

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 3167/07

In the case between:-

LOIS BRINK

Applicant

and

THE PREMIER OF THE FREE STATE PROVINCE

1st Respondent

**THE MEC: DEPARTMENT OF PUBLIC WORKS,
ROADS AND TRANSPORT OF THE FREE STATE
PROVINCE**

2nd Respondent

HEARD ON:

1 NOVEMBER 2007

JUDGMENT:

WRIGHT, J

DELIVERED ON:

13 NOVEMBER 2007

[1] The applicant in this matter, which concerns the interpretation of a second option in a lease agreement, is Lois Brink and respondents respectively the Premier of the Free State Province and the MEC for the Department of Public Works, Roads and Transport.

[2] The applicant requests a declaratory order declaring her exercising the said option contained in a written lease between her and the Provincial Government concluded on 3 November 1997 to be lawful and legally binding, and further declaring her renewal of lease for the period from 1 October 2007 to 30 September 2012 to be valid. She also requests a mandamus ordering the respondents to comply with their obligations in terms of the extended lease and to pay the costs of the application jointly and severally on an attorney and client scale.

[3] Although there is a dispute between the parties whether annexure “LB8” to the replying affidavit or annexure “MM1” to the opposing affidavit constitutes the lease, it is common cause that the lease has been concluded and implemented for 10 years, and that the relevant clause which has to be interpreted is contained in both the abovementioned documents.

[4] The lease, which was entered into after a public tender process, made provision for an initial period of five years from

1997 to 2002 and for two further options in respect of two further consecutive periods of five years.

[5] The applicant duly informed the second respondent that she was exercising the first option with regard to the period from 2002 to 2007, and applicant therefore leased the property described as “the Pleasure Resort at Jim Fouche” until the 30th September 2007.

[6] On the 29th January 2007 the applicant forwarded a letter by facsimile to the second respondent exercising her second option to extend the lease for the further five years from 1 October 2007 to 30 September 2012. The letter contains the following paragraph:

“It is my view that the options contained in the agreement are such that the second option which I hereby exercise, will be on the same terms and conditions as contained to in the existing agreement of lease, including the annual escalation of rentals. There is in my opinion thus no other conditions to be negotiated.”

[7] The second respondent replied on the 2nd February 2007 to

this missive succinctly stating:

“4. Please be advised that as we did the previous year whereby we gave notice that the Department will not renew or extend the leave (sic).”

[8] A further letter dated 13 February 2007 sent by applicant’s attorney contained the following passage:

“Kindly advise as to the possibility of having a round table discussions regarding the renewal of the lease for the final period of 5 years, failure which our client will have to approach the High Court with an Application for a Declaratory Order as to her right of a further extension in terms of the existing agreement.”

The letter was marked “WITHOUT PREJUDICE”, but attached to the applicant’s founding affidavit.

[9] A final reminder elicited the following response from the second respondent:

“... there is no second option to be exercised by your client. Alternatively, the Department does not consider itself bound by the second option if it does not exist at all.”

Accordingly the present application was lodged.

- [10] Although both parties referred to other disputed reasons why the application should succeed or fail, (e.g. the applicant referring to an amount of two million rand spent in upgrading the resort and respondent referring to an offer of more than double the existing rental) their counsel both agree that these (and various other aspects) are irrelevant and that the actual dispute between the parties relates to the question whether applicant could unilaterally renew the lease. They also are *ad idem* that this question depends on the interpretation of the relevant clause in the agreement.

- [11] The clause in question reads as follows:

“The LEASE is for a period of five (5) years from 1 October 1997 to 30 September 2002, with the proviso that the LESSEE shall have an option to extend the lease period for a period of five (5) years with a second option of 5 years on the same and/or new conditions as will be mutually agreed, excluding a further right to renewal. The LESSEE shall give written notice to the LESSOR six (6) months in advance of his or her intention to renew the contract and all

negotiations with regard to the renewal of the contract shall be concluded four (4) months before the initial contract lapses. If the LESSEE does not give written notice six (6) months before the contract lapses or if all negotiations are not concluded four (4) months before the contract lapses, this option to renew expires.” (My underlining.)

