Bib

40/85

EVANGELOS ANTONIOU SOTERIOU

AND

RETCO POYNTONS (PTY) LIMITED

381/83/AV

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

EVANGELOS ANTONIOU SOTERIOU Appellant

AND

RETCO POYNTONS (PTY) LIMITED Respondent

(formerly known as POYNTONS PROPERTIES(PTY)LTD)

CORAM: Kotzé, Botha, Nicholas, JJA, Galgut *et* Vivier, AJJA

HEARD: 7 March 1985

DELIVERED: 29 March 1985

J U D G M E N T

NICHOLAS, JA

This appeal has to do with the legal effect, if any, of a clause in a lease.

The ....

The lease was concluded on 18 December 1978 between POYNTONS PROPERTIES (PTY) LTD ("POYNTON's") as lessor and MICHAEL CONSTANTINIDES as lessee. (The name of the lessor was subsequently changed to RETCO POYNTONS (PTY) LTD). The lease related to shop 18 in POYNTON BUILDING in Church Street, Pretoria, and was for the period 1 February 1978 to 31 January 1983. Clause 2(b) of Part B provided:

> "2(b) The lessee shall have the first refusal of entering into an extension of this lease for a further period of 4 years and 11 months upon such terms and conditions and at such rental as may be mutually agreed upon. In the event of the lessee wishing to exercise such right, the lessee shall give to the lessor three months notice prior to the expiration of this lease of his intention so to do."

The rental was initially R643,00 per month, increasing

annually ....

annually to R811,00 in the last year of the lease. The lessee was limited to using the premises for the purpose of a "general dealer, fresh products, baking and restaurant".

(It appears that the owners of POYNTON BUILDING were companies in the RETCO group. The building was leased under a "head lease" to POYNTON's which sub-leased the individual letting units to various tenants. In March 1982 RETCO LTD appointed RICHARD ELLIS DUNLOP HEYWOOD (PTY) LTD ("RICHARD ELLIS") as managing agents for POYNTON BUILDING.)

On 29 February 1980, EVANGELOS SOTERIOU, the present appellant, took cession of the lease with the written consent of POYNTON'S, and thereafter conducted a take-away and confectionery business on the premises.

In a letter dated 21 October 1982 SOTERIOU's attorneys advised RICHARD ELLIS that SOTERIOU wished to exercise "the option" to renew the lease for a further period of 4 years and 11 months, commencing on 1 February 1983, and requested details, as soon as possible, "of the terms and conditions, as well as the rental which will be payable for such new lease." RICHARD ELLIS replied by letter dated 29 October 1982. It stated:

> "We deny that your client has an enforceable option to extend his lease beyond the 31st January 1983. We do not intend entering into negotiations for such an extension with your client. In fact the relevant premises have already been relet."

On that day SOTERIOU's attorneys wrote a letter direct to POYNTON's, advising that SOTERIOU intended exercising his right as contained in clause 2(b), and requesting that POYNTON's communicate with them. On 2 November 1982 RICHARD ELLIS sent a formal acknowledgment of this letter, in which it referred to its letter of 29 October 1982.

In a letter dated 17 November 1982, addressed to RICHARD ELLIS, SOTERIOU's attorney advised that SOTERIOU would not vacate the premises - he was in occupation as a valid tenant and he was lawfully entitled to remain in occupation.

Messrs ROOTH AND WESSELS, a firm of attorneys acting for RICHARD ELLIS, replied on its behalf in a letter dated 25 November 1982. They stated that their

client .....

client, acting on behalf of POYNTON's, denied the existence of a right of refusal or a valid option in SOTERIOU's lease, and reiterated that POYNTON's did not intend entering into negotiations regarding a renewal of the lease.

By letter dated 17 January 1983, ROOTH AND WESSELS informed SOTERIOU that the premises had been relet, with occupation as from 1 February 1983. They advised that unless SOTERIOU timeously vacated the premises, POYNTON's would take urgent steps to obtain an eviction order, and would also claim damages.

Towards the end of January 1983, SOTERIOU tendered payment of rental in respect of February. This was refused.

The ....

The threatened eviction proceedings were launched in the Transvaal Provincial Division as a matter of urgency by notice of motion dated 14 February 1983. POYNTON's sought firstly an order declaring that clause 2(b) of the lease did not afford SOTERIOU a right of first refusal but purported to be an option to extend the period of the lease, and that such option was of no force or effect; and secondly an order of ejectment.

