REPORTABLE

THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

CASE NUMBER 71/97

In the matter between:

Southern Sun Hotel Corporation (Pty) Ltd — Appellant

and

G and W Leases CC — Respondent

CORAM: Smalberger, Hoexter, Harms, Schutz and Zulman JJA

Date of Hearing: Monday 9 November 1998

Date of Judgment: Thursday 26 November 1998

JUDGMENT

ZULMAN JA:

The question in this appeal is whether the respondent has discharged the onus of proving the quantum of damages allegedly suffered by it due to the appellant's admitted failure to vacate rented premises on the agreed date. The respondent sued the appellant in the Cape Provincial Division for damages in the sum of R550 000,00, alternatively R31 628,16 as loss of rental, and a further amount of R22 700,00 being the fair and reasonable cost of putting the premises in good order and condition at the expiry of the lease, and costs. The court granted judgment in favour of the respondent in the sum of R550 000,00 together with interest thereon at the prescribed rate from the date of judgment until the date of payment, and costs. The alternative fell away and no order was made as to the claim for R22 700,00. The trial judge refused leave to appeal but the appellant, with leave granted upon a petition to the Chief Justice, appeals against such judgment.

The essential facts which are either common cause or not in dispute are as follows:-

1. In September 1988 a company known as D Glaser & Sons (Pty) Ltd entered into a written agreement of lease with the appellant for hostel

premises in Guguletu for a period of five years with an option to renew the lease for a further period.

2. The hostel was used by the appellant to house certain of its personnel.

3. During 1989 in terms of an oral or tacit agreement the respondent was substituted for the company as lessor.

4. On 16 November 1992 the appellant elected not to exercise its option to renew the lease. The respondent then decided to sell the property.

4. Early in 1993 a Mr Keal was approached by members of the respondent who indicated that they wished to sell their rights in the premises. Keal made various attempts to find a buyer. (I will deal with this aspect of the matter more fully later in this judgment when discussing the evidence that Keal gave at the trial).

5. On 1 October 1993 the respondent and the appellant agreed to extend the period of the lease by one month until 31 October 1993, the appellant undertaking to ensure that its personnel would vacate the hostel by 31

October 1993 and that any prospective purchaser of the premises would be given access to them.

6. On or about 22 October 1993 the respondent received a written offer from a Mr Homischer of Transkei Blue Line Bus Service ("the Blue Line offer") to purchase the respondent's leasehold rights to the premises for R800 000,00. The offer was conditional upon the purchaser being able to take occupation by 17h00 on 1 November 1993.

7. The appellant failed to give occupation of the hostel to the respondent by 31 October 1993 the hostel still being occupied by its personnel on that date.

8. During the course of 1 November 1993 the respondent instituted urgent ejectment proceedings against the appellant. Although an ejectment order was obtained before 17h00 on that day, the order was not served. Instead the respondent accepted the Blue Line offer during the course of the day of 1 November 1993 and at a time when it was aware that the appellant was in breach of its undertaking to vacate the premises.

10. The respondent was subsequently unable to comply with the conditions for the sale, as a consequence whereof the sale lapsed.

9. The breach of the appellant's undertaking to give vacant occupation persisted until 17 January 1994.

10. After the appellant vacated the premises the respondent occupied the premises until 21 March 1997. The premises were thereupon invaded and occupied by illegal squatters.

The respondent alleges the following in its particulars of claim in support of the damages claim for R550 000,00:

> "14. In the premises, plaintiff has sustained damages in an amount of R555 000,00, for which defendant is liable, which amount represents the difference between the aforesaid price of R800 000,00 and the market value of the leasehold rights as at 17 January 1994, being not more than R250 000,00.
>
> (The figure R555 000,00 is an obvious typographical error and should read R550 000,00)."

