

IN THE COURT OF APPEAL OF BOTSWANA
HELD AT LOBATSE

COURT OF APPEAL CIVIL APPEAL NO. 4/2001
HIGH COURT MISCELLANEOUS CASE NO. F74/2000

In the matter between:

JOAN SIVERTSSEN

Appellant

vs

JOSEPH DE-SOUZA

Respondent

Mr B. Sechele for the Appellant

Mr M. Furusa for the Respondent

J U D G M E N T

CORAM: NGANUNU (C. J.) J.A.
AKIWUMI J.A.
GROSSKOPF J.A.

AKIWUMI, J.A.

The crux of this appeal is, to put it simply, whether the three sub clauses (a), (b) and (c) of clause 16 of the lease between the Appellant, the lessor, and the Respondent, the lessee, are to be construed separately and independently or whether sub clause (c) can only be applied when the provisions of sub clauses (a) or (b) have first been satisfied.

It is convenient to now set out all the provisions of clause 16 of the lease which was entered into in March 1999, between the Appellant and the Respondent and which, subject to its termination for its breach or its renewal, was to come to an end in March 2004. The lease contained the following clause 16 which sets out the conditions under which the Appellant may terminate the lease agreement.

“If

- (a) the Lessee fails to pay any rent on due date and continues that failure for more than seven (7) days after written notice to him requiring payment; PROVIDED that no such notice shall be necessary in the case of a second (or) subsequent failure;
- (b) the Lessee commits any other breach of the conditions of this lease and fails to remedy that breach within fourteen (14) days or such longer period as may be reasonable if the aforesaid breach shall not be capable of being remedied within fourteen (14) days after written notice requiring that it be remedied; PROVIDED that no such notice shall be necessary in the case of a second or subsequent breach of the same conditions;
- (c) the Lessee so consistently breaches the conditions of this lease, (whether by non-payment of rent on due date or by non-compliance with its terms) as to justify the Lessor in holding that the Lessee’s conduct is inconsistent with an intention or an ability to carry out these conditions;

then the Lessor shall have the right, but shall not be obliged, forthwith to cancel this lease and to resume possession of the property, but without prejudice to his claim for arrears of rent or for damages which he (sic) may have suffered

by reason of the Lessee's breach of contract or of premature cancellation."

Upon the commencement of the lease, the Respondent paid rent for the first two months and thereafter, failed to pay rent for the next succeeding twelve months and into the Appellant's bank account, as provided for in the lease . The Appellant then applied for and obtained ex parte, inter alia, an interim order of attachment of goods found in the leased premises and another requesting the Respondent to show cause why he should not be evicted from those premises. The application was then subsequently, heard inter partes before Mosojane J. The undisputed facts before him were that, though the Appellant had not given the Respondent any written notice requiring the payment of any rent in arrears, the Respondent who had failed to pay rent for twelve months, had upon the granting of the interim orders, not only, paid the rent in arrears, but was also, paying current rents due into the Appellant's bank account. The issue, whether the Respondent was in arrears in paying rent being then academic, the learned Judge dealt only with the then outstanding issue whether the intended eviction of the Respondent by the Appellant should be confirmed.

The learned Judge then held that sub clause (c) of clause 16 of the lease was cumulative and could only be invoked after sub clause (a) or (b) either of which provides that a written notice must first have been given before the lease can be terminated had been complied with. In his view,

sub clause (c) which was superfluous, would confer on the Appellant too wide a discretion that could not have been contemplated by the parties to the lease; leave the Respondent completely at the mercy of the Appellant; and render sub clauses (a) and (b) useless. He therefore concluded that the Appellant "cannot elect to evict" under sub clause (c) without prior notice.

My understanding of clause 16 is quite different. In my view, it sets out three different and separate conditions under which the Appellant may terminate the lease. Sub-clause (a) specifically provides in respect of one particular misdeed, namely, the non payment of a particular rent, that the lease may be terminated for the non payment of that rent after the giving of a seven days written notice requiring payment of that rent, and without giving written notices of other subsequent failures. Sub-clause (b) similarly, provides that the lease may be terminated for any other particular breach of the lease after the giving of a fourteen days written notice or for such other longer period as may be reasonable, for remedial steps to be taken, also without the necessity of giving written notices of other subsequent breaches.

Whilst sub-clauses (a) and (b) relate to the termination of the lease for a particular act which is in breach of the lease, sub-clause(c) on the other hand, does not deal with a particular single act of breach but with a continuous breach of the lease such as, a continual failure to pay rents


On due dates, that would justify the lessor in holding the view that the lessee's conduct is inconsistent with an intention to carry out the terms of the lease. And what could be a more consistent breach of the lease than the failure of the Respondent, notified or otherwise, not to pay rent for twelve good months. The fact that the Respondent paid what he owed only after the Appellant had obtained the ex parte interim orders, makes no difference. If anything, it is more consistent with the Respondent's continuous behaviour that he would not have paid what he well knew, he owed, if the interim orders had not been made against him. This behaviour in my view, was "inconsistent with an intention" to pay the rents due under the lease. Furthermore, whilst sub clauses (a) and (b) require that a written notice be given before the lease may be terminated, no such prior specific requirement is contained in, or can be inferred from, the wording employed in sub-clause (c). Indeed, if this had been the intention of the parties to the lease, it would have been clearly stated in sub-clause (c) as was thought necessary to do, in sub-clauses (a) and (b), namely, that where there is a consistent breaching of the lease "as to justify the lessor holding that the lessee's conduct is inconsistent with an intention" to comply with the conditions of the lease, a written notice would first have to be given to the lessee before the lessor can terminate the lease.


In the result, the appeal is allowed and the Respondent and all those claiming occupation through the Respondent be and are hereby evicted from the premises which is the subject matter of this appeal, namely, Plot No 3022 Francistown.

The Appellant will have the costs for the appeal and in the court below.

It is so ordered.

DELIVERED IN OPEN COURT THIS DAY OF JANUARY 2003.


.....
A. M. AKIWUMI
JUDGE OF APPEAL

I agree, 
.....
J. M. NGANUNU
(CHIEF JUSTICE)
JUDGE OF APPEAL

I agree, 
.....
F. H. GROSSKOFF
JUDGE OF APPEAL