The grounds of urgency were that POYNTON's had concluded a written lease of shop 18 with CENTRAL NEWS AGENCY LIMITED (CNA) as from 1 February 1983 at a basic monthly rental of R1762,69; that CNA was suffering damages because it was unable to trade in the premises; and that CNA held

POYNTON's ....

POYNTON's responsible for such damages.

The contention raised in the applicant's founding affidavit was that foreshadowed in the letters written on its behalf, namely, that on a true interpretation of clause 2(b) it granted SOTERIOU not a right of first refusal but an option; and that the option was void and unenforceable because it did not contain the essential elements of a lease - in particular it contained no agreement as to the rental to be paid during the extended period of the lease. In consequence SOTERIOU had no right to hold over the premises.

SOTERIOU opposed the application. His opposition was not limited to a contention that clause 2(b)

was ....

was legally effective. He also raised two factual defences: one based on alleged representations made on behalf of POYNTON's; the other on an agreement for the extension of the lease allegedly concluded by its agents.

The application was heard by McCREATH, J. He dismissed the factual defences, and came to the conclusion that, whether clause 2(b) of the lease was an option or a right of first refusal, it was of no force or effect because the rental and the other terms and conditions had not in fact been mutually agreed upon. In view of this conclusion, he considered it unnecessary to make a declaratory order, and simply granted an order of

ejectment ....

ejectment with costs.

An application to the Court a quo for leave to appeal was refused with costs. Pursuant to a petition to the Chief Justice, however, leave to appeal to this Court was granted.

At the beginning of the hearing of the appeal, counsel for SOTERIOU informed the Court that no argument would be advanced in regard to the factual defences.

If clause 2(b) is to be construed as granting an option, then clearly it was invalid because there was no agreement as to rental or any other terms and conditions of the lease. (Cp. Aris Enterprises (Finance)(Pty)Ltd v Waterberg Koelkamers (Pty)Ltd 1977(2) SA 425(A) at 434, and cases there cited,

particularly ....

particularly Hattingh v Van Rensburg 1964(1) SA 578(T) at 582-583). If, however, the clause can properly be construed as granting a valid right of first refusal, that construction is to be preferred. The courts are "reluctant to hold void for uncertainty any provision that was intended to have legal effect". (Brown v Gould 1972 Ch 53 at 56-58). LORD TOMLIN said in Hillas & Co Ltd v Arcos Ltd 1932 All E R Rep 494 (HL) at 499 H-I that-

> "... the problem for a court of construction must always be so to balance matters that, without the violation of essential priciple, the dealings of men may as far as possible be treated as effective, and that the law may not incur the reproach of being a destroyer of bargains."

(This was quoted with approval in Collen v Rietfontein Engineering Works 1948(1) SA 413(A) at 428-429).

There can be no doubt that clause 2(b) was intended to have business efficacy and to be binding on the parties. It formed part of an agreement recorded on RETCO LTD's standard form of commercial lease, which was presumably used in many leases of business premises concluded by companies in the RETCO group. The letting of premises in the building was part of POYNTON's business. And the clause was one of considerable commercial importance to the lessee, because it promised him security of tenure for an additional period, if he should desire it.

In clause 2(b), the parties have used the term "first refusal" and there is no reason why it should not

be ....

be taken at its face value.

A right of first refusal is well-known in our law. In the context of sale it is usually called a right of pre-emption. The grantor of such a right cannot be compelled to sell the property concerned. But if he does sell, he is obliged to give the grantee the preference of purchasing, and consequently he is prevented from selling to a third person without giving the first refusal. (See <u>Van Pletsen v Henning</u> 1913 AD 82 at 95; <u>Owsianick v African Consolidated Theatres (Pty) Ltd</u> 1967(3) SA 310(A) at 321 F). So, a right of pre-emption involves a negative contract not to sell the property to a third person without giving the

grantee ....

grantee the first refusal; and the grantee has the correlative legal right against the grantor that he should not sell. This is a right which is enforceable by appropriate remedies.

In the case of an option, the grantor has made an offer which the grantee can accept without more, upon which a contract of sale is complete. In the case of a right of pre-emption, there is no offer at the time of the grant, and the grantor is not obliged to make an offer unless and until he wishes to sell the property. (See Owsianick's case (supra) at 316).

