159/92

LL Case No 185/1991

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

BENLOU PROPERTIES (PTY) LTD Appellant

and

VECTOR GRAPHICS (PTY) LTD Respondent

CORAM: HOEXTER, VAN HEERDEN, KUMLEBEN, F H GROSSKOPF JJA et KRIEGLER AJA

HEARD: 31 AUGUST 1992

DELIVERED: 18 SEPTEMBER 1992

JUDGMENT

VAN HEERDEN JA:

On 3 August 1988 the parties entered into a written agreement in terms of which the appellant let certain premises to the respondent. They were the first and second floors and portion of the third floor of a building in Johannesburg. The initial period of the lease was five years, and in terms of clause 1.7 the respondent had to pay a fixed, but escalating, rent for each of those years. Clause 8.5 provided that should certain "charges" be increased during the currency of the lease, the appellant would be entitled to recover 74.4% of such increases from the respondent.

During October 1990 the respondent initiated motion proceedings against the appellant in the Witwatersrand Local Division. It sought an order declaring the lease to be invalid. In the founding affidavit the respondent relied mainly on the provisions of clause 8.5. It contended that the amounts

which might become payable in terms of that clause constituted additional rent; that such amounts were neither determined in nor determinable from the written agreement; that clause 8.5 was consequently void, and that it was not severable from the other provisions of the lease. The appellant filed a brief opposing affidavit which in the main traversed the respondent's legal contentions.

The application was heard by Weyers J. He held that a number of the provisions of clause 8.5, read with certain other clauses, were invalid. As regards severability, Weyers J merely said that it was common cause that if those provisions were invalid the lease in its entirety was of no force and effect. He accordingly granted the declaratory order sought by the respondent and directed the appellant to pay the costs of the application. With the leave of this court the present appeal is directed against

those orders.

In so far as clause 8.5 is material, it reads as follows:

> "8.5 ...if any of the charges payable for any of the items listed below are or have ... been increased so as to exceed those in force at, or are imposed after, the date of commencement of negotiations, the LANDLORD shall be entitled to recover from the TENANT ... the TENANT'S proportionate share of such increases or impositions, which the Tenant agrees shall be equal to 74,4% of such increases:
>
> 8.5.1 rates, taxes or other charges of any nature whatsoever payable by the LANDLORD to any authority in respect of the premises, the building or the property or for service rendered in respect thereof;
>
> 8.5.2 wages and other payments of any nature whatsoever (including contributions to unemployment insurance and pension funds and medical aid schemes) in respect of cleaning, gardening and security services provided to the building and/or the property;
>
> 8.5.3 insurance premiums payable by the LANDLORD in respect of the

property and/or the building;

8.5.4 any charges relating to the maintenance, repair and upkeep of the building and/or the property including, without limiting the generality of the aforegoing, amounts paid to third parties in respect of lift maintenance, air conditioning or other maintenance contracts or other services rendered;

8.5.5 any levies, taxes or other charges in respect of the building or the premises or the property not in force at the date of commencement of negotiations but subsequently imposed by any authority;

8.5.6 the cost of electricity, water, gas, sanitary fees, refuse removal charges, domestic effluent or other charges used in or relating to the common areas;

8.5.7 all costs incurred in regard to the management, administration and letting of the building."

Reference must also be made to clauses 5.3, 28 and 29. Clause 5.3 provides that in the lease "common area"

"shall mean those portions of the building

> and property other than those actually let or capable of being let to individual tenants as determined by the LANDLORD in its sole discretion."

Clause 28 provides:

> "The LANDLORD shall take all such steps as it may consider necessary in its sole and absolute discretion for the maintenance and operation of the common areas."

And the material portion of clause 29 reads:

> "The nature of the services to be provided to the premises or the building or property by the servants of the LANDLORD or its agents, directors, ... independent contractors or representatives shall be at the sole discretion of the LANDLORD."

