

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

Case No. : 2511/2004

In the matter between:

FEROX INVESTMENTS (PTY) LIMITED

APPLICANT

and

BLUE DOT NURSERY CC t/a JASMINE
PLANT & BIRD CENTRE

RESPONDENT

HEARD ON: 21 OCTOBER 2004

JUDGMENT: MUSI J

DELIVERED ON: 2 DECEMBER 2004

- [1] On 18 December 2000 the respondent entered into a lease agreement with Bonatla Property Holdings Ltd (Bonatla) in terms of which the respondent leased from the latter certain premises in a business complex called Welkom Game Centre wherein the respondent conducted a nursery business. The duration of the lease was eight years two

months with effect from 1 August 2000. On 13 October 2003 the applicant bought the property from Bonatla and it is common cause that it has lawfully stepped into the shoes of Bonatla and has become the lawful lessor. It thus has *locus standi* to bring the instant application. The relevant lease agreement is annexed to the papers and marked as “JB2”.

- [2] On 21 May 2004 the applicant, through its attorneys, addressed a letter to the respondent advising of its intention to cancel the lease in terms of clause 20 with effect from 30 June 2004 from which date the respondent was required to vacate the premises. The ground on which cancellation was sought, is expressed as follows:

“2.1 As a result of certain recent structural damage to the building in which the premises leased to you in terms of the agreement are situate, our client has elected to engage in reconstruction, renovation and the re-building of such building.”

The respondent's response thereto was to deny, through a

letter dated 26 May 2004 addressed to the applicant's attorneys by its attorneys, that there was any damage to the premises which entitled the applicant to cancel the contract.

The respondent went further to hint that the real motive for the intention to cancel, was that the applicant wanted to replace the respondent's existing nursery business with a KFC outlet and a Tyre Fitment Centre.

- [3] It turns out that prior to the letter of cancellation aforesaid, the parties had been engaged in negotiations involving proposals to get the respondent to relocate to another section of the complex or to accept monetary compensation in exchange for the early termination of the lease. The negotiations deadlocked. It is clear from the relevant exchanges and material filed in this regard, that indeed the applicant wanted to give the main complex a major facelift and replace the premises leased to the respondent with a KFC and a Tyre Fitment Centre.

- [4] The dispute in this matter centres on the interpretation of clause 20.2 which reads as follows:

“20.2 (if) there is destruction or damage to the building or parts thereof, whether or not the premises are involved and the landlord determines to put an end to the tenancies in the building in order to engage in reconstruction, renovation or rebuilding.”

- [5] Mr. Bester, for the applicant, has referred me to the golden rule of interpretation as stated in **COOPERS AND LYBRAND AND OTHERS v BRYANT 1995 (3) SA 761 AD at 767 E – F**, to the effect that “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”. He argued that the language of clause 20.2 was clear and unambiguous, namely if there should be damage to the building or parts thereof and the landlord decided on that account to engage in reconstruction, renovation or rebuilding, he would be entitled to cancel the contract upon giving the tenant a proper notice. He interpreted the phrase “whether or not the premises are involved” to mean that it did not matter that the destruction or damage was on the leased

premises. In other words, so long as there was damage elsewhere in the complex and the landlord decided to renovate, it was entitled to cancel. He referred to the Schedule to the contract and submitted that the word “building” did not refer to the building of the premises leased by the respondent but rather to the complex as a whole. He further submitted that the word “damage” was not qualified and any damage would suffice.

- [6] Mr. Oberholzer, for the respondent, submitted, on the other hand, that the grammatical meaning of the words used in this clause would lead to an absurdity and inconsistency with the rest of the contract. He submitted that the clause must be read in the context of the contract as a whole and bearing in mind its nature and purpose. He laid emphasis on the nature and extent of the damage and submitted that it could not have been the intention of the parties that the applicant would be entitled to cancel on the basis of minor damage. He further submitted that it had to be damage to the leased premises itself and not damage unrelated to the portion

leased by the respondent. In this regard, he pointed out that there was in fact no damage at all to the latter portion. In any event, even the damage in the main complex was not of a serious nature and did not warrant a cancellation, so Mr. Oberholzer argued.

- [7] Now the golden rule in the interpretation of contracts is to be followed, namely, that the common intention of the parties must be ascertained. This is done not by relying on what the parties purported to intend, but “what the language used in the contract means, i.e. what their intention was as expressed in the contract”. See **MIA v D J L PROPERTIES (WALTLOO) (PTY) LTD AND ANOTHER 2000 (4) SA 220 TPD at 228 E**. The first step in the process of ascertaining the common intention is to adhere to the grammatical and ordinary meaning of the words used, unless this would result in some absurdity or repugnancy or inconsistency with the rest of the document. See **COOPERS AND LYBRAND AND OTHERS v BRYANT** *supra*. Now parties to contracts do not always use words in their usual, literal meaning and it is the

context in which they are used that will indicate the particular meaning that the parties had in mind. This is where the second step in interpretation of contracts comes in, namely, that the words used should not be considered in isolation, but must be considered in the context of the particular clause and the contract as a whole, bearing in mind the nature and purpose of the contract. See **COOPERS AND LYBRAND** *supra* at 767 i to 768 B.

