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IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between

PROUD INVESTMENTS (PTY) LTD Appellant

and

L L G INTERNATIONAL (PTY) LTD

formerly LANCHEM INTERNATIONAL PTY LTD..... Respondent

Coram: JOUBERT, HEFER, VIVIER, KUMLEBEN et

EKSTEEN JJA

Heard: 19 March 1991

Delivered: 23 May 1991

J U D G M E N T

JOUBERT, J A :

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This is an appeal against a judgment of LABUSCHAGNE AJ in the Witwatersrand Local Division dismissing an exception of the appellant to the respondent's plea.

The appellant is the registered owner of certain immovable property in Rosebank on which a building is situated. On 1 September 1986 the parties entered into a written agreement of lease ("the main lease") in pursuance of which the appellant, as landlord, let to the respondent, as tenant, the entire second floor of the building for administrative offices together with 24 basement parking bays, as from 1 January 1987 for a period of 6 years.

It is necessary to refer to those material terms of the main lease which are relevant for purposes of the appeal.

1. Clause 5 provides for payment during the first year of the lease of rent in the fixed amount of

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R8 750-82 per month for the second floor of the building and a fixed amount of R65-00 per month for each of the parking bays. Provision is also made for a percentage increase of the rent during the second and third years of the lease.

As regards the remaining period of the lease the rate of escalation of the rent is to be determined in accordance with an agreed method of ascertainment by valuers designated by the parties, or failing agreement by the valuers, by a third party appointed by the South African Council for Valuers.

The parties also entered into a written addendum of lease. In terms thereof the respondent undertook to pay the appellant, during the currency of the main lease certain fixed amounts of monthly rent for the use of certain furnishings and fittings

effected to the leased premises.

The provisions of Clause 5, read in conjunction with the addendum of lease, obviously comply with an essential element of a contract of lease of things (locatio conductio rei), viz., that the rent agreed upon by the parties should be fixed in a definite amount (merces certa) or be determinable by a third person in accordance with the maxim: certum est quod certum reddi potest, D 12.1.6, D 45. 1. 74.

See de Groot (1583-1645) 3.19.7, Voet (1647-1713) 19.2.7, Van der Keessel (1738-1816) ad Gr 3.19.7.

2. Clause 8 reads as follows:

"8. Local authority charges

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8.1 . The tenant shall pay on demand to the landlord or to the local authority, as the landlord may require, the cost of all -

8.1.1 electric current consumed in the premises:

8.1.2 water consumption, sewerage and effluent charges and sanitary fees and business refuse removal fees levied from time to time in respect of the premises.

8.2 Should any amount referred to in 8.1.2 be levied or assessed in respect of the property and/or the building as opposed to the premises, the tenant shall pay an amount equal to the contribution quota of the total amount levied or assessed."

3. Clause 9 provides as follows:

"9 Rates and other expenses

9.1 The tenant shall pay the landlord a portion equal to the contribution quota of -

9.1.1 the assessment rates payable in respect of the property and/or the building;

9.1.2 any levies of whatever nature imposed in respect of the ownership of immovable property or in respect of services supplied

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to occupiers of immovable property;

- 9.1.3 the reasonable wages or other costs payable or incurred by the landlord in or about or in connection with the administration, cleaning, maintenance and/or security of the building, the property and the gardens thereon;
- 9.1.4 the landlord's reasonable costs of maintaining and/or servicing the lifts, electrical installations, safety and/or fire-fighting equipment in the building;
- 9.1.5 the landlord's reasonable costs of maintenance of the water reticulation, internal or external finishes, roofs and other items and services essential to the effective and safe functioning of the building and the property.
- 9.2 If there is any dispute between the landlord and the tenant concerning the reasonableness of any of the operating costs or as to the amount for which the tenant is liable in terms hereof, such dispute shall be determined by the landlord's auditors acting as experts and not as arbitrators and whose decision shall be final and binding on the parties provided that such auditors shall be obliged, in making

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such determination, to have regard to whether the services in respect of which the operating costs are paid have been supplied at fair market cost and to call evidence from such persons as the auditors may regard as being suitably qualified to assist them in making their determination."

The purpose of Clauses 8 and 9 is to cast on the respondent as tenant a liability to make contributions in respect of certain charges, rates, maintenance and service costs which would according to our common law appertain to the appellant's obligations as landlord.

