SNELLER VERBATIM JHB/LKS

IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG

CASE NO. 00/8849 DATE: 2000.11.09

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES ~~YES~~/NO
(3) REVISED

DATE 9/2/2001 SIGNATURE

In the matter of:

TRANSVAAL ASSOCIATION FOR CARE OF
CEREBRAL PALSY Applicant

and

CORPORATE OPTIONS CC t/a RITE SITE Respondent

JUDGMENT

WILLIS, J: This is an application in which the applicant seeks the following relief:

"1. Declaring that the agreement of lease entered into between the applicant and the respondent dated 16 March 1999 to have lapsed and to be of no force and effect between the parties.

2./..

2. Alternatively to 1 above, declaring that the respondent has not obtained the necessary commission and licence, as envisaged in clause 2.1 of the agreement of lease entered into between the applicant and the respondent on 16 March 1999.

3. Compelling the respondent to forthwith remove the advertising signs erected in or on the property situate at Portion 272 (Portion of Portion 39) Woodlands Farm, Driefontein situate at William Nichol Drive, Bryanston, Sandton, together with all other appurtenances relating thereto.

4. Directing that the costs of this application be paid by the respondent.

5. Granting the applicant such further and/or alternative relief as this Honourable Court may deem just and equitable in the circumstances."

The applicant is the owner of certain immovable property described as Portion 373 (Portion of Portion 39) Woodlands Farm, Driefontein, Reg.Div.I.R. in the district of Johannesburg ("the immovable property") which has as its corresponding street address at William Nichol Drive, Bryanston.

On or about 16 March 1999 the applicant and the respondent entered into a written agreement of lease in terms whereof the applicant agreed to lease to the respondent certain sites on the immovable property for advertising purposes. The terms material to the aforesaid written agreement of lease are as follows:

"2. 2.1 This lease agreement is conditional upon the necessary permission and licence being

obtained/..

obtained by the lessee from the municipal authority for the erection, installation and operation of advertising signs on the sites.

2.2 The lessee shall forthwith at its sole cost make application to the municipal authority for the requisite permission and licence (or for the renewal of the same) and should this condition not be fulfilled or any licence granted subsequently be cancelled this lease agreement shall lapse and neither party shall have any claim against the other in respect of anything hereunder or arising therefrom. Likewise, in the event of such licences lapsing, then this agreement shall come to an end and no compensation will be payable by the lessor to the lessee. The lessee shall at all times undertake liability for renewal of the said licences.

3. Lease of sites

Subject to the provisions of paragraph 2 hereof -

3.1 The lessor hereby lets to the lessee which hereby takes on hire the site(s) for the purpose of the erection, installation, operation and display of the site(s) of the [sic] such advertising signs as are substantially the same in size and appearance as that reflected in Annexure 'B' hereto and provided same complies with the code of

ethics/..

ethics of the Outdoor Advertising Association of South Africa, a copy of which is annexed hereto marked 'C'.

3.2 The lessee shall have the right to carry out all work reasonably necessary thereon and also the right to lead and install in or through the property all necessary wiring and other accessories.

3.3 The lessee shall at all reasonable times have the right of access to the site(s) for the purpose of servicing, maintaining, altering or removing the signs and carrying out the necessary work in connection with the electricity supply thereto."

Annexure B referred to in paragraph 3.1 gives a diagrammatic representation of the sign envisaged between the parties which would be 16 by 4 metres in size. It seems to me to be quite clear, and indeed I did not understand the parties to make any point thereof, that the condition referred to in paragraph 2.2 is the condition mentioned in paragraph 2.1.

It is common cause that a written application was made to the local authority during March 1998. It is also common cause that on or about 1 April 1999 the local authority purported to grant a licence to erect a 12 metre by 3 metre panel advertising sign.

There are other facts which are relevant by way of background. It is common cause that the respondent has erected upon the site in question a panel advertising sign

which is 16 metres by 4 metres in size. It is also common cause that the Eastern Metropolitan Transitional Council has objected to the erection of this particular sign. It is furthermore common cause that the Bryanston Rate Payers Association has also registered its protest as to the existence of this sign on the site. It is furthermore common cause that no payment has been made by the respondent to the applicant in respect of the aforesaid lease, although it does appear from annexures from the respondent's answering affidavit that subsequent to a dispute which arose between the parties a tender has been made.

Although the point was taken in the respondent's answering affidavit that the condition referred to in clause 2 of the agreement was a resolutive condition rather than a suspensive condition, this point was wisely abandoned by Mr van Blerk who appeared for the respondent.

There were a number of points which the applicant made in its submissions before the court. It was argued, *inter alia*, that the licence had not been granted to the respondent, that it was clear that the licence had been granted to Rite Site CC which is a non-existing legal entity. It is also submitted that there had been a lapse of a reasonable time for the fulfilment of the condition and accordingly the contract was discharged.