There is in priciple no differences between a

right ....

right of pre-emption in the case of sale, and a right of first refusal of a lease.

Although clause 2(b) refers to "the first refusal of entering into an extension of the lease", it is clear that what was contemplated was not an extension of the existing lease (because the terms and conditions and the rental might well be different), but an extension of the period of occupation under a new lease. The right is, therefore, the right of first refusal of such new lease.

"Refusal" imports an offer. As FARWELL J said in Manchester Ship Canal Company v Manchester Racecourse Company (1900) 2 Ch 352 at 364:

> "Now,a refusal, to my mind, implies an offer. A thing is not in ordinary

parlance ....

parlance refused before it is offered."

The Court of Appeal agreed. (See Manchester Ship Canal Company v Manchester Racecourse Company (1901) 2 Ch 37(C.A.) at 48.)

POYNTON's was accordingly under an obligation to offer SOTERIOU a new lease of shop 18. Plainly any offer had to be one which was capable of being turned into a contract by acceptance. It had therefore to state a rental and any other terms and conditions which POYNTON's required.

Nothing was said in clause 2(b) as to the method of determining the rental to be stated in the offer, but POYNTON's was not free to fix any rental it pleased.

The ....

The case is not one like Bellairs v Hodnett and Another 1978(1) SA 1109(A) where the offer price for shares in a company was that which the member, by the exercise of his own free volition, fixed as the amount he wanted the other members to pay him for his shares. Plainly POYNTON's must act *bona fide*. Cp CORBIN ON CONTRACTS s. 261, p. 477.

> "The law will require performance 'in good faith' and the term 'offer' will be interpreted as denoting one that is not beyond the bounds of commercial reason and practice and made for the purpose of inducing a rejection."

In the Manchester Ship Canal Company case (*supra*) the Court was concerned with a clause in an agreement between a racecourse company and a canal company which provided that if the racecourse should at any time be proposed to be used for dock purposes, the racecourse company should give the canal company the first refusal thereof. VAUGHAN WILLIAMS LJ, who delivered the judgment of the Court of Appeal, considered what meaning was to be given to the words "first refusal" at pp. 46-48. He said:

> "There appear to be two possible meanings of the words 'first refusal' : one is that they mean the opportunity of refusing a 'fair and reasonable offer' by the race-course company to sell the lands en bloc to the canal company; the other is that they mean the opportunity of refusing the land at a price acceptable to the race-course company offered by some person other than the canal company, which is what we understand by the term 'right of pre-emption'. .... The agreement

does ....

does not provide that the first refusal shall be given at any particular price or on any particular terms; nor that the price and other terms shall be ascertained by arbitration, or in any other way. Looking at these circumstances, we think there is at least fair ground for the contention that the clause only imports that the racecourse company shall .... make a fair and reasonable offer to sell the lands to the canal company .... We think that the very words 'first refusal' in clause 3 import that the price at which the racecourse company give the canal company the 'first refusal' is a price at which the racecourse company will offer the land to other would-be buyers in the event of the refusal of the canal company to buy at that price. If there is no person negotiating a purchase it may not be easy to prove that the price offered to the canal company is above the price which the racecourse company are willing to take from persons other than

the ....

> the canal company; but whenever this can be proved, it seems to me that there is a clear infraction of the right of pre-emption given to the canal company by clause 3."

Having regard to the fact that POYNTON's was responsible for the leasing of all the letting units in a building in central Pretoria, it would obviously be concerned to ensure that, so far as possible, the building was kept fully let. That being so, the words "first refusal" import that the rental and other terms and conditions to be contained in the offer will be those upon which the lessor will offer the premises to other would-be lessees in the event that SOTERIOU is not willing to exercise his right.

There is here no difficulty of proof of such rental and other terms and conditions. It appears from POYNTON's replying affidavits that already in May 1982 (that is, several months before SOTERIOU gave notice of the exercise of his right) ROOTH AND WESSELS had advised RICHARD ELLIS that clause 2(b) was an "option" and not a right of "first refusal" and that the "option" was unenforceable. RICHARD ELLIS was then negotiating with CNA for the lease to it of shops 19 and 20 as from 1 June 1982, and shop 18 (that occupied by SOTERIOU) as from 1 February 1983, and ROOTH AND WESSELS suggested that a single lease be entered into in respect of all three shops. Whether this was done does not appear, but it seems that CNA duly entered into occupation of shops 19 and 20 during 1982, and concluded a lease with POYNTON's which provided for occupation of shop 18 as from 1 February 1983. The rental and other terms and conditions which should have been offered to SOTERIOU are therefore readily ascer-tainable.

