon receipt of 90 days notice to do so, as required by clause 13, the defendant was entitled to cancel the lease. It did so by instituting action against the plaintiff in the Verulam Magistrate's Court in December 1997, as set out above. This was long before any purported acceptance by the plaintiff of any purported repudiation of the lease by the defendant.

[56] Although the plaintiff did eventually purport to give notice to the defendant, apparently in terms of clause 13 of the lease, that the latter was in breach in that it had failed, inter alia, to flag and point out the boundary pegs and to give the plaintiff 'total occupation' of the property, this was done only on

10 June 1998, once again long after the lease had been cancelled by the defendant on the grounds of the plaintiff's non-payment of rent.

[57] The plaintiff's contractual claim against the defendant should therefore have failed in the court a quo. As regards the alternative delictual claims, I have already indicated that the decision of this court in the *Lillicrap* case precludes such claims.[7]

[58] It follows that the appeal should succeed.

[59] Order

[60] In the circumstances, the appeal is upheld with costs. The order of the court a quo is set aside and substituted with an order of absolution from the instance with costs.

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[62] **B J VAN HEERDEN**
JUDGE OF APPEAL

[63] CONCUR**:**

[64] **HARMS ADP**

[65] **JAFTA JA**

[7]See para [5] above.

[6] [7] **13**

[66] **COMBRINCK JA**

[67] **CACHALIA AJA**

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