110/92

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CASE NO 457/90

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

JANET MAY RUSTEBURG — FIRST APPELLANT

MARILYN HOMAN — SECOND APPELLANT

and

PETER RONALD LORIMER GORDON — RESPONDENT

CORAM: BOTHA, NESTADT JJA et VAN COLLER AJA

DATE HEARD: 14 MAY 1992

DATE DELIVERED: 1 JUNE 1992

J U D G M E N T

NESTADT, JA:

I feel bound to express my regret that the litigation between the parties has reached the stage of

an appeal to this Court. There existed between them a cordial relationship of long standing. The matter concerns a capital amount of only R3 000. And in issue is purely a question of fact. One would have hoped that in these circumstances a compromise could at an early stage have been reached.

I do not propose to set out the factual background to the dispute or the course that it has taken. Nor will I detail the evidence of the witnesses. It would be idle to do so. These matters appear from the magistrate's judgment as well as from the judgment of the court a quo. I think it can be safely assumed that the limited number of persons interested in the outcome of this appeal are familiar with them. For the same reason I shall not list the various arguments that were respectively advanced by counsel before us.

Basically and broadly these may be summarised by saying that Mr Quinn on behalf of the appellants adopted the reasoning of the magistrate whilst Mr Lang for the respondent supported the court a quo's approach. In the circumstances I proceed immediately to a consideration of the merits of the appeal.

The narrow but crucial issue that the magistrate had to decide was whether at the November 1987 meeting it was agreed that the duration of the lease be for a year, ie until 31 October 1988. In this regard he had before him two mutually destructive versions. The problem which he faced was therefore one of credibility. In resolving it he did not rely on the demeanour of any of the four witnesses. This was because "there (was) nothing to choose between them" in this regard. His decision was based rather on the

probabilities. These he found to be in favour of the appellants. Hence the grant of judgment in their favour. Our task is to re-assess the correctness of the trial court's conclusion.

I deal firstly with certain factors which despite argument to the contrary were in my opinion either not established or in any event do not advance either side's case and which are therefore neutral.

(i) I cannot agree with Mr Quinn that it should have been inferred, contrary to the respondent's denial, that he received the written lease which Mr Abdo had allegedly caused to be posted to him. Despite some confusion in his evidence as to when a copy later came into his possession, there is no warrant for rejecting what he stated on this

issue. And the magistrate did not do so.

(ii) The court a quo held that Mr Abdo's evidence was "strong support...that there was no lease and it is in direct contradiction of...the existence of an oral lease for one year". This is not so. His evidence is equivocal. He conceded that he could not recall what his "exact conversation" was with Mr Rusteburg. Nor does either of his two letters assist the respondent. The reference in the one dated 24 November 1987 (exhibit A) to "if the agreement is acceptable" is no indication, at least of any significance, of there having been no agreement (to a years' tenancy). There were a number of terms in the written lease that had not been discussed at the

meeting and which the respondent would have had to agree to. And Mr Abdo does not in his evidence confirm the statement in his letter dated 23 May 1988 (exhibit B) that he had explained to the appellants that "no oral agreement had been arrived at". In any event his advice may have been wrong. Moreover Mr Rusteburg denied that he was so informed by Mr Abdo.

(iii) Mr Lang argued that the terms of exhibit G, being a letter dated 8 March 1988 written by the appellants' attorneys to the respondent were inconsistent with and detracted from the veracity of the appellants' version. I do not think so. If there is a slight inconsistency, it is not of any moment.

(iv) The respondent on his version was only obliged to give the appellants one month's notice terminating the lease. He and his wife satisfactorily explained why two month's notice was given.

This brings me to those matters which are of significance. In the forefront here is what I conceive to be the pith of the magistrate's reasoning. It was that both parties wanted security of tenure; this was especially so in the case of the respondent; he had no alternative premises to go to; indeed he did not wish to move; a monthly tenancy would therefore not have suited him; and this being so it was improbable that the duration of the lease would not have been discussed and agreed upon. This approach would have considerable force - if it had a sound factual

foundation. But I do not think it has. As the court a quo found, it overlooks the true import of the respondent's evidence. And it is, of course, against such evidence that the probabilities must be tested. It is true that the respondent wanted security of tenure. Such security was however not qua tenant. On a proper interpretation of his evidence he had no qualms about the short term. It was not then in his mind that his tenancy was a monthly one. That realisation only came later. He and the appellants were on good terms. He had been their tenant for a number of years. So he did not think that the appellants would terminate the lease on short notice. Consider the following extract from the respondent's evidence. Dealing with what happened at the end of the meeting he says:

> "And then what was said after that? --- Then I think I said well what happens to us, what do I do. So she said that she was quite happy that we stay

> where we were, that a new lease would be drawn up by her lawyers and that the ability to buy the building would be deleted from the new lease. No time period at this time was mentioned at all because we had already dealt with two other time periods in previous leases."