I do not think that the qualification contained in the words "upon such terms and conditions and at such rental as may be mutually agreed upon" has the effect of making the clause void for uncertainty. Given that the lessor is obliged to make an offer, the lessee can either accept the offer

(in ....

(in which case the terms and conditions and the rental will be mutually agreed upon), or refuse it.

This approach follows that adopted in the English case of Smith v Morgan 1971(2) All ER 1500 (Ch D).

In that case, a paragraph in a conveyance included a provision that

> ".... should the Vendor wish to sell the same the first option of purchasing the said land edged and hatched blue as aforesaid shall be given to the Purchaser at a figure to be agreed upon PROVIDED THAT any such offer for sale shall only remain open for a period of 3 months from the date on which the said offer for sale is made by the Vendor."

In arguing that the paragraph was invalid, counsel for the vendor relied heavily on the principle of law summarised in the judgement of MAUGHAM LJ in Foley v Classique Coaches Ltd (1934) 2KB 1 at 13:

> "An agreement to agree in the future is not a contract; nor is there a contract if a material term is neither settled nor implied by law and the document contains no machinery for ascertaining it ....."

In Foley's case reference was made to May and Butcher v The King, decided in the House of Lords in 1929 and reported in 1934 2 KB 17. There LORD BUCKMASTER said at p. 20 with reference to an agreement that the price to be paid for goods sold should be agreed upon from time to time between the seller and the purchaser:

> "In my opinion there never was a concluded contract between the parties. It has long been a well recognized principle of contract law that an agreement between two parties to enter into an agreement

in ....

> in which some critical part of the contract matter is left undetermined is no contract at all."

BRIGHTMAN J said in Smith v Morgan (supra) at 1503-1504

that the paragraph there in question

> "... is not an agreement to agree. It does not purport to impose a future contract on the parties. For that reason I take the view that the May and Butcher case is not decisive of the case before me. The claim in May and Butcher failed because the document demanded consensus which is a contradiction in terms. That is not this case. What the conveyance purports to impose is an obligation on the vendor alone, that is to say, an obligation to make to the purchaser an offer for sale should the vendor wish to sell, such offer for sale to remain open for three months.
>
> It is axiomatic that an offer for sale must be capable of acceptance. It is not

capable .....

capable of acceptance if it omits to state a price. It therefore follows inevitably that the offer contemplated by para 1 in the present case must be an offer which names a price. The price contemplated by para 1 cannot possibly be a figure to be agreed on, because ex hypothesi there is no consensus at the offer stage of any contract. An offer represents the will of one party and not the will of both parties. The words 'a figure to be agreed upon' therefore inevitably relate to the ultimate contract of purchase, if there be one, and not to the offer itself. The question therefore arises, what, if anything, ought to be implied in para 1 as regards the price to be named in the offer, para 1 being, as I have indicated, silent as to the price to be inserted in the offer? In seeking to answer that question I do not think that this court should go out of its way to conclude that a bargain freely negotiated and intended to be binding is nevertheless void for uncertainty ..... In my view it is implicit (in the para-

graph ....

graph) that a purchase, if it results from an offer, should be at a price acceptable to both parties. On that basis it appears to me that para 1 can only mean one thing: that the obligation on the vendor, should she wish to sell, is an obligation to make an offer to the purchaser at the price and at no more than the price at which she is, as a matter of fact, willing to sell. If that offer is accepted by the purchaser, then there will be a purchase at a figure which has been agreed upon. If the offer is rejected, then cadit quaestio."

I am in entire and respectful agreement.

My conclusion is that clause 2(b) gave SOTERIOU a valid and enforceable first refusal.

In terms of the decision of this Court in Associated South African Bakeries (Pty) Ltd v Oryx and Vereinigte Bäckereien (Pty) Ltd en Andere 1982 (3) SA

893(A) ....