Weyers J found that clauses 8.5.2, 8.5.3, 8.5.4, 8.5.7, as well as clause 8.5.6 read in conjunction with clauses 5.3 and 28, were invalid. His reasoning was that those clauses confer on the appellant a discretion to determine various costs and charges, a substantial portion of which will have to

be borne by the respondent. By way of example he pointed out that if the appellant decides to pay increased wages covered by clause 8.5.2, it may recover 74,4% of such increases from the respondent.

As will appear, our old authorities were of the view that a lease is invalid if the rent is to be determined by the lessor - or the lessee - in his unfettered discretion. Likewise a sale is void if the price is to be fixed by either party. It has often been said that these results flow from the application of the broader principle that contractual obligations must not be vague or uncertain (cf Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd 1986 (2) SA 555 (A) 574, and Genac Properties Jhb (Pty) Ltd v N B C Administrators CC (previously N B C Administrators (Pty) Ltd) 1992 (1) SA 566 (A) 576). There was some debate before us as to whether the increased expenditure recoverable

under clause 8.5 forms part of the rent payable by the respondent. Although it does not appear to me that the answer has any real bearing on the outcome of this appeal, I shall assume that, as contended for by the respondent, that portion of the increased expenditure payable by the respondent is a component of the rent.

Weyers J relied heavily on the decision of a full bench of the Transvaal Provincial Division in Kriel v Hochstetter House (Edms) Bpk 1988 (1) SA 220 (T). In that case it was common cause in the court below that certain clauses in a lease were invalid. The dispute between the parties related solely to the severability of those clauses. The court of first instance held that they were severable. On appeal the full bench of its own accord examined the meaning of the relevant provisions. It came to the conclusion that the court of first instance - and the

parties - had correctly construed the clauses in question as conferring upon the landlord "'n absolute diskresie ... om die omvang van die teenprestasie wat ... vir die gebruik van die verhuurde perseel betaal moet word te bepaal" (at p 226G). It is apparent that on appeal the appellant in that case did not argue that the clauses were nevertheless valid. The full bench accordingly said no more (at p 226G) than that it is "geykte reg dat 'n huurkontrak ongeldig is indien die partye ooreenkom dat een van hulle die huurgeld kan vasstel".

The provisions of the lease considered in Kriel differ in a number of respects from those of clause 8.5 of the present lease, and no purpose would be served by examining the former in any detail. It suffices to say that on the approach adopted by the full bench clauses 8.5.2, 8.5.3, 8.5.4, 8.5.6 and 8.5.7 of the present lease would also be invalid

because they confer upon the appellant the power to "determine" the extent of additional rent payable by the respondent.

Weyers J also relied upon an unreported decision of Labuschagne AJ. This decision has, however, since been overruled by this court on the ground that the lease in that case provided a mechanism for the objective determination of the reasonableness of additional amounts payable by the tenant: Proud Investments (Pty) Ltd v Lanchem International (Pty) Ltd 1991 (3) SA 738 (A) 751. It was not held or suggested, however, that in the absence of provision for such a mechanism the impugned clauses would necessarily have been invalid.

The lease under consideration in Genac provided for payment by the tenant of "rental" as well as (in clause 6) a portion of the landlord's actual and reasonable maintenance and running

expenses such as wages, insurance premiums, the cost of maintaining lifts and air conditioning, etc. It was argued that the amounts payable in terms of clause 6 constituted additional rent, and that the clause was invalid because it empowered the landlord to determine in its discretion the total rent payable; particularly because it was left to the landlord to decide which expenses would be incurred. This argument was rejected. On the assumption that the additional amounts payable by the tenant were components of the rent, this court came to the following conclusion (at p 579B-C):

> "It is question-begging to say that provided the expenses are actually and reasonably incurred, the landlord can without reference to the tenant determine the amounts recoverable under clause 6. The first qualification is that the expenses should be actually incurred. The amount of these, it is true, is within the control of the landlord. The second qualification is that such expenses should be reasonable - reasonable, that is, in relation to both the nature of the expenses and their

> amount. That is something which is to be objectively ascertained and is not subject to the will or whim of the landlord. It is therefore wrong to say that under clause 6 the landlord determines the amount of the expenses."