What the respondent was concerned about was having the premises as his permanent place of business. In other words the security he was seeking was tied to his desire to purchase the property. That he wished to do so is, for the reasons given by the court a quo, plain. It is a recurring theme throughout his evidence. But at the meeting he was told in effect that he could not purchase; that the property was not for sale. In these circumstances the argument that the respondent would not have left the meeting without getting an undertaking from the respondent concerning the duration of the lease, loses much of its cogency. There was no need for him to raise the issue. Indeed, being

committed to an unqualified years' tenancy might have caused him problems in the event of him during the following year finding another (more permanent) home for his practice. This is what he had in mind doing. Hence his evidence about a "two month escape clause".

What has been stated does not quite dispose of the point under consideration. The magistrate also relied on certain other factors which in his view militated against the acceptance of the respondent's evidence. One was the respondent's statement that he hoped or expected that the written lease would provide for a years' tenancy. It would seem that the magistrate regarded this as inconsistent with the respondent's version. Another was the appellants' evidence that they too required a secure tenancy (in the form of a committed tenant) so as to finance a second

property which they intended to and did buy. A third was what the magistrate regarded as the respondent's inability to explain why, when he did not receive the written lease, he failed to communicate with the Rusteburgs. These matters were raised before and dealt with by the court a quo. It was found that they did not significantly advance the appellants' case. Suffice it to say that for the reasons given by JONES J, I respectfully agree with this conclusion.

There are other criticisms of the magistrate's reasoning. To begin with I agree with the court a quo that he was not entitled (as he did) to regard the appellants' instructions to Mr Abdo to draw up a lease containing a term that it be for a year as supporting their version. Mr Rusteburg may have been under the mistaken impression that this had been agreed to. Or he may simply have wanted such a term to be inserted without there having been agreement on the point.

Secondly, the trial court was not in my opinion justified in finding that the first appellant "remained unshaken...on the fact that it was agreed that the lease was to be for twelve months". On the contrary, her evidence on this point is somewhat confused and indeed contradictory. She initially stated that she told the Gordons that "they could stay and rent the place for another year and they seemed quite happy...(T)hey agreed to that". Under cross-examination however her evidence changes. The following passage exemplifies this.

> "What did you actually say to them then? --- I said we would carry on as before with the same lease for the same period.
> Did you say for the same period or for one year?
> ---For one year, well I said I would not sell the house for one year.
> I'm sorry to be so persistent but the thing is the whole case turns around what was said on that occasion by yourself. Now you've said to us that you said stay where you are as before at the same rental. Then you say that it was stay where you are before at the same rental for one year or for the same period or as previous leases. Now what

> exactly (intervention) --- As the previous leases, that's what I meant, as previous leases."

I pause here to mention that if this was what was said, it creates a difficulty for the appellants. The second lease was for two years whilst the third was for one year. Perhaps realising this, she then says that it was agreed that "we would continue on the same basis as we'd done the year before...as per the previous lease". Even this stance was not maintained. Later she reverts to "old leases" and eventually to "I said as before". Allowance must of course be made for the fact that the first appellant was testifying to events that had occurred some eighteen months before. It is natural therefore that there be an element of uncertainty in her recollection of what was said at the meeting. Also Mr Rusteburg unhesitatingly says that the agreement was that the lease be renewed for one year. Even so, what

has been set out constitutes in my view a criticism of the first appellant's evidence which detracts from her reliability. As such it is a factor which the magistrate wrongly overlooked.

Another reason for putting a question mark against the acceptability of the appellants' evidence arises from the following. The Rusteburgs were both adamant that at the meeting there was no discussion about the respondent purchasing the property (at any price). I fully subscribe to the court a quo's view that the respondent's evidence to the contrary was far more consistent with the probabilities and that if the first appellant and her husband were "wrong on the point (t)hey could also be wrong about the (duration of the) lease". This is not to say that they were untruthful. The magistrate regarded them as honest. The court a

quo does not disagree with this finding. Nor do I. One can readily see how the Rusteburgs might subjectively have assumed that the respondent had agreed that the duration of the lease be for a year. The respondent had long been a tenant of theirs. They obviously trusted him. They had no reason to fear that he might want to vacate the premises on short notice. On the expiry of the previous lease they were content to let the respondent's tenancy continue on an informal basis.