The appellant concedes that when it gave the undertaking to vacate the premises it was aware that the respondent intended to negotiate a sale of the

hostel and that in terms of the sale agreement the respondent would warrant to the purchaser that vacant occupation of the premises would be given. The appellant, however, puts in issue the respondent's claim for damages. The onus accordingly rested upon the respondent.

Eight witnesses testified in support of the respondent's case. The appellant closed its case without leading any evidence. It is only the evidence of the witness Keal that is central to the question of the appellant's liability for R550 000,00.

Keal gave evidence as an expert witness. At the time he was the industrial relations manager of Murray & Roberts (Cape) Limited where he had been employed for the past 20 years. During the course of his employment he became the de facto letting and selling agent of privately owned hostels in the Western Cape and he appeared to have had wide knowledge of, and experience in, the value of such hostels including the hostel in question. Keal expressed the opinion that the offer received by the respondent in October 1989 of R800 000,00 represented the fair market value of the premises at that time.

As I have previously indicated, Keal testified that in early 1993 he was

approached by members of the respondent who indicated that they wished to sell their rights in the property. The asking price was Rl 000 000,00. On 4 March 1993 Keal wrote to the respondent indicating that a party from Britain was interested in purchasing the hostel for £200 000,00 (then approximately equivalent to Rl 000 000,00) but that there were concerns that the appellant's employees in the hostel would not vacate it. On 2 September 1993 Keal again wrote to the respondent indicating that "three prominent Sowetans" were interested in purchasing the hostel, but when they sought to inspect the hostel they were asked to leave and were told by the "civics" that the hostel was not forsale.

When the Blue Line offer of 22 October 1993 failed to result in a sale because of the respondent's inability to give vacant occupation by 17h00 on 1 November 1993, Keal continued to market the property until 17 January 1994. He was not successful. According to him, "it was a bad period for a lot of people at that time". He continued to market the property from 17 January tot 21 March 1994, this being the period after the appellant gave occupation of the premises to the respondent and before the premises were illegally occupied by squatters. During this time Keal approached a number of people including a group of local doctors who intended to turn the hostel into a clinic as also

businessmen and other welfare organisations. It emerged during the cross-examination of Keal that on 2 December 1993 the respondent received an offer from Racec (Pty) Limited ("Racec") offering to negotiate to purchase the leasehold rights for a price around R700 000,00 provided that the building was empty. This offer was not acceptable to the respondent "as the price was not right". Keal further testified that in February 1994 he was confident that he could sell the hostel particularly as the hostel was then vacant. He made no mention of a price.

Subsequent to 21 March 1994 when the property was occupied illegally, Keal continued to try to find a buyer. He again had no success. Keal expressed the opinion that any attempt to evict the illegal occupants would have destroyed the marketability of the hostel. Keal testified on 15 November 1995. He was asked what options were open and what the value of the building would be if it were sold "today". He said that he had considered the option of selling the building to the head of each unit within the building using a government housing subsidy. The other option would be to sell it to a local black businessman or businessmen at a reduced amount. Keal was asked what any of the prospective purchasers would be prepared to pay for the premises. He answered that it would be an amount between R200 000,00 and R250 000,00.

He was further asked to state what price the hostel would fetch if he were given an open mandate. His answer was R250 000,00. It is apparent to me that if one reads Keal's evidence as a whole and in its proper context he was not referring to a value on 17 January 1994 but a value well after that date. Later in his evidence Keal stated that the doctors to whom I have made previous reference were then only prepared to offer a sum of around R200 000,00 to R250 000,00 on condition the hostel was vacant. Keal conceded in cross-examination that there would have been no difficulty in marketing the hostel if the employees had left voluntarily and were not evicted. He emphasised that there was a desperate shortage of accommodation in the Western Cape at the time.

