REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: **NO**

(2) OF INTEREST TO OTHER JUDGES: **NO**

(3) REVISED. ✓

7/2/2019
DATE

SIGNATURE

Case No: 17/22900

In the matter between:

MERCHANT WEST (PTY) LTD Applicant

and

CELL C (PTY) LTD Respondent

JUDGMENT

ANDRÉ GAUTSCHI AJ:

1 This application concerns the interpretation of a lease agreement ("the lease agreement") concluded between the applicant and the respondent and which consists of a Master Rental Agreement ("the MRA") concluded on 19 December 2013, a side letter dated 4 December 2013, and two Equipment Schedules ("schedule 1" and "schedule 2") concluded on 19 December 2013 and 24 December 2013 respectively.

2 The exact nature of the equipment rented by the respondent from the applicant is unimportant, but it needs to be pointed out that the side letter gives the respondent the option at the expiry of the initial rental period to purchase the equipment for an amount of R100.

3 The MRA has a Commencement Date of 3 December 2013, a Rental Due Date of 1 March 2014 and a Minimum Rental Period of 12 quarters. Clauses 3.2 and 4.1 of the terms and conditions of the MRA provide as follows:

> "3.2 This Agreement commences on the Commencement Date as set out in the Equipment Schedule and unless terminated subject to the terms of the provisions of clauses 8.10 or 11, shall terminate at the expiry of the Rental Period as set out in the Equipment Schedule ("Rental Period") ...
>
> 4.1 Customer shall pay Rentor, for the duration of this Agreement the Rental as specified in the relevant Equipment Schedule together with VAT at the prescribed rate ("the Rentals"), the first payment shall be due on the Commencement Date and subsequent payments thereafter on or before the Rental Due Date as specified in the relevant Equipment Schedule.

4 The MRA contains an "Equipment Schedule", which incorporates by reference the terms and conditions of the MRA and in turn advises the reader to "See Schedule". That is a reference to schedule 1 and schedule 2, each of which contains the following term ("the *interregnum* term"):

"Should the RENTAL DUE DATE and COMMENCEMENT DATE not fall on the same day, the CUSTOMER will rent the EQUIPMENT from the RENTOR for the interregnum period between the COMMENCEMENT DATE and the RENTAL DUE DATE. The interregnum rent shall be due and payable on the COMMENCEMENT DATE and shall be equivalent to one ninetieth of the QUARTERLY RENTAL multiplied by the number of days of the interregnum period."

5 The respondent made the first payment (calculated according to the *interregnum* term) shortly after the Commencement Date, on 5 December 2013, and thereafter made another 11 payments at the beginning of each quarter commencing on 1 March 2014, with the last payment being made on 1 September 2016. It then contended that it had paid the rental for the 12 quarters commencing 3 December 2013 and ending on 30 November 2016, and that it was entitled to purchase the equipment rented for R100.

6 The applicant contends that, by reason of the *interregnum* term, the first payment between the Commencement Date and the Rental Due Date was not a quarterly payment, but a payment for the *interregnum period* referred to in that clause, that the 12 quarterly payments commenced on 1 March 2014, and that there was another payment due of R3 078 402.89 (inclusive of VAT) on 1 December 2016 to fulfill the respondent's obligation to pay for 12 quarters.

7 For the reasons which follow I do not agree with the applicant's interpretation:

7.1 Clause 3.2 quoted above provides for the agreement to terminate at the expiry of the specified rental period. The Minimum Rental Period is for 12 quarters, which on the face of it would be 12 quarters from 3 December 2013, ending on 30 November (or perhaps 2 December 2016). The effect of the applicant's contention is that that period is

extended for another three months, making the actual rental period almost 13 quarters, and the termination date 28 February 2017. The applicant's interpretation leads to an absurdity, in that, contrary to the express provision in the MRA that the agreement will terminate after 12 quarters, its interpretation extends that to almost 13 quarters, which was not the intention. The applicant responds to this by submitting that the contract period is still for 12 quarters, but that the *interregnum* period would be in addition thereto, and that the 12 quarters commence on 1 March 2014. That submission ignores the clear wording of clause 3.2 quoted above, namely that the Rental Period would be 12 quarters commencing on the Commencement Date.

7.2 The second difficulty I have with the applicant's interpretation is that it considers the *interregnum* rental as something different from and extraneous to the quarterly payments. I think that counsel for the respondent was correct in submitting that the first payment was a quarterly payment, but adjusted because the period involved was shorter than a quarter. That is in line with clause 4.1, which does not distinguish between the first rental payable on the Commencement Date and the subsequent rentals payable on the Rental Due Date (and thereafter). Interpreting the *interregnum* term in that way again avoids the absurdity that an agreement intended to expire after 12 quarters from the Commencement Date, will instead expire after (almost) 13 quarters.

7.3 Counsel for the applicant, with some justification, submitted that there would be an absurdity if the Commencement Date was a matter of days

before the Rental Due Date, which would then shorten the Minimum Rental Period to a little over 11 quarters. The agreement does not make specific provision for any shortfall of the rental period of 12 quarters. The answer may lie in importing a tacit term to the effect that the rental period is extended to make up the shortfall and that a proportionate rental is payable at the end in order to make up 12 quarterly payments. The position does not arise here, where the shortfall of the twelfth period is a mere two days and may therefore be seen to be *de minimis*.

7.4 I should mention that the MRA and schedules 1 and 2 are clearly standard contracts and not custom drawn for this particular deal. As a result, the language employed is at times inappropriate for the specific transaction. For instance, the Equipment Schedule contained in the MRA refers to "Rentals payable monthly in advance from the Commencement Date", instead of "quarterly in advance", and clause 4.1 does not distinguish between the first payment and the subsequent payments, and seems to conflict with the wording of the *interregnum* term. It is necessary that I give the language its ordinary and grammatical meaning "unless this results in absurdity, repugnancy or inconsistency with the rest of the agreement ..."[1]. Also, "[a] sensible meaning is preferred to one that leads to insensible or unbusinesslike

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1 Privest Employee Solutions (Pty) Ltd v Vital Distribution Solutions (Pty) Ltd 2005 (5) SA 276 (SCA) at para [21]

results or undermines the apparent purpose of the document."[2] In the present case, the interpretation advanced by the respondent, namely that the first payment for the *interregnum* period is the first quarterly payment albeit adjusted for the shorter period, and that there were only 11 quarterly payments due thereafter, is to be preferred.

8 For all these reasons, I am of the view that the applicant's interpretation of the agreement is wrong.

9 This conclusion renders it unnecessary for me to consider the respondent's alternative defence of rectification. In the event that this matter is taken further, I indicate briefly that counsel for the respondent disavowed any reliance on common error, but instead relied on a unilateral error induced by the applicant. For this, it had to allege an intentional act on the part of a representative of the applicant[3], which it failed to do. I do not think that the rectification pleaded by the respondent could succeed.

10 Counsel for the respondent abandoned any reliance on the further alternative defence of estoppel.

11 In the result, the application is dismissed with costs.

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2 Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at para [18]

3 Benjamin v Gurewitz 1973 (1) SA 418 (A) at 425H-426A

ANDRÉ GAUTSCHI
ACTING JUDGE OF THE HIGH COURT

Date of Hearing:	4 February 2019
Judgment Delivered:	7 February 2019

APPEARANCES

Counsel for the Applicant:	Adv B Edwards
Instructed By:	Schindlers Attorneys, Johannesburg
Counsel for the Respondent:	Adv S Pincus SC
Instructed By:	BBM Attorneys, Johannesburg

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