It will be observed that this court relied upon two separate qualifications built into the relevant clause. It did not, however, hold that in the absence of the second qualification the clause would have been invalid. It was indeed unnecessary for it to express a view on such an hypothesis.

I revert to the provisions of clauses 8.5.2, 8.5.3, 8.5.4 and 8.5.7 of the present lease. (Clause 8.5.6 differs in a material respect from the other clauses and will be considered at a later stage. I shall also deal later with clauses 28 and 29 upon which counsel for the respondent relied heavily in argument before us.) Supporting the reasoning of the court a quo, counsel for the respon-

dent submitted in his heads of argument that the provisions of clauses 8.5.2, 8.5.3, 8.5.4 and 8.5.7 are invalid because they leave it to the appellant to determine in its discretion amounts of increased expenditure, a portion of which must be paid by the respondent. Thus, for instance, so it was argued, the appellant may employ whatever labour it chooses for the cleaning of the building or in connection with security services at wages which it determines, and incur whatever costs it wishes in relation to the management or administration of the building.

Subject to three qualifications, it is true that the extent of the respondent's liability under the above clauses may be dependent upon a decision taken by the appellant. The first qualification is that only a defined share - 74.4% - of increased expenditure may be recovered from the respondent. The second qualification is that such expenditure

must actually be incurred by the appellant. It must therefore enter into an agreement with a third party which brings about an increase in expenditure. In short, the appellant must incur increased contractual liability.

The third qualification stems from the condition precedent to the incurring of liability under clause 8.5, viz, "if any of the charges payable for any of the items listed below are or have ... been increased so as to exceed those in force at, or are imposed after, the date of commencement of negotiations ...." (The words "are imposed after", though cast in a less than perfect grammatical setting, clearly pertain to "charges" set out in clause 8.5.5.) Counsel for the respondent submitted that the condition is fulfilled if, at any time after the inception of the lease, the total amount payable for all the listed items exceeds the aggregate payable

for such items at the date of commencement of negotiations ("the relevant date"). I cannot agree. It seems to me that the submission ignores the use of the significant word "any" in the phrase "if any of the charges payable for any of the items". (My emphasis.) One must therefore compare the "charges" payable for each listed item at the relevant date with the "charges" payable for such an item at a later date in order to determine whether the condition has been fulfilled in respect of that item. Hence the respondent cannot incur liability in regard to a particular item if at the relevant date nothing was payable for it (save, of course, for an item listed in clause 8.5.5). Thus, if the appellant did not make use of security services at the relevant date, the respondent would not be liable for a share of the costs of procuring such services after that date. In sum, the third qualification in regard to

"charges" with a contractual origin amounts to this: the respondent is only obliged to contribute to increased contractual expenditure incurred by the appellant after the relevant date in respect of specific listed items.

The question then arises whether a provision in a lease is void merely because it confers upon the landlord a measure of discretion in determining components of the rent payable by the tenant. With reference to the facts of this appeal the question can perhaps be refined to read: can the parties to a lease validly agree that, as part of his obligation to pay rent, the tenant has to contribute to circumscribed expenditure incurred by the landlord in his discretion?