When it comes to the version of the respondent and his wife however the position is somewhat different. What I mean is that unlike in the case of the Rusteburgs, there is less room for them having made a bona fide mistake as to what was discussed at the meeting. Their denial that the duration of the lease was agreed to would more likely be a deliberately false

one. Yet I do not understand the trial court to have found them to have been dishonest. And with good reason. The respondent would seem to have genuinely been under the impression that he was entitled in February 1988 to terminate the lease. I cannot agree with Mr Quinn that he craftily took advantage of the non-arrival of the written agreement to cancel the lease. A reading of his and Mrs Gordon's evidence confirms the impression that they were honest. There are a number of examples of them having made admissions against their interest when a denial would have been open to them. They might easily have alleged that at the meeting a monthly tenancy was agreed upon.

I do not say that the magistrate was faced with an easy decision. The exercise of assessing where in a given case the probabilities lie is often difficult. This is such a case. What is involved is

a comparison between two opposing contentions. As Wigmore on Evidence, paragraph 2498, quoting an American case, puts it:

> "By a preponderance of evidence is meant, simply, evidence which is of greater weight, or more convincing, than that which is offered in opposition to it..."

It is not to be understood that I consider the evidence of the respondent and his wife as being without blemish. In certain respect they contradict each other. There are other criticisms to which Mr Quinn referred. In the final analysis however I remain unpersuaded that appellants' version carried greater weight or was more convincing than that of the respondent. In my opinion therefore they failed to discharge the onus of proving that it was agreed that the period of the lease entered into in November 1988 would be for a year. This is what the court a quo decided and I agree with it. It

follows that their claim should have been dismissed.

On behalf of the respondent it was argued in the alternative that the appellants could have mitigated all their damages by letting or selling (and giving occupation of) the property by 1 May 1988. In view of my conclusion that it was not proved that the respondent was in breach of the lease, it is however unnecessary to deal with this issue.

The appeal is dismissed with costs.

NESTADT, JA

BOTHA, JA - CONCURS

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MARYLIN HOMAN — SECOND APPELLANT

and

PETER RONALD LORIMER GORDON — RESPONDENT

Coram: BOTHA, NESTADT JJA et VAN COLLER AJA

Date heard: 14 May 1992

Date delivered: 1 June 1992

J U D G M E N T

VAN COLLER AJA:

I have had the privilege of reading the judgment of my brother Nestadt JA. For the reasons which follow I am unable to agree with the conclusion to which he has come.

I agree with what has been said by Nestadt JA with regard to the four neutral factors. I also agree that to determine where the probabilities lie in this case is not an easy task.

The main and crucial dispute between the parties is whether or not the further period of the lease was agreed upon. First appellant and her husband testified that a period of one year was mentioned and accepted. Respondent and his wife testified that no period at all was mentioned. What is of importance is that on neither version did any argument ensue about the duration of the proposed lease. There was in fact no discussion about the duration. What must therefore be determined on the probabilities is only whether or not a period of one year was mentioned at all. If it was mentioned that respondent could have the premises for another year, then there is no reason not to accept the evidence of first appellant and her husband that this was accepted. I need only to refer to the evidence of Mr Rusteburg that when respondent and his wife left, they were very glad "that you people are prepared to renew the lease for a year." According to his evidence they were also glad that the rental was not increased.

It is not in dispute that it was made clear to respondent and his wife that first appellant did not wish to sell the property. Although respondent, on his version, went to the meeting in order to purchase the property, he was informed that appellant was not prepared to sell. One would have expected that under these circumstances, the possibility of a further lease would then have been discussed. This is what in fact happened. According to first appellant, she said that the respondent could stay and rent the place for another year. It was put to first appellant under cross-examination that all that was mentioned was that respondent could stay on at R1000 per month. According to first appellant's husband they discussed the renewal of the lease for a period of one year at a monthly rental of R1000. Respondent's wife also said in her evidence that first appellant had said that the rent would continue at R1000. She was, however, sure that no period was mentioned. It

seems to me to be highly improbable that no mention was made of the period. When respondent's offer to purchase was rejected, his position was uncertain and it is improbable that he would have left the meeting without any certainty about the duration of the lease. It is also improbable that first appellant, to whom it was also important to have a lease, would not have mentioned the period. It is, of course, possible that because the previous lease was for a period of one year, and because first appellant stated that she would not sell the property for at least one year, that the fact that the lease would be for one year was so obvious to first appellant and her husband that it was never mentioned. I do not think, however, that this is probable. According to the evidence of first appellant and her husband, they, during November 1987, were about to purchase another property and intended doing so by way of a mortgage bond over the leased property. The bond repayments would be paid out of the