[12] Before setting out the arguments of both legal representatives with regard to the interpretation of the above clause, which mainly relates to the interpretation of the words “and/or” and whether mutual agreement is necessary before the option can be exercised, it is necessary to refer shortly to certain applicable principles.

[13] The basic rule for interpreting contracts has been set out as follows in **COOPERS & LYBRAND AND OTHERS v BRYANT** 1995 (3) SA 761 (A) at 767E – 768E:

“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 the 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:

- (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 ...;
- (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 ...;
- (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."

[14] Since the option in question refers to a lease, it is necessary to bear in mind that the *essentialia* of a lease are:

- "(a) that the lessor is to give and the lessee to receive the temporarily use and enjoyment of the property;
- b) the property which is leased; and
- c) the rent."

See Cooper, **Landlord and Tenant**, 2nd Edition, p. 3.

POTCHEFSTROOM MUNICIPALITY v BOUWER 1958 (4) SA 384 (T) at 384C – D.

[15] Options entitling a lessee to renew a lease frequently contain a stipulation that the renewal is subject to conditions to be mutually agreed upon. If the lessee should unilaterally exercise such an option, this will not result in a lease. See Cooper *op. cit.* p. 13. This does not, however, result in the option itself being invalid. The effect of such a clause has been set out by Hathorn JP and quoted as follows in **BILODEN PROPERTIES (PTY) LTD v WILSON** 1946 NPD 736 at 739:

“But when, as here, the lessee is given the right to a renewal ‘upon terms to be arranged’ the meaning is changed and full effect must be given to the phrase I have just quoted, and, in my opinion, it is clear that unless terms are arranged there is no renewal. This does not mean that the right of renewal is valueless. On the contrary it has great value, for it obliges the lessor to negotiate and it prevents him from refusing pointblank to let to the lessee, and it also prevents him from letting to a third person upon terms which the lessee is willing to accept.”

[16] Although there is also a dispute whether the words “on the

same and/or new conditions as will be mutually agreed” refer to the first and the second options, or only to the second, this aspect is not decisive. Having regard to the precise wording of the whole clause it seems more probable that they only refer to the second option. The parties evidently did not consider negotiations necessary when the first option was exercised.

[17] It is also common cause that the words “and/or” must be interpreted both disjunctively as well as conjunctively.

[18] The applicant’s counsel, Mr. Van der Walt, argued that the applicant has the right to unilaterally exercise the option in view of the following:

- (a) With reference to certain dictionary meanings of the word option (“a thing that is or may be chosen - the freedom or right to choose ...”), and (“used to introduce an additional comment or interjection”) and or (“used to link alternatives”), he argued that the applicant had the right to choose to exercise the option on:
 - (i) the same conditions;
 - (ii) altogether new conditions (to be mutually agreed upon); or

iii) the same and new conditions.

(b) He argued that if it was the intention of the parties that negotiations should always take place the word “or” would not have been used in the last sentence of the clause. (It must, however, be pointed out that it is also possible for both parties to agree that the same conditions would be applicable.)

(c) He also argued that if the parties intended that the lessor would in any case have the right to negotiate, the contract would probably have read:

“a second option of five years on conditions to be negotiated.”

(d) Further, building on (a) above, he argued that the word “and” was necessary to make provision for a choice between only new conditions, and partly the same and partly new conditions.

(e) The following arguments set out in his supplementary heads of argument:

“Die woorde ‘**as will be mutually agreed**’ staan in direkte sinsverband met die woorde ‘**new conditions**’ en bepaal bygevolg dat wanneer die applikante se keuse op nuwe voorwaardes, hetsy uitsluitlik of tesame met die bestaande voorwaardes, val daar deur die partye onderhandel sal moet word.

Die woorde ‘**as will be mutually agreed**’ staan egter nie in direkte sinsverband met die woorde ‘**on the same**’ nie. Dit is daarvan geskei in die opsig dat alleen bestaande voorwaardes ter sake kan wees, maar daarby gevoeg wanneer bestaande sowel as addisionele nuwe voorwaardes ter sake is.”