893(A), if a seller concludes a contract of sale with a third party contrary to a pre-emptive right, the purchaser can step into the shoes of the third party by an unilateral declaration of intent. There would seem to be no reason in principle why the same should not apply where a lessee of premises has a right of first refusal of a new lease. But the lease concluded with the third party must be such that the grantee of the right can step into the third party's shoes. It is not clear that he could do so in the present case. The terms of POYNTON's contract with CNA have not been disclosed,so that important provisions are unknown, including the duration of that lease, and the use to which the premises may be put.

What ....

What is clear is that POYNTON's was in breach of SOTERIOU's right of first refusal. It has persisted in refusing to make an offer of a lease. SOTERIOU, on the other hand, has at all times offered to pay the rentals and to be subject to the conditions and terms set out in the CNA lease. In those circumstances, POYNTON's was not entitled to the ejectment of SOTERIOU from shop 18, and McCREATH J erred in granting the order that he did. In consequence the appeal should be upheld and the order of ejectment set aside. No doubt this result will occasion practical problems by reason of the lapse of time since 1 February 1983, from which date any new lease between POYNTONS and SOTERIOU should have run. Such problems will, however, be the result solely

of ....

of POYNTON's breach of clause 2(b).

It is clear from SOTERIOU's abandonment of the two factual defences that all the costs in connection therewith were fruitlessly incurred, and that SOTERIOU should not have those costs either in the Court *a quo* or in this Court.

The following order is made:

The appeal succeeds with costs, including the costs of two counsel, but excluding all costs in connection with pages 55 to 123 of the appeal record. The order of the Court *a quo* is set aside and there is substituted therefor:

> "The application is dismissed with costs, including the costs of two counsel, but excluding the costs in connection with

the ....

the respondent's answering affidavit, the applicant's replying affidavit, and the respondent's supplementary affidavit."

H C NICHOLAS, J A

KOTZé, JA
GALGUT, AJA } Concur
VIVIER, AJA

LL Case No. 381/1983

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

EVANGELOS ANTONIOU SOTERIOU Appellant

and

RETCO POYNTONS (PROPRIETARY) LIMITED Respondent

(formerly known as POYNTONS PROPERTIES (PROPRIETARY) LIMITED

CORAM: KOTZé, BOTHA, NICHOLAS JJA, GALGUT et VIVIER AJJA

HEARD: 7 MARCH 1985

DELIVERED: 29 MARCH 1985

JUDGMENT

/BOTHA JA ...

BOTHA JA:-

In my judgment this appeal ought to be dis= missed.

There is no doubt in my mind that clause 2 (b) of the lease is not susceptible of bearing the mean= ing assigned to it in the judgment of my Brother NICHOLAS.

By using the expression

> "upon such terms and conditions and at such rental as may be mutually agreed upon"

the parties in the plainest possible language expressed their intention to be that the terms, conditions and rental to be applied to the extended period of the lease would be settled by negotiation and agreement between the parties. It cannot be doubted, I consider, that the words embody an agreement to agree.

The words "first refusal" connote a right of election either to accept or to decline something. That something can be, and frequently is, an offer by the other

/party ...

party. But it need not be so. It can also be an opportunity to negotiate and to enter into an agree= ment. That, to my mind, is clearly what is conveyed by the words "first refusal" in the context of clause 2 (b).

At the heart of the interpretation of the clause which is contained in the judgment of my Brother NICHOLAS lies the view that the lessor is obliged to submit an offer to the lessee, which the latter can then accept or refuse. In my opinion, with respect, such a notion cannot be found in the wording of the clause, and is, on the contrary, quite foreign to it. It will not do to transplant the reasoning in the Manchester Ship Canal Company case (1900) 2 Ch 352 at 364 and (1901) 2 Ch 37 at 48), on which my Colleague relies, onto a clause such as the present, which contains explicit provisions of a kind not present in the clause considered in that case. Here, the clause in

/question ...

question contemplates mutual agreement being reached on the terms, conditions and rental of the extended lease. If the parties had intended to impose an obligation on the lessor to submit a unilaterally settled offer to the lessee, I can hardly conceive of a more inept way of saying so than that contained in the clause. If, instead of affording the lessee an opportunity of nego= tiating an agreement regarding the extension of the lease, the intention had been to oblige the lessor to submit an offer, the parties would assuredly have given expression to such an intention in words quite different from those appearing in the clause.