The concept of an invalid lease strictly speaking involves a contradiction. It is, however, convenient to use such terminology. Roman-Dutch

writers do not say in so many words that a lease is invalid if the rent is to be determined by either the lessor or lessee. It can, however, be inferred that in their view such a lease was invalid. Firstly, when dealing with the requirement that rent must be definite or definable ("certain"), they only mention a determination by a third party, and not also one by a party to a lease. Secondly, relying primarily upon D.18.1.35.1, they clearly state that in the case of a sale the price may not be left to the determination of either the seller or the purchaser, and it is inconceivable that they would have drawn a distinction between the fixing of a purchase price and that of rent. See e g Voet 18.1.23, De Groot 3.14.23, Van der Keessel Th. 636 and Van der Linde 1.15.8. Indeed, Pothier, who has often been cited by our courts, says in his Treatise on the Contract of Letting and Hiring (Mulligan's translation), p 14:

> "Rent must be certain and fixed, just as, in contracts of sale, price must be certain and fixed, and what we have said as to certainty and fixity of price in contracts of sale, applies to leases"

And in his Treatise on the Contract of Sale (Cushing's translation) at p 16 Pothier, having stated at the outset that the price in a contract of sale must be certain and determined, goes on to say:

> "If a thing is sold for a price, to be fixed afterwards by one of the parties, the sale is void ...."

See also De Groot 3.19.7 read with 3.14.23.

I must confess to considerable difficulty in grasping why a price (or rent) to be fixed by one of the parties should be regarded as less certain than one to be determined by a third party. As a matter of logic it is also not clear to me why the requirement that a third party must act arbitrio boni viri - as to which see Voet 18.1.23 and

Machanick v Simon 1920 CPD 333, 336-339 - should not also govern the situation where it has been left to one of the parties to determine the price (or rent). It is therefore not surprising that in such other legal systems as I have been able to consult, an agreement conferring upon a party the right to determine a prestation is not regarded with disfavour. In German law a provision empowering one of the parties to an agreement to fix the extent of his or the other party's performance is valid, but in case of doubt as to the parties' intention an equitable determination must be made (Larenz, Lehrbuch des Schuldrechts, 12th ed, vol 1, p 68, and Palandt, Bürgerliches Gezetzbuch, 42nd ed, pp 355-6). In Dutch and Swiss law such a provision is likewise valid, but the determination must comply with "redelijkheid en billijkheid" or be a "billigem Ermessen" (Asser, Verbintenissen-Recht, De Verbintenis in het Algemeen, 9th ed, part

1, p 16, and Algemene Leer der Overeenkomsten, 8th ed, part 2, p 296; Von Tuhr, Allgemeiner Teil des Schweizerischen Obligationenrechts, 3rd ed, vol 1, p 191. There is also authority for the view that the type of provision under consideration is unassailable in Scots law: Note to Foley v Classique Coaches, Limited (1934) 2 KB 1 (H of L) 21. And the Uniform Commercial Code, Sales, sec 2-305 (2), which has been enacted by many States in the USA, provides:

> "A price to be fixed by the seller or by the buyer means a price for him to fix in good faith."

See Anderson, Uniform Commercial Code, 2nd ed, vol 1, p 417.

I should also mention that Daube, Studies in the Roman Law of Sales (edited by Daube), pp 21-22, questions the interpretation of D.18.1.35.1 which was favoured by Roman-Dutch writers. According to Daube there is much to be said for a construction

that the text does not condemn a sale as invalid if the price is to be fixed by the buyer, but merely provides that the sale is imperfectum until the price has been fixed.

Be all that as it may, I shall assume that we are bound by the views of our old authorities; viz, that a sale (or lease) is invalid if the price (or rent) is to be determined by one of the parties to the agreement. However, the important point for present purposes is that in their reliance on Roman law they go no further than disapproving of a lease where the determination of the rent depends entirely on the will of one of the parties (cf Murray and Roberts Construction Ltd v Finat Properties (Pty) Ltd 1991 (1) SA 508 (A) 514G-H and Theron NO v Joynt 1951 (1) SA 498 (A) 506G). That is not the situation in casu. In particular the appellant cannot unilaterally, and simply of its own volition, impose an

obligation upon the respondent under clause 8.5. As has been said, it must first bind itself to a third party and so incur contractual liability. The third party will look to the appellant for payment of the amount concerned, and should the respondent be unable to contribute its share, the appellant will have to foot the entire bill.