- [8] Sometimes the language of a contract may be ambiguous and open to different interpretations. There are various rules of interpretation that may help to resolve the ambiguity, amongst which is what is referred to as the equitable interpretation. See R H Christie **THE LAW OF CONTRACT** **4th Edition at 249 – 250**. The learned author refers in this regard to **RAND RIETFontein Estates Ltd v Cohn** **1937 AD 317** where the following passage from an earlier judgment was cited with approval:

“The Court will lean to that interpretation which will put an

equitable construction upon the contract and will not, unless the intention of the parties is manifest, so construe the contract as to give one of the parties an unfair or unreasonable advantage over the other.”

The learned author continues to state at 250:

“It should always be borne in mind that, even if a contract has been drafted by a skilled draftsman, it has become the act of the parties and should therefore be interpreted not in a subtle way that might appeal to a lawyer but in the straight forward way that can be presumed to represent the common intention of two business people or farmers or whatever the parties might be, and of course an interpretation that does not give one party an unfair or unreasonable advantage over the other is to be preferred to one that does.”

[9] It is against the above background of the applicable legal position that I now turn to consider the clause in question.

The language of clause 20.2 is not plain at all; in fact, it is complex. It consists of two parts. The first ends with the phrase “whether or not the party the premises are involved” and then follows the second.

[10] I deal firstly with the first part. The crucial words are “building” and “premises”. Ordinarily building denotes a wall structure, whereas premises ordinarily referred to a site. In respect of a lease contract, premises would normally comprise the whole letting unit, open spaces and buildings included. So that the buildings would normally form part of the leased premises. But that is clearly not the sense in which the word “building” is used in this clause, for it is used in contradistinction to “premises”. In other words, it is not used in its ordinary, literal sense.

[11] We shall therefore have to look into the context both of the clause and the contract as a whole to ascertain what the parties intended it to mean. Mr. Bester has referred to the schedule to the contract and contended that the words “building” and “premises” are defined there. He contended that “building” refers to the whole complex whereas “premises” refers to the portion of the complex leased by the respondent. But “premises” in the schedule is given as “erf

165, Welkom”, which is the plot on which the whole complex is situated. That would mean that “building” and “premises” are synonymous, which cannot be correct. It becomes necessary therefore to look into the other clauses in the contract.

[12] Clause 12.1 reads in part:

“The landlord shall be entitled at all times during the period of this lease to complete the buildings on the property and to effect any repairs, alterations, improvements and additions to the said building and for such purpose to erect building equipment anywhere on the property or in the building (including the premises) ...”

“Buildings” in the phrase “buildings on the property” clearly refers to all buildings on the complex whereas “building” in the phrases “in the building” and “to the said building” refers to the whole complex as a unit. This is reinforced by use in brackets of the words “including the premises”. Clause 3.2 provides in part that the tenants’ share of the municipal rates and taxes payable by the landlord in respect of the “land or building” shall be determined by multiplying the factor of the lettable area of the “premises” divided by the total lettable area of the “building” in which the premises are located. The word building in the phrase “land or building” refers to the whole complex, and “building” in the phrase “the total lettable area of the

building” has the same meaning. In my view, this is the same meaning in which the words are used in clause 20.2. I do not think that there can be any doubt that “premises” in clause 20.2 refers, not to the whole complex as a letting unit, but to the specific portion leased by the respondent. In the suretyship agreement, annexure “A” to the lease agreement, the relevant portion is described as shop 33. If there is any doubt about the sense in which the word “premises” is used in this clause, chapter 6 of the lease contract dispels that.

It is not disputed that the portion leased by the respondent comprises buildings as well as the open spaces of the nursery and is detached from the main complex, so that reference to the premises includes both the buildings and the open spaces of shop 33.

- [13] The phrase “whether or not the premises are involved” should therefore mean irrespective of whether there is destruction or damage on the leased premises itself. Insofar as this part of clause 20.2 is concerned, the interpretation contended for by Mr. Bester, is therefore correct.