- (f) According to the other terms of the contract there was no obvious reason why negotiations would be necessary. He specifically referred to the escalation clause, but also to other terms of the contract which, according to him, would not require amendment during the period of the lease.
- (g) If there is doubt to which interpretation should be accepted, the interpretation resulting in the extension of the lease should be preferred to an interpretation resulting in the possible non-extension thereof as the result of the failure to conclude successful negotiations.

In this respect he referred to the following cases:

BURROUGHS MACHINES LTD v CHENILLE

CORPORATION OF SA 1964 (1) SA 669 (W) op 670

G – H;

SNYMAN EN ANDERE v ODENDAALSRUS

PLAASLIKE OORGANGSRAAD 1998 (2) SA 297 (O)

op 312 C - F;

ROODE v MORTEL 1976 (4) SA 989 (A) op 993 A – C.

[19] Mr. Claasen, arguing for the respondents, relied on the following submissions:

- (a) That the option was conditional as a result of the words underlined above in the clause because of the following:
 - (i) The lessee shall give written notice to the lessor six months in advance of his or her intention to renew the contract;
 - (ii) All negotiations with regard to the renewal of the contract shall be concluded four months before the initial contract lapse; and

(iii) The second option of five years to be exercised in the same and/or new conditions as will be mutually agreed.

(b) That the applicant did not have a unilateral right to extend the lease on the same conditions;

(c) That the words “and/or” should be interpreted cumulatively.

He referred to the following cases: **REESKENS v**

REGISTRAR OF DEEDS 1964 (4) SA 369 (N) at 372

F;

S v BENNIE 1964 (4) SA 192 (ECD);

BERMAN v TEIMAN 1975 (1) SA 756 (WLD) op 757 D - H;

DU TOIT EN ‘N ANDER v BARCLAYS NASIONALE BANK BPK
1985 (1) SA 563 (A) op 370 D – I.

d) A contract should not be interpreted to allow any word to be unnecessary or not to have a meaning which may influence the interpretation of the contract as a whole. In this respect he referred to the following words appearing in **REX v STANDARD TEA AND COFFEE COMPANY (PTY) LTD** 1951 (4) SA 412 (A) 416 G – H:

“... and it appears to me that the Notice can and should be

construed so as not to treat as *pro non scripto* either of the words mentioned.”

- (e) He also argued with reference to **ARONSON v STERNBERG BROTHERS (PTY) LTD** 1985 (1) SA 613 (A) at 621 – 622 that the option would not be invalid if it contains the words in question. These words had the effect as already set out in paragraph 15 of this judgment.
- (f) He also relied on the two other sentences of the clause, and especially the word “and” in the following sentence:

“The LESSEE shall give written notice to the LESSOR six (6) months in advance of his or her intention to renew the contract and all negotiations with regard to the renewal of the contract shall be concluded four months before the initial contract lapses.”

He argued that the word “and” is indicative that there

would be notice, as well as negotiations. With regard to the last sentence of the clause and the word “or” in that clause, he argues as follows in his supplementary heads of argument:

“Duidelik is die sinnetjie voor die woordjie ‘or’ gerig op die skriftelike kennisgewing ses maande vooraf. Dit is ‘n absolute *sine qua non*. Indien geen kennisgewing plaasvind nie, dan verval die opsie. Die laaste gedeelte van die sin na die woordjie ‘or’ is ook duidelik. Dit kan slegs van toepassing wees nadat daar ‘n kennisgewing uitgegaan het. Met ander woorde, dit beteken ek gee kennis plus alle onderhandelinge moet afgehandel word vier maande voor verstryking van die kontrak. Daar moet dus onderhandel word.”

[20] After considering the arguments as summarised in the last two paragraphs, I have come to the following conclusions:

- (a) There would have been no problem if only the word “or” had been used in the underlined sentence. In that case the applicant would have had a choice to renew the lease on the same conditions.