I am fortified in my view by the distinction drawn in our law between a pure and a mixed potestative condition. Commonplace examples of the two types of conditions are respectively: "I will pay you R500 if I wish to do so" (a condicio si voluero). And: "I will pay you R500 if I do not visit Cape Town before the end of the year". The pure condition is invalid because it depends entirely upon the will of the promissor whether or not he will pay. The mixed condition is, however, unobjectionable (D.45.1.99.1; D.45.1.108; D.45.1.115.1; Voet

45.1.19). The reason for the benevolent approach to mixed conditions is thus explained by Pothier, A Treatise on the Law of Obligations (translation of Evans), vol 1, p 29:

> "Lastly, though I promise something under a condition, which depends upon my will whether I will accomplish it or not ... as, if I promise to give you ten pistoles in case I go to Paris, the agreement is valid; for it is not entirely in my power to give the money or not, since I can only refuse to do so in case I refrain from going to Paris." (My emphasis.)

Admittedly in the examples of mixed conditions given in the books the prestation is determined or objectively determinable. What is of importance, however, is the distinction drawn between mere volition and a discretion, the exercise of which does not depend entirely upon the will of a party. By a parity of reasoning the rule that the determination of rent - or, for that matter, any prestation - may not be left to one of the parties should be

confined to the situation where the determination depends entirely upon the unfettered will of that party.

The above rule relates, of course, to the requirement that a prestation must be sufficiently specified. I shall revert to the question whether an obligation of one party to pay expenditure incurred by the other may not be invalid on another ground.

English law also recognises the principle that rent must be certain. Yet it would appear that in that system a clause such as clause 8.5 of the present lease would be regarded as unobjectionable. In Greater London Council v Conolly (1970) 1 All ER 870 (CA) 876 Lord Pearson quoted a passage in the judgment of Sir George Jessel MR in Re Knight, ex parte Voisey (1882) 21 Ch D 442, 456. Part of that passage reads as follows:

> "The kind of improvement most familiar to us in regard to agricultural leases is

> drainage. It very often happens that when the landlord does the drainage he puts in a stipulation that he shall receive a certain percentage on what he lays out, and he may be entitled to drain even without the consent of the tenant, and to cause the tenant to pay an increased rent. I do not see the difficulty in law ..."

In commenting on this dictum Lord Pearson said (at p 877b):

> "The importance of that passage is that it shows that the increase of rent may be dependent by the terms of the lease on some unilateral act of the landlord."

By way of analogy reference may also be made to a clause often incorporated in consent papers in matrimonial matters, viz, that all future medical and hospital expenditure of the wife is to be paid by the husband. In a very real sense the wife may in her discretion incur such expenses and recover them from her ex-husband. So, for instance, when she falls ill she may decide either to call in a doctor or, without medical assistance, stoically to suffer

pain or discomfort. Then, again, she may either decide to undergo an operation or choose to live with the suffering brought about by, say, a degeneration of her hip joint. Furthermore, if she opts for an operation she may decide to have it performed in a provincial hospital or in a more expensive private institution. And it has rightly never been suggested that such a clause is invalid merely because the extent of the husband's obligation depends to a degree upon the wife's discretion,

Indeed, I am not aware of any authority, save Kriel, for the proposition that an undertaking by one party to compensate the other for expenditure to be incurred by the latter, albeit in his discretion, is necessarily invalid. Nor is there a policy reason why such an undertaking should be void merely because it relates to the exercise of a discretion. Although pronounced in a different context, the

following oft-quoted dictum of Sir George Jessel MR in Printing and Numerical Registering Co v Sampson (1875) LR 19 Eq 462, 465 is apposite:

> "... if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice."

