IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

27.9.2012
DATE

SIGNATURE

5/10/2012
Date: ~~27.9.2012~~

Case Number: 31805/08

In the matter between:

TECHNOLOGIES ACCEPTANCE (PTY) LTD Plaintiff

and

NSOVO YA RIXAKA CC First Defendant

NKATEKO NORMAN MASINGI Second Defendant

JUDGMENT

JANSE VAN NIEUWENHUIZEN AJ

INTRODUCTION

[1] The plaintiff, a finance company, instituted action against the defendants for the cancellation of two rental agreements and ancillary relief.

[2] The first defendant conducted business as, *inter* alia, a photocopying shop and is cited in its capacity as a party to the rental agreements. The second defendant is cited in his capacity as surety and co-principal debtor with the first defendant, for the due and punctual payment of all amounts due and owing by the first defendant to the plaintiff .

[3] On 24 August 2007 the plaintiff and the first defendant entered into a Master Rental Agreement, which agreement contained the following special condition:

> *"This constitutes a Master Rental Agreement and each item to be rented by the User shall be recorded in a separate annexure and each item shall be governed by the terms and conditions of this Master Rental Agreement as though it were a separate agreement commencing from the date reflected on such annexure and which terms and conditions the User by his/her signature acknowledges having read and understood."*

[4] On the same date the parties concluded a rental agreement in respect of two copiers, to wit a XEROX C7132 and a XEROX C128. The agreement, contained in an annexure to the Master Rental Agreement, was for a 60 month period and the total monthly rent payable was R 5 736, 77. The effective date of the agreement was, according to the annexure, 11 January 2007 and the date on which the first rental was due was 1 August 2007.

[5] On 27 August 2007 a further rental agreement for a XEROX C118 copier was concluded between the plaintiff and the first defendant. The agreement was once again contained in a separate annexure, with a rental period of 60 months and monthly rent in the amount of R 899, 96. The effective date was 24 August 2007 and the due date for the first rental payment was 9 September 2007.

[6] The equipment *supra*, was referred to during the trail as the "initial equipment" and the equipment will be referred to herein as such.

[7] The initial equipment was delivered and installed at the premises of the first defendant and was utilised by the first defendant until 3 October 2007, when the equipment was damaged beyond economical repair due to a burst water pipe.

[8] The initial equipment was replaced on 29 November 2007 with new equipment. The annexure in respect of the replacement equipment was signed by the first defendant on 24 October 2007 and by the plaintiff on 14 December 2007. The annexure referred to the same rental amount and period, but did not contain an effective date or a due date for first rental.

[9] The aforesaid facts are common cause between the parties.

[10] The plaintiff's claim contained in its summons dated 9 June 2008, was in respect of arrear rental on the initial equipment.

[11] On 31 January 2011 the plaintiff served a Notice of Intention to Amend its particulars of claim.

[12] The proposed amendment reads as follows:

> *"7A.1 On or about 3 October 2007 the equipment* (the initial equipment) *was damages beyond economical repair.*
>
> *7A.2 The Plaintiff elected to replace the equipment, as it was entitled to do.*
>
> *7A.3 On or about 24 October 2007 the First Defendant, duly represented by the Second Defendant, signed a new annexure to the rental agreement in respect of the replacement equipment.....*
>
> *7A.4 On or about 29 November 2007 the replacement equipment described as 1 x Xerox C128 Copier with serial number 3313698326 and 1 x Xerox C7232 Copier with serial number 3312598280 was delivered to the First Defendant at its business address situated at Shop 54, Hubyeni Shopping Centre, cnr R578 & R528, Elim.*
>
> *7A.5 The new annexure to the rental agreement in respect of the replacement equipment was duly signed on behalf of the Plaintiff on 14 December 2007.*
>
> *7A.6 The terms and conditions of the rental agreement* (in respect of the initial equipment) *at all material times applied to the replacement equipment."*

[13] The same averments are made in respect of a Xerox C118 Copier.

[14] In introducing these new averments, the plaintiff relied on the provisions of clause 15.1 of the Master Rental Agreement which reads as follows:

> *"If any equipment leased in terms of the rental agreement is lost or stolen and not recovered within a period of 21 days after such loss or theft or, in the Plaintiff's sole discretion, is damaged beyond economical repair, this agreement shall terminate forthwith in respect of such equipment, and the First Defendant shall pay all lease payments (plus VAT if applicable) outstanding in respect of the period to such termination; provided that such equipment may, at the Plaintiff's election, be replaced, in which event the terms and conditions of the rental agreement shall apply to such replacement equipment."*

[15] The defendants filed an objection to the proposed amendment on the ground that the proposed amendment sought to introduce a new claim, based on a different cause of action, more than three years after the date upon which such claim arose. In the premises, the defendants contend that the claim which the plaintiff seeks to introduce had become prescribed in terms of section 11 of the Prescription Act, Act 68 of 1969.

[16] The plaintiff lodged an application for leave to amend its particulars of claim, which leave was granted by Bosman AJ on 15 August 2011.

[17] The defendants thereupon filed an amended plea raising, *inter alia*, a plea of prescription.

ISSUE TO BE DECIDED

[18] The parties were in agreement that the interpretation of clause 15.1 of the Master Rental Agreement will be decisive of the issues in the action.

CLAUSE 15.1

[19] Mr. Grundlingh, appearing on behalf of the plaintiff, contended that the words *"provided that"* qualify the first portion of the clause and clearly states that the plaintiff may elect to replace the equipment forming the subject matter of the existing lease agreements between the parties with new equipment. He contended, furthermore, that the same terms and conditions contained in the existing lease agreements will be applicable and that the rental agreements will continue to run until the expiry of the lease period.