The following extract from the evidence of Keal in cross-examination, is of considerable importance in deciding this matter:-

> "And would I be correct in saying that there was no significant factor between October of the previous year to January and February of the next year, in that two or three months, which would have affected the value of the premises? — I don't understand you.
>
> There was no significant, nothing of any significance which would alter the value of the premises in November '93 as opposed to the value of the premises in January and February 1994? In other words when this letter was written by Mr Glaser — No I don't think so."

The letter referred to is a fax dated 28 February 1994 sent by Mr Glaser

of the respondent to the respondent's bank manager. The material portion of the fax reads as follows:-

> "Various offers received since March 1993 follow. There have
> also been other verbal ones.
> As you see, they were all dependent on vacant occupation, which
> we now have.
> The name of the prospective purchaser has been removed for
> security reasons, but I will make it available to you on request.
> They are a highly reputable company.
> My agent is confident it will sell."

The offers referred to are the offer of 4 March 1993 for £200 000,00 and the offer of R700 000,00 from Racec to

which I have already made reference.

The crucial question which I believe should have been put to Keal during his evidence in chief, regard being had to the onus which rested upon the respondent, was what the value of the property was on 17 January 1994. The question was not asked. We were invited by counsel for the respondent to infer from the evidence given by Keal in cross-examination that even although the question was never directly put to the witness either in chief or in cross-examination, the answer that he would have given, had it been put would have

been R250 000,00. I do not agree. Besides the obvious observation that there was no obligation upon the appellant's counsel to ask the question so as to fill a gap in the respondent's case, there is no reason to assume that the witness would, had he been asked the question, have answered R250 000,00. He might have answered R700 000,00 based on his knowledge of the Racec offer, which after all had been made six weeks previously on 2 December 1993 when the premises were then unlawfully occupied by the appellant. He might even have volunteered a figure of between R700 000,00 and R800 000,00 bearing in mind that the premises were vacant on 17 January 1993. In all probability, having regard to the tenor of his evidence, he would, have given a valuation well in excess of R250 000,00. The figure of R250 000,00 was his opinion of the value of the property at the time of the trial in November 1995, and not on 17 January 1994. It is not for a court to speculate upon what his answer might have been to a question that he was not asked. It was for the respondent, who bore the onus, to prove, upon a balance of probabilities what the value of the property on 17 January 1994 was. It failed to do this.

Whilst it is true that Keal in his evidence stated that the absence of vacant occupation had a deleterious effect on the marketability of the property, he did not state what in his opinion the market value of the property was when vacant

occupation was given on 17 January 1994. There is no direct evidence as to the market value on this date. I repeat that the only direct evidence given by Keal regarding the value of the premises related to its value at the time of the trial in 1995.

It is apparent from a consideration of Keal's evidence that it was the occupation of the hostel by illegal squatters which took place some two months after the appellant restored occupation to the respondent that largely accounted for its reduction in value. Such reduction cannot be laid at the door of the appellant.

The Court a quo's finding that "Mr Keal's……uncontroverted evidence [is] that the building could only be sold at a vastly reduced price from the time of the breach" (my emphasis), is not supported by a proper evaluation of all of Keal's evidence.

I am accordingly of the view that the Court a quo erred when it accepted that the respondent established, even prima facie, that the appellant's breach of its undertaking caused a loss of R550 000,00 to the respondent.

As regards the alternative claim for loss of rental there is no cross-appeal by the respondent in regard thereto. Accordingly this Court it is not empowered to consider the matter. (See for example South African Railways and Harbours v Sceuble 1976 (3) SA 791(A) at 794 B-D and Holmdene Brickworks (Pty) Ltd v Roberts Construction Co. Ltd 1977(3) SA 670(A) at 692 C-D). The claim for R22 700,00 in respect of the fair and reasonable costs of putting the premises in good order and condition on the expiry of the appellant's lease must suffer a similar fate . There was, in any event, insufficient evidence to support both these claims.

In the result 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.

RH ZULMAN JA

SMALBERGER JA)
HOEXTER JA)
HARMS JA)CONCUR
SCHUTZ JA)