- b) Effect must be given to the use of the word “and”.
- c) I have noted the various cases with regard to the interpretation of the words “and/or”, and find the interpretation favoured by **DU TOIT EN ‘N ANDER v BARCLAYS NASIONALE BANK BPK**, *supra* to be the most useful. This Court is in any case bound by this decision. It is firstly mentioned that these words are not ambiguous. This means, of course, that no extrinsic evidence is admissible with regard to the interpretation of the contract. I have already mentioned that the parties are in agreement that all other considerations referred to in paragraph 10 hereof, are irrelevant and that the only source of interpretation is the words of the contract itself on the basis as set out in paragraph 13 hereof. In the **DU TOIT**-case the words in question referred to a suretyship where the surety accepted liability for the debts of “A and/or B”. The following interpretation was given by Botha JA on p. 570 G – I of the report:

“Kry 'n mens nou 'n borgstelling waarin die borg hom teenoor die bank verbind vir die betaling van die toekomstige skuld van "A en/of B", dan skyn dit my redelik duidelik te wees wat deur die uitdrukking "en/of" beoog word. Met die vermelding van twee hoofskuldenare is daar die inherente vooruitsig dat op 'n gegewe tydstop òf A alleen, òf B alleen, òf beide A en B geld aan die bank kan skuld wat die bank van die borg sal wil verhaal. Om net op die bewoording van die dokument af te gaan, lyk dit vir my redelik duidelik dat daar deur middel van die uitdrukking "en/of" beoog word om voorsiening te maak vir al drie die moontlikhede wat ek genoem het. As op enige gegewe tydstop slegs A, maar nie B nie, geld aan die bank skuld, kan die borg vir A se skuld aangespreek word; as slegs B skuld, en nie A nie, kan hy vir B se skuld aangespreek word; en as beide A én B geld skuld, kan hy vir albei se skuld aangespreek word. In so 'n samehang is ek van mening dat dit 'n heel natuurlike, en selfs voor-die-hand-liggende, uitleg van die uitdrukking "en/of" is, om al drie die moontlike gevalle te dek soos ek aangedui het.”

- (d) The contract must be interpreted bearing in mind the interests of both the lessee and the lessor. It seems to me that both parties could agree that the lease could be extended on the same conditions and/or new

conditions (or on only the one or the other), and that Mr. Van der Walt's argument to the contrary is subjective. The words "as will be mutually agreed", therefore refer to both methods of extension (on the same or new conditions or both).

- (e) This view is substantiated by Mr. Claasen's argument with regard to the use of the words "and" and "or" in the last two sentences of the clause.
- (f) Mr. Claasen's argument that neither the two interpretations will lead to invalidity is also correct, and therefore Mr. Van der Walt's reliance on the cases mentioned in paragraph 18(g) hereof has less persuasive value.
- (g) Considering the clause as a whole it seems likely that the parties intended that after ten years of the lease had expired, the parties should have the right to possibly negotiate new terms in view of changing circumstances, and this is precisely what the words of the clause, construed as a whole, have achieved. The respondents were, however, not entitled to refuse to

negotiate.

[21] The parties are also in agreement that as the respondents took the view that the lease could not be extended, and flatly refused to negotiate, it was necessary for the applicant to approach the court to obtain the necessary relief. Applicant abandoned its prayer for costs on an attorney and client scale, and merely asked for party and party costs. Although Mr. Claasen did not concede that the applicant was entitled

to the costs, he did not strenuously oppose applicant's request, or argue to the contrary, and did not provide any persuasive argument why costs should not be allowed in favour of applicant.

[22] A draft order (on the alternative basis as argued by applicant) has been prepared by the applicant's counsel to which the respondents' counsel agreed (except as far as the costs are concerned). This order was drawn in Afrikaans as were the applicant's papers, and I propose therefore to give the order directly in terms of the draft order. The

respondents should bear in mind the rights given to the holder of an option to renew a lease subject to negotiations with regard to the conditions as set out above, and that the second respondent should always allow the applicant to match the highest tender, or offer, received in respect of the renewal of the lease.