According to our common law a landlord is obliged to pay all taxes and burdens charged upon the leased land unless the parties expressly agreed that they should be borne by the tenant. Van Leeuwen (1625-1682) R H R 4.21.5 (as translated by Sir John G Kotzé) states the position thus :

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"The common burdens and charges, fixed by the State, town, or village, upon hired property, must be borne by the lessor. arg. l.7. de publican. Charond Pandect. du droicts franch. lib. 2. cap. 32. Garsias de expens. et meliorat. cap. 14. num. 18. Tussch. vol. 2 practicab. conclus. 617. littera C. Pinell in l. 1. Cod. de bon matern. part. 2 num. 72. except where any charges have been laid upon the fruits themselves, which the lessee would then have to bear, but otherwise not. arg. cap. 26. in verb. sicut. Colonus extr. de decimis. Charond. d. loco, unless the contrary was expressly agreed upon (e)."

See also de Groot 3.19.15, Van der Keessel ad Gr. 3.19.15, Wassenaar (1589-1664), Practyck Notariaal, 1729, cap 14 nr 9, Pothier (1699-1772), Contrat de Louage, (Mulligan's translation as Pothier's Treatise on the Contract of Letting and Hiring) para 211.

A landlord is likewise according to our common law obliged to maintain at his own cost the leased

property during the currency of the lease in a condition reasonably fit for the purpose for which it was let unless the parties expressly stipulated that they should be borne by the tenant. Compare de Groot 3.19.12, Van Leeuwen C.F. 1.4.22.10, Voet 19.2.14, Van der Keessel ad Gr 3.19.12, Wassenaar, op.cit., cap 14 nrs 7, 8, 9, Huber (1636-1694) H R 3.10.2, Kersteman (1728-1793), Hollandsch Rechtsgeleert Woordenboek, 1768, s.v. Huur p 182 nr 6, Van Zutphen (ob.1685), Practycke der Nederlantsche Rechten, 1655, s.v. Huyringe en Verhuyringe, nr 44, 2 Observationes Tumultuariæ Novæ 979, Harlin Properties (Pty) Ltd and Another v Los Angeles Hotel (Pty) Ltd, 1962 (3) SA 143 (A) at p 147 A-B.

In law there is no nexus or correlation between a tenant's contractual obligation to pay the fixed or determinable amount of rent as an essential element of the lease and his contractual undertaking of those common

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law obligations of the landlord which are in essence unrelated to the tenant's obligation to pay rent for the use of the leased property. Compare Black v Scheepers 1972(1) SA 268 (E) at p 269 H.

It is common cause that the respondent duly took occupation of the leased premises in terms of the main lease.

On 29 January 1988 the respondent wrote a letter to the appellant in which it stated that the lease was void for vagueness and therefore of no force and effect. The defendant could let the premises at its convenience.

On 23 August 1988 the appellant instituted its action against the respondent which was based on the main lease and the addendum of lease as annexures "A" and "B" respectively. In its main claim as set out in its particulars of claim the appellant alleged that the respondent

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had on 29 January 1988 unlawfully repudiated the lease agreements which repudiation the appellant accepted. As a result of the repudiation the appellant claimed from the respondent payment of the amount of R6 110-61 in respect of the respondent's obligations under the lease agreements as well as an amount of R192 855-07 as damages.

In its alternative claim the appellant alleged that the respondent had occupied the leased premises from 1 November 1987 until 19 February 1988 well-knowing that it had no lawful right to do so (or alternatively without reasonable grounds for believing it possessed a lawful right so to occupy) and as such was a mala fide occupier of the leased premises as a result of which it had been unjustly enriched at the expense of the appellant in the amount of R19 029-29.

The respondent admits in its plea having

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entered into the main lease and the addendum of lease with the appellant. The material grounds of its defence to the appellant's main claim are described in para 2.3 to 2.6 as follows:

- "2.3 In terms of clauses 8 and 9 of annexure A the defendant is obliged to pay to the plaintiff certain charges, rates, levies, wages and other costs and expenses (collectively referred to herein as 'cost items') -
- 2.3.1 the quantum of each of the cost items is not determined in or determinable from annexure A and B;
- 2.3.2 some or alternatively all of the cost items vary from time to time and are dependent upon circumstances and expenses which may be incurred by the plaintiff;
- 2.3.3 some or alternatively all of the cost items are determinable at the sole instance of the plaintiff;
- 2.4 In the premises annexures A and B fail to make provision for payment of a fixed or determinable rental.

2.5 The terms of annexures A and B are not severable.

2.6 Accordingly annexures A and B are invalid and of no force or effect."

The same defence is raised in para 10.2 of the plea to the appellant's alternative claim.

On 17 November 1988 the appellant filed an exception to para 2.3 to 2.6 and 10.6 of the plea as being bad in law, alternatively as not containing matters of fact and/or law sufficient to sustain a defence, further alternatively as irrelevant. The grounds of the exception were stated as follows:

- "1. In paragraph 2.6 of its Plea the Defendant alleges that Annexure 'A' and 'B' are invalid and of no force or effect.
2. The bases upon which Defendant grounds this conclusion are:
 - 2.1. that the quantum of each of the cost items is not determined in or determinable from

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Annexures 'A' and 'B';

- 2.2 that some or alternatively all of the cost items vary from time to time and are dependent upon circumstances and expenses which may be incurred by the Plaintiff; and
- 2.3 some or alternatively all of the cost items are determinable at the sole instance of the Plaintiff.