In Smith v Morgan (1971) 2 All ER 1500, on which my Brother NICHOLAS relies, the clause under con= sideration differed substantially from the clause in question here, particularly in so far as the former contained an express reference to an offer to be made, which is lacking in the latter. Apart from that, I differ, with respect, from NICHOLAS JA in my assessment of the reasoning in that case: I do not find it con=vincing. Applied to the circumstances of the present case, it amounts to this: the expression "as may be mutually agreed upon" is to be understood as referring to the agreement which will arise in the event of the lessee accepting an offer which the lessor is obliged to submit to him. With great respect, I consider such an interpretation of the words mentioned to be wholly strained and artificial, and, in fact, in conflict with the plain and natural meaning of the words. As far as comparable cases go, I much prefer the reasoning of TROLLIP J in Hattingh v Van Rensburg 1964 (1) SA 578 (T) at 582 D - H, and I think it applies to the facts of the present case.

No doubt the parties intended the clause to have business efficacy. But then, they no doubt did not realise that an agreement to agree was devoid of

/legal ...

legal effect. The Court is powerless to correct their error for them. While the Court will strive not to be a destroyer of bargains, it can never be the creator of them. In Roode v Morkel 1976 (4) SA 989 (A), MILLER JA said, at 993 E:

> "Die uitgangspunt van die betoog namens die appellant is dat dit hoogs waarskynlik is dat die partye deur klousule 9 by die kon= trak in te lyf, bedoel het om 'n afdwingbare hernuwingsreg te skep. Daar moet egter gewaak word teen enige neiging om die be= doeling van die partye te veronderstel en dan op grond van sodanige veronderstelling die woorde wat in die kontrak gebesig is te interpreteer. Die bedoeling van die partye moet in die eerste instansie in die bewoord= ing van hulle kontrak gesoek word."

And in Aronson v Sternberg Brothers (Pty) Ltd 1985 (1) SA 613 (A) at 622 E ELOFF AJA said:

> "The defendant's counsel submitted that if the grant of a right of first refusal was not coupled with a duty on the part of Alburn to find another tenant, the clause lacked business efficacy. That might be so, but that per se is not sufficient justi= fication for placing an interpretation on

/the ...

the lease to supplement a deficiency for which the parties did not provide. As WESSELS JA said in Haviland Estates (Pty) Ltd and Another v McMaster 1969 (2) SA 312 (A) at 336 E - G:

> 'It not infrequently occurs that, where subsequent developments show that a party has contracted 'inadequately', equitable considerations may at times give rise to a natural desire to come to the aid of the party concerned, par= ticularly so where the 'inadequacy' of his right vitally affects him. This feeling of sympathy should, however, not be permitted to blunt the Court's under= standing of the meaning of the words.'"

In my view, therefore, clause 2 (b) of the lease did not confer a legally effective right of renewal of the lease on the appellant and I would dismiss the appeal on that ground.

There is, however, another difficulty in the way of the appellant, which I consider to be insuperable. On the supposition that my interpretation of clause 2 (b) is wrong and that of my Brother NICHOLAS correct, it seems to me that the appellant has failed to avail himself of

/his ...

his proper remedy. In terms of the decision in the <u>Associated South African Bakeries</u> case (1982 (3) SA 893 (A)), which is mentioned in the judgment of NICHOLAS JA, the appellant's remedy, in principle, was to step into the shoes of CNA by means of a unilateral declaration of intent. Clearly, to be legally effective such a declaration had to be an unequivocal and unqualified one. To the extent that some of the unknown terms of the respondent's contract with CNA may have been inappro= priate to the appellant's use of the premises, I am of the view that the appellant should at least, if he had wished to pursue his remedy, have declared unequivocally and unqualifiedly that he intended to step into the shoes of CNA at the rental fixed between the respondent and CNA for a period of 4 years and 11 months and on the terms and conditions of that lease in so far as they were not inconsistent with his continued use of the premises as before. The appellant never expressed a firm intention in that regard, as appears from a perusal of his answer=ing affidavit.