An agreement conferring upon A the right to claim from B particularised expenditure incurred by the former may be so worded that the extent, and possibly also the nature, of such expenditure is wholly within A's unfettered discretion. At the other end of the scale the agreement may be so phrased that A is only entitled to recover reasonable expenditure from B; i e, expenditure which is objectively reasonable (cf Moe Bros v White 1925 AD 71, 77; and Deetlefs v Deetlefs 1966 (2) PH A58 (at pp

210-11). More usually, however, such an agreement will be subject to a term implied by law; viz, that A must exercise an arbitrium boni viri and that B is consequently only liable in respect of expenditure which a reasonable man in the position of A could have incurred (cf Machanick v Simon 1920 CPD 333, 338; Dharumpal Transport (Pty) Ltd v Dharumpal 1956 (1) SA 700 (A) 707; Nedbank Ltd v Capital Refrigerated Truck Bodies (Pty) Ltd and Others 1988 (4) SA 73 (N) 74G; D.18.1.7 pr; Voet 18.1.23, and Windscheid, Lehrbuch des Pandektenrechts, 7th ed, vol 2, p 407).

It may be that, depending on all its terms and other circumstances and considerations, an agreement falling into the first of the above three categories will be void as being against public policy. Counsel for the respondent submitted that the present lease is indeed one which obliges the

respondent to contribute to increased expenditure incurred by the appellant in the exercise of an unfettered discretion. In further submitting that there is no room for implying a term that the appellant must act arbitrio boni viri, counsel relied exclusively upon clauses 28 and 29 of the lease.

Clause 28 appears in the printed lease under the heading "Landlord's Maintenance". It will be recalled that in terms thereof the landlord is obliged to take all such steps as it may consider necessary in its sole and absolute discretion for the maintenance and operation of the common areas. In so far as it is material clause 29, under the heading "Services", stipulates that the services to be provided to the leased premises or the building or property shall be at the sole discretion of the landlord.

In its founding and only affidavit (there

being no reply to the opposing affidavit) the respondent did not rely upon clauses 28 and 29. On the contrary, its contention that the lease was invalid was based solely on the provisions of clause 8.5, read with clauses 4 and 7. Hence the appellant was not called upon to deal with the effect or application of clauses 28 and 29. On the assumption that those clauses have a bearing on the respondent's liability under clause 8.5, we consequently do not know whether the former clauses could ever affect the extent of that obligation. I say so because if at the relevant date nothing was payable by the appellant for maintenance and services falling within the ambit of clauses 28 and 29, the respondent could not be called upon to contribute to any expenditure later incurred in respect of those items. Indeed, counsel for the respondent conceded that, given the construction of the condition precedent at which I have

arrived, he could not rely on clauses 28 and 29.

There is, however, a more fundamental reason why counsel's reliance on those clauses is misplaced. It is trite law that, unless otherwise provided, a landlord is obliged to maintain the leased property during the currency of the lease. It often happens, however, that only a portion of a building is let to a tenant, or that portions thereof are let to more than one tenant. In such a case, I conceive, the landlord will also be obliged to maintain so-called common areas and to provide services in connection therewith.

It appears to me that clauses 28 and 29 were intended to limit the above obligation. They leave it to the appellant to decide in its sole discretion what steps should be taken in connection with maintenance and the provision of services. The appellant must, of course, exercise an honest discre-

tion, but non constat that expenditure honestly incurred under clauses 28 and 29 will, or may, give rise to liability on the part of the respondent under clause 8.5. Indeed, the former clauses, solely designed as they are to limit the appellant's common law liability, do not have any bearing on clause 8.5. Were it otherwise, one would have the curious situation where the respondent in respect of only certain listed items, such as maintenance, and not in regard to other items, such as insurance, would have to contribute to increased expenditure incurred in the sole discretion of the appellant.

I am accordingly of the view that the respondent's liability under clause 8.5 is not determined by increased expenditure incurred in the unfettered discretion of the appellant. It is unnecessary to decide whether the respondent is liable to contribute to increased expenditure which is objectively

reasonable, or to such expenditure incurred arbitrio boni viri since, on either construction, clauses 8.5.2, 8.5.3, 8.5.4 and 8.5.7 are unobjectionable.