3. In fact:

- 3.1. the quantum of each of the cost items is either determined in or determinable from Annexures 'A' and 'B';
- 3.2 although certain of the cost items are dependent upon circumstances and expenses which may be incurred by the Plaintiff from time to time, the said items are not thereby rendered vague, uncertain or indeterminable;
- 3.3. none of the cost items are determinable at the sole instance of the Plaintiff,

and therefore all the rental items provided for in Annexures 'A' and 'B' are either determined or determinable."

The Court a quo held that the cost items referred to in Clause 8 were determined or determinable from its provisions. Clause 9.1.2 was held to be void for vagueness while Clauses 9.1.3, 9.1.4 and 9.1.5, which left the determination of the cost items referred to therein to be ascertained in the discretion of the landlord, were invalid. Since Clause 9 was not severable from the other provisions of the main lease it followed that the invalidity of Clause 9 invalidated the entire main lease. The exception was accordingly dismissed.

In this Court the finding of the Court a quo in regard to the validity of Clause 8 of the main lease was not challenged by the parties. It was also common cause that Clause 9, which formed an integral part of the main lease, was not severable from its other provisions.

The gist of the respondent's defence to

Clause 9 of the main lease (as set out in para 2.3 to 2.6 of its plea) is that the cost items mentioned therein amount to rental while the quantum thereof is not determined in or determinable from the provisions of the main lease but is determinable at the sole instance of the appellant without reference to the respondent. Hence the main lease and the addendum of lease, which are inseverable, are invalid and of no force or effect.

The exception in attacking the soundness and validity of the respondent's defence recognised the cost items as constituting rental which was either determined in or determinable from the main lease but not determinable at the sole instance of the appellant. The issue raised by the exception in regard to Clause 9 is accordingly whether or not the cost items referred to therein are fixed or determinable "rental". In view of the reference in both

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the plea and the exception to the cost items as rental I shall for purposes of this judgment assume, without deciding, that they in fact amount to rental to which the legal principles regarding the fixing and determination of rent apply.

I now turn to consider the provisions of Clause 9. According to Clause 9.1 the respondent is to pay a portion equal to the contribution quota of the cost items mentioned in the other sub-clauses of Clause 9. This contribution quota is to be calculated in terms of Clause 7.1 according to the ratio between the rentable area of his leased premises on the second floor of the building and the total rentable area of all offices in the building. I shall now consider the cost items mentioned in the other sub-clauses of Clause 9 :

1. Clause 9.1.1 refers to assessment rates payable

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in respect of the building. The assessment rates determined by a public body or a local authority will obviously consist of fixed amounts of money. They accordingly present no difficulty.

2. Clause 9.1.2 relates to "levies of whatever nature" imposed in respect of the building or in respect of services supplied to occupiers of the building. The Court a quo held that the "levies of whatever nature" was framed in such wide terms as to render Clause 9.1.2 void for vagueness. I cannot agree. The levies in question, determined by a public body or a local authority, are circumscribed to relate to the ownership of the building or to services supplied to occupiers of the building. They will be easily ascertainable and consist of fixed amounts of money.

3. The cost items mentioned in Clauses 9.1.3, 9.1.4 and 9.1.5 were held by the Court a quo to be so worded that they were left to be determined by the appellant according to the circumstances and expenses incurred by it during the currency of the main lease. They were therefore held to be invalid. In my judgment the Court a quo erred in its interpretation of Clauses 9.1.3, 9.1.4 and 9.1.5. I am not persuaded by the contentions advanced by Mr Van Wyk on behalf of the respondent in support of the interpretation by the Court a quo. On a proper construction of Clauses 9.1.3, 9.1.4 and 9.1.5 they should be read in conjunction with Clause 9.2. The operating charges referred to in these sub-clauses are described with sufficient clarity to identify them. The fact that each of the cost items in

question are qualified by the word "reasonable" does not brand them as reasonable rental, since Clause 9.2 provides the mechanism for the objective determination of the reasonableness "of any of the operating costs or as to the amount for which the tenant is liable" by the landlord's auditors as expert outsiders without any reference to the landlord.

In the result the appeal succeeds with costs, including the costs of two counsel. The following order is substituted for the order of the Court a quo:

"The exception is upheld with costs. Such costs are to include the costs of two counsel."

C P JOUBERT J A.

HEFER JA
VIVIER JA Concur.
KUMLEBEN JA
EKSTEEN JA