Although the appellant alleged in his affi=davit that the respondent was not entitled to let the premises to CNA until it had given him an opportunity of competing with the rental proposed to be paid by CNA, and although there are passages in the affidavit in which he professes a willingness to pay the rental agreed upon between the respondent and CNA, it is clear from other passages that such professed willingness did not in fact constitute an unqualified declaration of intent. This came about because the appellant's main line of defence against the application for ejectment was based on an alleged agreement which the appellant said he had concluded with a representative of the res=pondent, one Walker. The appellant alleged that he and Walker had agreed on a renewal of the lease at a rental not exceeding by more than R200 per month the rental

/payable ...

payable by the appellant at the termination of his period of lease. This, the appellant averred, meant that a renewal had been agreed upon at a rental of R811 plus R200 per month, which he was prepared to pay. The appellant anticipated that a dispute would arise on the papers regarding the alleged agreement with Walker. Against this background, I quote the following two pas= sages from the appellant's affidavit:

> "Without prejudice and without being lawfully obliged to do so by reason of the prior agree= ment with the said WALKER, I am prepared to pay the same rentals and be subjected to the same conditions and terms as the CNA in their purported contract."
>
> "I am, pending the dispute, in fact quite pre= pared to pay the same rental as the CNA would be required to pay the applicant, although I contend that there is a valid agreement between the applicant and myself as aforesaid."
>
> (My emphasis.)

These passages make it abundantly clear that the appellant by no manner of means expressed an unequivocal and

/unqualified ...

unqualified intent to be bound by the rental agreed upon between the respondent and CNA. On the contrary, it seems to me that the appellant plainly disavowed any in= tent to avail himself of his proper remedy. Moreover, it is apparent from the appellant's affidavit that his lack of knowledge of the full terms and conditions of the lease with CNA played no role at all in the stance that he took in his affidavit. The appellant at no time suggested that the application for his ejectment should be dismissed, or even stayed, pending the submis= sion of an offer to him by the respondent, and its re= fusal or acceptance by him. On the contrary, the first two paragraphs of the prayer with which his affidavit concluded are significant:

> "WHEREFORE I pray that applicant's claim for:
>
> (a) A declaration and ejectment be dismissed with costs.
>
> (b) That the applicant be interdicted and restrained from giving the CNA posses= sion of the leased premises <u>pending the hearing and determination of the dispute</u>."
>
> (My emphasis.)

"The dispute" obviously refers to the appellant's alleged agreement with Walker. Although McCREATH J found that the appellant's allegations in regard to the agreement were so improbable that they could be summarily dismissed on the papers, they were persisted in in the heads of argument filed on behalf of the appellant, albeit side by side with the argument that the respondent was obliged to submit an offer to the appellant. It was only at the commencement of the hearing of the appeal that counsel for the appellant abandoned reliance on the alleged agreement with Walker and confined himself to the last-mentioned argument.

In all these circumstances the conclusion is inescapable, in my opinion, that the appellant has perempted the right either to step into the shoes of CNA or to re= ceive an offer from the respondent in regard to the exten= sion of the lease. At the very least, his attitude has been ambivalent up to the last moment, and it is impossible for the Court to come to his assistance now without causing serious prejudice to the respondent, which it would not have suffered had the appellant not miscon= ceived his remedy in the Court _a quo_. In this connec= tion it is to be observed that in the judgment of my Brother NICHOLAS there is to be substituted for the order granted by McCREATH J an order dismissing the ap= plication for ejectment. Such an order would seem to be the only possible one if the appeal were to be allowed, in view of the way in which the appellant's case was con= ducted in the Court _a quo_. But such an order would leave a number of issues of vital importance to the parties unresolved. It cannot mean that the appellant has been occupying the premises at the rental stipulated in the respondent's contract with CNA, nor that he will henceforth occupy them at that rental. Presumably the order is intended to compel the respondent to submit an offer to the appellant. But, having regard to the

/latter's ...

latter's past conduct in this litigation, he will not be obliged to accept it even if it corresponded exactly to the terms of the lease with CNA, and it may well be that it would serve his purposes now to refuse it. Is the offer to be made with retrospective effect? If it is refused, by virtue of what title has the appel= lant been occupying the premises, and what are the rights of the parties with regard to the rental in the inter= vening period? Considerations such as these fortify my view that the appellant ought not at this late stage to be afforded an opportunity of pursuing his proper remedy, which he neglected to do timeously.

I would accordingly dismiss the appeal, with costs.

A.S. BOTHA JA