It remains to add that in so far as the decision in Kriel is in conflict with the conclusions at which I have arrived, it should not be followed.

I turn to clause 8.5.6 which pertains to the cost of electricity, water, refuse removal etc relating to "the common areas". It is clear that if those areas are sufficiently demarcated in the lease, clause 8.5.6 is unassailable. Apart from the conclusions at which I have arrived above, the appellant has no say in the determination of the cost of electricity and related charges. Those charges are prescribed by a public body such as a local authority (cf Proud Investments at p 749I). Counsel for the respondent relied, however, on the definition of "the common area" in clause 5.3. It will be recalled that

that clause defines "common area" as "those portions of the building and property other than those actually let or capable of being let to individual tenants as determined by the landlord in its sole discretion". (My emphasis.) The respondent contended that because the appellant may simply of its own volition determine the common area, he may likewise determine the extent of the charges relating to that area.

It is not easy to grasp the import of clause 5.3. It sets out objective criteria for determining the common area but the emphasised words then purport to confer upon the appellant a discretion in regard to those standards. There seems to be little room for the exercise of an honest discretion which will lead to a result different from that flowing from an application of the objective criteria. Thus, if a portion of the building is

actually let, it is inconceivable that the appellant could honestly determine that it is in fact not let. And as regards portions capable of being let, there is hardly scope for a genuine difference of opinion.

I shall, however, assume in favour of the respondent that notwithstanding the enumeration of the said criteria clause 5.3 confers upon the appellant an untrammelled discretion to determine the common area. I shall also assume that this results in the invalidity of clause 8.5.6 read in conjunction with clause 5.3. On those assumptions it is clear that clause 8.5.6 becomes unobjectionable if the words emphasised by me are deleted from clause 5.3. The question then arises whether the offending phrase is severable from the rest of clause 5.3 and, of course, the other provisions of the lease.

It admits of no doubt that the phrase is grammatically and notionally severable. It is also

clear that the deletion of the phrase will not have a substantial effect on the character of the lease, and in particular the ambit of clause 8.5.6. The crucial question then is whether the parties would have entered into the agreement of lease if the phrase in question had been deleted: Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A) 16-17 and 24.

It is hardly necessary to say that in the postulated case the respondent would undoubtedly have become a party to the lease. The deletion would not have had the slightest prejudicial effect on its rights and obligations as tenant. I also have very little doubt that the appellant would have been prepared to enter into the "amended" agreement of lease. At the risk of repetition I again emphasise that clause 8.5.6, as it now reads, leaves very little scope for an honest, but erroneous, determination of those "portions of the building and property

other than those actually let, or capable of being let to individual tenants". Hence the offending phrase was, from the appellant's point of view, practically worthless. Its deletion would therefore have been a matter of little consequence to it.

It was rightly not suggested that any other provision of the lease cannot survive the elimination of the above phrase. It follows that the attack on clause 8.5.6 must also fail.

In the result it is unnecessary to consider the possible application of the principles enunciated in the minority judgment in Sasfin at pp 26-31 and which, in the present context, do not appear to be in conflict with anything decided in the majority judgment. (See also Du Plooy v Sasol Bedryf (Edms) Bpk 1988 (1) SA 438 (A) 455-7 and Vogel NO v Volkersz 1977 (1) SA 537 (T) 548-551.) It only remains to add that those principles, if sound, may also have been

determinative of this appeal even if clauses 8.5.2, 8.5.3, 8.5.4 and 8.5.7 were held to be invalid.

The appeal is allowed with costs, including the costs of two counsel, and the following is substituted for the order made by the court a quo:

"The application is dismissed with costs."

H J O VAN HEERDEN JA

HOEXTER JA

KUMLEBEN JA

CONCUR

F H GROSSKOPF JA

KRIEGLER AJA