The point upon which the applicant placed greatest reliance was that the condition referred to in the agreement had not been met. The argument was that the entire lease was conditional upon the municipal authority in which the immovable property was situate granting the requisite permission and licence for an advertising sign that was 16

by 4 metres in size, whereas in fact such permission had not been granted, permission having been granted only for a sign 12 metres by 3 metres in size.

Non-fulfilment of a condition precedent normally renders a contract void. See for example Ex Parte De Villiers in re Carbon Developments (Pty) Ltd 1993 (1) SA 493 (A) at 505A-B; Legate v Natal Land and Colonisation Co Ltd (1906) 27 NLR 439 at 455; Administrateur-Generaal vir die Gebied Suid-Wes-Afrika v Hotel Onduri (Edms) Bpk 1983 (4) SA 794 (SWA). However, non-fulfilment of a condition that is exclusively for the benefit of one party may be waived by that party and cannot be relied on by the other party. See for example Van Jaarsveld v Coetzee 1973 (3) SA 241 (A); Latsky v Burger 1976 (1) SA 667 (NC); Laskey v Steadmet (Edms) Bpk 1976 (3) SA 696 (T); Westmore v Chrestanello 1995 (2) SA 733 (W) at 736F-739C.

Two riders must immediately be added to the proposition that non-fulfilment of a condition that is exclusively for the benefit of one party, may be waived by that party and cannot be relied upon by the other party. The first is that it must be clear that the parties intended the condition to be exclusively for the benefit of one party. If this is not clear, the other party is not bound by the waiver. (See e.g. Wacks v Goldman 1965 (4) SA 386 (W) at 388E-F; Phillips v Townsend 1983 (3) SA 403 (C) at 408G).

The second rider is that if the contract places a time limit on the fulfilment of the condition the party for whose exclusive benefit it was imposed cannot waive it after the time limit has expired. See e.g. Trans-Natal Steenkool-korporasie Bpk v Lombaard 1988 (3) SA 625 (A). The second

rider is clearly not relevant to the facts of this particular case. See also for a general discussion Christie, *The Law of Contract* 3rd ed by Butterworths at 162.

Mr van Blerk who, as I have said, appeared for the respondent, valiantly argued that the condition, more particularly the size and appearance of the advertising sign, were drawn for the benefit of the respondent alone. I am in respectful disagreement with this submission. Clause 5.1 of the lease agreement clearly provides that the lease agreement shall commence on fulfilment of the condition contained in clause 2.1 above. In other words, it is absolutely clear that in the absence of permission granted in terms, the applicant would not be entitled to receive any payment in respect of the lease. This much alone is, in my view, the most significant indicator of the fact that the condition was not drawn for the exclusive benefit of the respondent.

There are, however, further considerations which are relevant. On the respondent's own version the importance of a 4 by 16 metres sign had the following implications:

> "It was indicated that should the 4 by 16 metre sign be approved, then and in that event an additional amount of R3 000,00 per month would be paid by the respondent to the applicant (see paragraph 47 of the answering affidavit)."

In other words, it is clear from the respondent's own version of events that the granting by the Council of permission for a sign 4 by 16 metres in size would have a direct bearing, at the very least, upon the amount per month which the applicant would receive. Moreover, as I have

indicated earlier, there is an important rider to the general rule that non-fulfilment of a condition that is exclusively for the benefit of one party, may be waived by that party. This is that it must be clear that this is indeed what the parties intended and that it is not so that the other party is not bound by the waiver. It certainly is not clear from a perusal of the agreement in question.

There is a further factor which, in my view, is decisive. Nowhere does it appear anywhere in the respondent's answering affidavit that it purported to waive the stipulation in the condition that the advertising sign for which permission was to be granted by the municipal authority should be 16 by 3 metres in size. Nowhere does it appear that the respondent, having accepted that waiver, then purported to perform in terms of the agreement by, for example, paying the lease amount provided for in the agreement from the date upon which it became due. In my view, this failure of the respondent historically to have indicated clearly to the applicant that it accepted the fact that permission was granted for a sign of lesser size and was nevertheless otherwise prepared to abide by the agreement is, in my view, fatal to the respondent's entire case.

There are certain reserved costs in this matter which the parties agreed should be costs in the cause and be awarded in my order today. The parties also agreed that this was a matter which warranted the employment of two counsel. Clearly the implications that arise from any order that this court may make, are potentially considerable and, in my view, both parties were entirely justified in engaging two counsel.

In my view the applicant is entitled to relief substantially in the form sought in prayer 1 of the notice of motion dated 14 April 2000 and also to the relief sought in paragraph 3 thereof. Clearly of course costs in this particular case should follow the result.

In the result the following order is made:

1. The agreement of lease entered into between the applicant and the respondent dated 16 March 1999 is declared to be of no force and effect between the parties.
2. The respondent is ordered to remove forthwith the advertising signs erected in or on the property situate at Portion 373 (Portion of Portion 39) Woodlands Farm, Driefontein situate at William Nichol Drive, Bryanston, Sandton, together with all other appurtenances relating thereto.
3. The respondent is to pay the costs of this application, including all costs reserved to date, which costs are to include the costs of two counsel.