[23] The following order is made:

“1. Dit word verklaar dat die verhuurder (die Provinsiale Regering van die Vrystaat Provinsie) nie geregtig was om summier en sonder dat *bona fide* onderhandelinge tussen die huurder (die applikante) en die verhuurder omtrent ‘n verdere verlenging van die huurkontrak, ‘LB1’ tot die funderende beëdigde verklaring soos vervang, gevoer was, die huurder se versoek om ‘n verdere verlenging van die huurkontrak te weier nie.

2. Die verhuurder word gelas om onderhandelinge met die huurder aan te knoop oor die moontlike verdere verlenging van die huurkontrak ingevolge die bepalinge van klousule 2 daarvan tot en met 30 September 2012, hetsy op dieselfde of ander voorwaardes of ingevolge ‘n kombinasie van die bestaande en ander voorwaardes.

3. Ten einde die aanvang van die onderhandelingsproses te reël, word dit gelas dat:

3.1 die verhuurder binne 21 dae na die verlening van hierdie bevel 'n skriftelike uiteensetting van die voorwaardes waarop die verhuurder bereid sou wees om die huurkontrak te verleng, aan die applikante se prokureur van rekord moet beteken;

3.2 die huurder binne 14 dae na die aflewering van die uiteensetting in paragraaf 3.1 gemeld, haar skriftelike aanvaarding van sodanige voorstelle of enige skriftelike teenvoorstelle aan die respondente se prokureur van rekord moet beteken; en

3.3 die verhuurder en die huurder nadat daar aan paragrafe 3.1 en 3.2 voldoen is, indien ooreenkoms dan nog nie bereik is nie, verplig sal wees om oor 'n verdere tydperk van drie kalendermaande bereken vanaf die eerste dag van die maand opvolgend op die maand waartydens aan paragraaf 3.2 voldoen is, redelikerwys, sonder vooroordeel en *bona fide* onderhandelinge te voer ten einde te poog om

ooreenkoms te bereik oor die voorwaardes waarop 'n verdere verlenging van die huurkontrak tot en met 30 September 2012 kan geskied.

4. Gedurende die tydperk in paragraaf 3.3 gemeld, sal dit die partye vrystaan om die Hof te nader vir 'n verlenging van sodanige tydperk, mits en indien dit sou blyk dat enige van die partye in versuim is om redelikerwys, sonder vooroordeel en *bona fide* onderhandelinge omtrent die verdere verlenging van die huurkontrak tot en met 30 September 2012 en die voorwaardes daarvan, te voer.
5. Indien die verhuurder en die huurder daarin sou slaag om 'n ooreenkoms te bereik omtrent die verlenging van die huurkontrak tot en met 30 September 2012, sal sodanige ooreenkoms in skrif vervat word en deur die verhuurder en die huurder, of hul gemagtigde verteenwoordigers, onderteken word, alvorens dit

bindind sal word.

6. Hangende die duur van die onderhandelinge voormeld hetsy gedurende die aanvanklike termyn of enige verlenging daarvan, of gedurende die beregting van enige aansoek om 'n verlening van die termyn waartydens onderhandelinge gevoer moet word, en tot tyd en wyl 'n skriftelike huurkontrak soos in paragraaf 5 beoog gesluit is, of tot tyd en wyl die onderhandelinge ingevolge die bepalinge van hierdie bevel tot 'n einde sou kom, sal die bepalinge en voorwaardes van die huurkontrak *mutatis mutandis* van toepassing bly, en sal sodanige huurkontrak alleen ten einde loop indien die partye nie 'n skriftelike ooreenkoms bereik nie. In sodanige omstandighede sal die huurkontrak beëindig word op die laaste dag van die maand onmiddellik opvolgende op die maand waartydens die onderhandelings tydperk, of enige verlenging daarvan, verstryk het.

7. Die respondente word gesamentlik en afsonderlik, die een te betaal die ander vrygestel te word, gelas om die applikante se koste te betaal.”

G.F. WRIGHT, J

On behalf of applicant:

Adv. D.J. Van der Walt
Instructed by:
Symington & De Kok
BLOEMFONTEIN

On behalf of respondents:

Adv. J.Y. Claasen
Instructed by:
Staatsprokureur
BLOEMFONTEIN

/sp