[20] Mr. Griessel, appearing on behalf of the defendants, held a contrary view and contended that the existing lease agreements terminated forthwith when the initial equipment was damaged beyond economical repair. According to Mr Griessel, once the plaintiff elected to replace the damaged goods a new agreement had to be concluded between the parties in respect of the new equipment.

[21] In order to establish which interpretation is correct, the often quoted test in ***Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A)** at 676E – 768E is valuable:

> *"According to the 'golden rule' of interpretation the language in the documents is to be given its grammatical and ordinary meaning, unless this would result in some absurdity or some repugnancy or inconsistent 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 mind 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."*

[22] In determining the grammatical and ordinary meaning of the language used in the contract, regard must be had to legal interpretation of the words.

[23] ***Stroud's Judicial Dictionary of Words and Phrases*** **Greenberg and Millbrook** 6th Edition at 2105 describes the word *"proviso", inter alia,* as follows:

> *"If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by an earlier clause, the later clause is to be rejected as repugnant, and the earlier clause prevails... But if the later clause does not destroy but only qualifies the earlier, then the two are to be read together and effect is to be given to the intention of the parties as disclosed by the deed as a whole"*

[24] ***Dictionary of Legal Words and Phrases*** **Claassen,** 2nd Edition at P-133 defines the word *"proviso", inter alia*, as follows:

> *"A stipulation introduced into a section of a statute, or into a clause of an agreement, providing that the preceding part of the section or clause is subject to the provisions of such stipulation."*

[25] The Appellate Division held in ***Mphosi v Central Board for Co-operative Insurance Ltd*** **1974 (4) SA 633**, that the effect of a proviso is to qualify the obligations imposed by the substantive provisions of a section. In reaching this finding, Botha JA referred on 645 D to an earlier decision that read as follows:

> *"The fallacy of the proposed method of interpretation (i.e. to treat a proviso as an independent enacting clause) is not far to seek. It sins against the fundamental rule of construction that a proviso must be considered in relation to the principal matter to which it stands as a proviso...."*

[26] The words *"provided that"* in clause 15.1 clearly qualifies the provision, in the preceding part of the clause, that the rental agreements shall terminate forthwith. It is not a separate enacting clause.

[27] Having regard to the nature and purpose of the agreements between the plaintiff and the first defendant, it is clear that they intended to enter into a rental agreement in respect of photocopiers for an agreed time and at an agreed rental.

[28] The plaintiff and first defendant in including clause 15.1 in the agreement, foresaw a situation in which the equipment might be damaged beyond economical repair during the subsistence of the lease agreements. Provision was therefore made for the agreements to terminate forthwith with certain subsequently consequences. This part of the clause was, however, made subject to the stipulation that the plaintiff may elect to replace the equipment.

[29] If a new rental agreement had to be entered into between the parties, as contended by Mr. Griessel, a new period of lease at a new rental had to be agreed between the parties. Should the parties not be able to agree, the election of the plaintiff to replace the equipment becomes nonsensical.

[30] Mr. Griessel argued that the interpretation suggested by Mr. Grundlingh will be detrimental to the first defendant, in that the plaintiff could delay until the end of the rental period to deliver the replacement equipment,

whilst the first defendant had to continue paying the rent in terms of the agreement. The first defendant will, in such circumstances have a remedy against the plaintiff and I do not deem the scenario sketched by Mr. Griessel to be so repugnant as to justify a departure from the ordinary meaning of the words contained in the clause.

[31] In the premises, I agree with Mr. Grundlingh's interpretation of the clause and find that new rental agreements were not concluded between the parties upon the plaintiff's election to replace the equipment.

[32] In the circumstances, the amendment effected by the plaintiff did not introduce a new claim, based on a different cause of action and the special plea is dismissed.

RELIEF

[33] The second defendant admitted during his evidence that it was not possible to return the equipment to the plaintiff.

[34] The parties were *ad idem* that the order suggested by Mr. Grundlingh in his heads of argument should therefore follow.

COSTS

[35] Both the Master Rental Agreement and the Deed of Suretyship makes provision for a cost order as between attorney and client and such an order should therefore follow.

[36] The costs of the opposed motion decided by Bosman AJ provided that such costs should be costs in the cause and the cost order awarded herein will include such costs.

[37] The following order is made against the first and second defendants, jointly and severally, the one to pay the other to be absolved:

1. The cancellation of the rental agreement concluded between the plaintiff and the first defendant on 24 August 2007 is hereby confirmed;

2. The defendants are ordered to pay the plaintiff the amount of R500,024.56;

3. The defendants are ordered pay interest to the plaintiff on the amount of R500,024.56 at 15.5% per annum calculated from 16 July 2008, to date of final payment;

4. The cancellation of the rental agreement concluded by the first defendant and the plaintiff on 27 August 2007 is hereby confirmed;

5. The defendants are ordered to pay to the plaintiff the amount of R76,523.09;

6. The defendants are ordered to pay interest to the plaintiff on the amount of R76,523.09 at 15.5% per annum calculated from 16 July 2008, to date of final payment;

7. The defendants are ordered to pay the plaintiff's costs on an attorney and client scale, which costs will include the costs of the opposed motion as per the order of Bosman AJ dated 15 August 2011.

N. JANSE VAN NIEUWENHUIZEN

ACTING JUDGE OF THE HIGH COURT