[14] The second part of clause 20.2 is more problematic. It is ambiguous and can mean that as long as there is damage, even of a trivial nature, anywhere in the property and the landlord decides to engage in reconstruction, renovation or rebuilding, he can cancel. In this sense, the crux of the matter is the decision of the landlord. This is the interpretation contended for by Mr. Bester. Mr. Oberholzer contended, on the other hand, that it could not have been the intention of the parties that the landlord will be entitled to cancel even on account of the slightest of damage. He referred to the nature and purpose of the contract and pointed out that this is a long term lease that was meant to give the tenant security of tenure.

[15] The alternative interpretation postulates emphasis on the nature and extent of the damage. In terms hereof the reconstruction, renovation or rebuilding, whichever is decided to engage upon, must relate to the nature and extent of the destruction or damage and must be justified by it. In other words, the nature and extent of the damage must be

such that correction thereof necessitates cancellation of the contract. It is imperative to again consider the other clauses of the contract, for an indication of what the parties intended. One needs go no further than the very chapter 20 under which the disputed clause appears. Clause 20.1 is clear and unambiguous and provides for cancellation in event of destruction or severe damage to the premises. It is significant that clause 20.2 is in fact an alternative to 20.1. This suggests that as in clause 20.1 cancellation must be on account of destruction or damage, albeit of a lesser degree. Clause 20.4 also deals with cancellation on account of damage and it is significant that the word “destruction” is omitted. It envisages the sort of damage that would be serious enough to adversely affect the tenant’s use of the premises, but not so serious as to warrant termination of the lease; in which event the tenant would be entitled to a remission of rental for the duration of the inconvenience. This would clearly apply to the sort of damage that only necessitates renovations, as is the case in the instant matter where the applicant has been engaged in renovations in the

main complex.

[16] Now the respondent has averred that none of the affected tenants in the main complex have had their leases cancelled. Mr. Bester countered this by saying that it is not known whether the other tenants have the same contract as the respondent and the respondent did not aver in his answering affidavit that this was so. This contention cannot stand. The nature and the structure of the contract is such that it can safely be accepted that it is a standard document applicable to all the tenants of the complex. In particular the main body of the contract containing "General Conditions of Lease" need no modifications to apply to each and every tenant. The difference between the tenants would relate to their personal particulars, duration of the lease, description and size of the specific leased premises and rental, which are all matters provided for in the schedule. Incidentally the averment that the leases of the other tenants have not been cancelled is made in paragraph 10.15 of the answering affidavit and the applicant did not deny it in its replying

affidavit.

[17] The use of the words “destruction or damage” in clause 20.2 suggests that the damage contemplated, although not of a severe nature as in clause 20.1, must nonetheless be serious. This is reinforced by the omission of the word “destruction” in clause 20.4, which means that the damage contemplated therein is of a less serious nature than that contemplated in 20.2. By necessary implication, for cancellation to be justified in terms of clause 20.2 more serious damage must have occurred and it would be the sort of damage that would need more than just renovations to remedy.

[18] Finally, the heading of the whole chapter 20 is significant and reads: Damage or Destruction. Cancellation in terms of all the clauses herein must therefore be on the basis of destruction or damage and the clauses are in the order of the degrees of damage, starting with the severe, to the serious up to the less serious. A construction that ignores the nature

and extent of the damage is therefore untenable.

[19] I hold therefore that the correct interpretation of clause 20.2 is that in the event of serious damage to the building as defined, the landlord will to be entitled to cancel the contract in order to engage in reconstruction, renovation or rebuilding. This construction is moreover in line with the principle of equitable interpretation and will give none of the parties an unfair or unreasonable advantage over the other. And I venture to suggest that the principle of equitable interpretation is compatible with the values of fairness and equality rooted in our constitution and that parties entering into a contract would not intend consequences that would impinge on these values.

[20] Now these are motion proceedings and insofar as there are disputes of act, the rule in **PLASCON-EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD 1984 (3) SA 623 AD** applies. As far as the nature and extent of the damage in the building is concerned, the applicant had, in the letter of

cancellation, annexure “SJB5”, alleged structural damage as the reason for the cancellation. This in a way implies an awareness that for cancellation in terms of clause 20.2 there had to be serious damage. However, in its founding affidavit the applicant merely alleged that the building had suffered damage and in argument it adopted the stance that it did not matter whether the damage was serious or not. The version of the respondent was that the damage was not serious at all and that renovations in the main building were merely for the purpose of giving the building a facelift. The renovations were moreover not necessitated by whatever damage had been there, but were part of the applicant’s grand design to revamp the main complex and introduce new businesses. Hence it wanted to replace the nursery with a KFC outlet and a Tyre Fitment Centre. On this version of the respondent, which is not without merit, I find that there was no damage of the sort that entitled the applicant to cancel the contract in terms of clause 20.2.

The application is dismissed with costs.

H.M. MUSI, J

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