rent from the leased premises. This fact militates against the above-mentioned possibility, and it strengthens appellant's case. The fact that they did not call for the written lease cannot be held against them, because on their version they already had an oral agreement with a reliable tenant. It is true that first appellant's evidence is subject to valid criticism as stated by Nestadt JA, but he also points out that Mr Rusteburg unhesitatingly testified that the agreement was that the lease be renewed for one year. The trial took place approximately 18 months after this meeting was held and one cannot blame the witnesses for not remembering everything, although it is difficult to accept that respondent and his wife could be absolutely certain that the period was not mentioned at all.

Two other aspects remain to be mentioned very briefly. There is no acceptable explanation by respondent why the duration of the lease was not discussed. As appears from

the extract from respondent's evidence referred to by Nestadt JA, respondent testified that no time period was mentioned at all "because we had already dealt with two other time periods in previous leases". This does not make sense and is not a plausible explanation.

The second aspect relates to the question why respondent would have cancelled the lease if a period of one year had in fact been agreed upon. The evidence of respondent in this regard is the following:

> "Now the letter, how did it come about that you decided to cancel your lease? --- I decided to cancel my lease because first of all I was told that the Rusteburgs were not prepared to sell to me, secondly at this stage I had not received any lease at all, thirdly I had not been contacted by any party with reference to the lease, any attorneys or the landladies and fourthly when these other people came around to value and they weren't prepared to divulge what they were valuing for I got rather concerned, because I looked at the possibility of my having to leave certainly within the year."

It is clear from this evidence that respondent could have inferred that appellant was going to act in breach of the oral agreement entered into by the parties. Respondent became concerned and it is quite probable that he, notwithstanding the oral agreement, then decided to act in the manner in which he did.

In my judgment the balance of the probabilities favours the appellants and the magistrate came to the correct conclusion.

It remains to deal very briefly with the alternative argument that the appellants could have mitigated all their damages by letting or selling the property by 1 May 1988. Corbett J said the following with regard to the onus in Everett & Another v Marian Heights (Pty) Ltd 1970 (1) SA 198 (C) at 201 H - 202 A:

"Generally, the burden of proof rests upon the party who asserts that a claimant for damages failed to take reasonable steps to mitigate his loss (Hazis v Transvaal and Delagoa Bay Investment Co. Ltd., 1939 A.D. 372). Similarly, in my view, the onus of proof would also rest upon the party who asserts that the mode of mitigation employed by the claimant was not a reasonable one in that an alternative mode, less expensive or burdensome, was available (Shroq v Valentine 1949 (3) SA 1228 (T) at p. 1237). In this regard the Court should not be too astute to hold that this onus has been discharged. As Lord McMILLAN put it in the well-known case of Banco de Portugal v Waterlow & Sons Ltd., 1932 A.C. 452 at p. 506-

> "Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment, the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticise the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken."

See also De Pinto & Another v Rensea Investments (Pty) Ltd 1977 (2) SA 1000 (A) at 1007 [as inserted in 1977 (4) SA 529] and Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd 1977 (3) SA 670 (A) at 689 D - F.

This is a minority judgment and consequently I do not propose to deal in detail with the facts and the reasons for the conclusion to which I have come on this issue. Mr Lang, on behalf of respondent, has also not made any oral submissions on this issue in support of his written heads of argument.

It appears from the evidence that at the beginning of May 1988 the property was entrusted to a firm of estate agents in order to find a tenant. They could not succeed in this, and a purchaser was eventually found who bought the property on 30 May 1988. The purchaser could only take occupation at the beginning of September 1988. I am not

satisfied that the steps taken by appellant were not reasonable. Respondent practised on the premises as a chiropractor. First appellant's reason why she had not entrusted the property to an estate agent even before respondent vacated the premises, was that it would have been awkward to take prospective tenants through the premises while respondent was still conducting his practice there. If it is assumed that this attitude was unreasonable, then I am not satisfied that even if appellant had acted more promptly, a tenant or buyer would have been found at an earlier stage.

In my judgment it has not been proved by respondent that appellants could have mitigated their damages.

I would allow the appeal with costs, set aside the judgment of the court a quo and substitute an order dismissing the appeal with costs.

VAN COLLER AJA