THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case no: 256 / 08

LOÏS BRINK **Appellant**

and

THE PREMIER OF THE FREE STATE PROVINCE **First Respondent**
THE MEC: DEPARTMENT OF PUBLIC WORKS, ROADS AND TRANSPORT OF THE FREE STATE PROVINCE **Second Respondent**

Neutral citation: **Brink *v* Premier of the Free State (256/08) [2009] ZASCA 16 (19 March 2009)**

CORAM: **STREICHER, NAVSA, PONNAN and MLAMBO JJA and LEACH AJA**

HEARD: **10 MARCH 2009**

DELIVERED: **19 MARCH 2009**

SUMMARY: **Contract – interpretation of – language to be given its grammatical and ordinary meaning.**

ORDER

On appeal from: The High Court, of South Africa, Free State Provincial Division (Wright J sitting as court of first instance).

The appeal is dismissed with costs.

JUDGMENT

PONNAN JA (STREICHER, NAVSA and MLAMBO JJA and LEACH AJA concurring):

[1] A contract of lease in respect of a resort between the Free State Provincial Government,[1] as lessor, and the appellant Loïs Brink, as lessee, gave to the latter - so she contends - two options to extend the period of the lease. When she sought on the second occasion to renew the lease, her right to do so was challenged by the respondents.

[2] At the heart of the dispute between the parties is Clause 2 of the lease headed 'PERIOD', which provides:

'The LEASE is for a period of five (5) years from 1 October 1997 to 30 September 2002, with the proviso that the LESSEE shall have an option to extend the lease period for a period of five (5) years with a second option of 5 years on the same and/or new conditions as will be mutually agreed, excluding a further right to renewal. The LESSEE shall give written notice to the LESSOR six (6) months in advance of his or her intention to renew the contract and all negotiations with regard to the renewal of the contract shall be concluded four (4) months before the initial contract lapses. If the

[1] Represented by the Premier of the Free State Province as the first respondent and the Department of Public Works, Roads and Transport as the second respondent.

LESSEE does not give written notice six (6) months before the contract lapses or if all negotiations are not concluded four (4) months before the contract lapses, this option to renew expires.'

[3] After the initial term of five years, the first five year option to renew in terms of clause 2 was exercised by the appellant and the lease was duly extended until 30 September 2007.

[4] Things did not go as smoothly, however, when she purported to exercise the second option to extend the lease period for a further five years. She did so by despatching a letter per facsimile to Advocate Msibi, the Head of the Department of Public Works, Roads and Transport, on 29 January 2007. The relevant portion of that letter reads:

'I herewith notify you that I hereby exercise the option to extend the lease for a further period of 5 years effective from 1st October 2007 until 30th September 2012 on the same terms as provided for in clause 2 of the agreement.

It is my view that the options contained in the agreement are such that the second option which I hereby exercise, will be on the same terms and conditions as contained to in the existing agreement of lease, including the annual escalation of rentals. There is in my opinion thus no other conditions to be negotiated.'

[5] The response from Advocate Msibi was:

> 'Your letter correctly states that the agreement was signed on the 3rd of November 1997 for [an] initial period of five (5) years.
>
> It should be mentioned that your initial agreement expired at the end of October 2002, and you were given an option to extend your lease hence expiry in October 2007.
>
> Please be advised that as we did the previous year whereby we gave notice that the Department will not renew or extend the lease.'

[6] Not content with that response, the appellant consulted with an attorney who wrote to Advocate Msibi, on 13 February 2007, as follows:

'Clause 2 of the Lease Agreement specifies that an initial period of 5 years running from the 1st of October 1997 to the 30th September 2002. During this period our client exercised her option to renew for a further period of 5 years (the 1st option afforded to her) and the lease was subsequently renewed for a further period of 5 years in terms of this first option.

In terms of clause 2 of the written Lease Agreement our client was afforded a second option for a final period of 5 years which second option she now exercises in terms of her letter dated the 29th January 2007, a copy of which is annexed hereto.

Kindly advise as to the possibility of having a round table discussion regarding the renewal of the lease for the final period of 5 years, failing which our client will have to approach the High Court with an Application for a Declaratory Order as to her right of a further extension in terms of the existing agreement.'

[7] That letter failed to elicit a response. A subsequent letter, in a similar vein, did. The response was this:

> 'The Department wishes to reiterate it that it does not intend extending the lease with your client, as according to the Department, there is no second option to be exercised by your client.
>
> Alternatively the Department does not consider itself bound by the second option if it does exist at all.
>
> [Consequently] your client would be expected to vacate the premises upon the expiry of the present lease i.e. on or before 30 September 2007.'

[8] Impasse having been reached, the threatened application for declaratory relief adverted to earlier by the appellant's attorney, was launched. The appellant accordingly sought an order in the High Court (Bloemfontein) that she had lawfully and validly exercised the second option and that her renewal of the lease for the

period 1 October 2007 to 30 September 2012 was valid. The High Court (per Wright J) held:

'Considering the clause as a whole it seems likely that the parties intended that after ten years of the lease had expired, the parties should have the right to possibly negotiate new terms in view of changing circumstances, and this is precisely what the words of the clause, construed as a whole, have achieved. The respondents were, however, not entitled to refuse to negotiate.'

[9] The learned Judge accordingly issued the following order:

'1 Dit word verklaar dat die verhuurder (die Provinsiale Regering van die Vrystaat Provinsie) nie geregtig was om summier en sonder dat *bona fide* onderhandelinge tussen die huurder (die applikante) en die verhuurder omtrent 'n verdere verlenging van die huurkontrak, "LB1" tot die funderende beëdigde verklaring soos vervang, gevoer was, die huurder se versoek om 'n verdere verlenging van die huurkontrak te weier nie.

2 Die verhuurder word gelas om onderhandelinge met die huurder aan te knoop oor die moontlike verdere verlenging van die huurkontrak ingevolge die bepalinge van klousule 2 daarvan tot en met 30 September 2012, hetsy op dieselfde of ander voorwaardes of ingevolge 'n kombinasie van die bestaande en ander voorwardes.

3 Ten einde die aanvang van die onderhandelingsproses te reël, word dit gelas dat:

3.1 die verhuurder binne 21 dae na die verlening van hierdie bevel 'n skriftelike uiteensetting van die voorwaardes waarop die verhuurder bereid sou wees om die huurkontrak te verleng, aan die applikante se prokureur van rekord moet beteken;

3.2 die huurder binne 14 dae na die aflewering van die uiteensetting in paragraaf 3.1 gemeld, haar skriftelike aanvaarding van sodanige voorstelle of enige skriftelike teenvoorstelle aan die respondente se prokureur van rekord moet beteken; en

3.3 die verhuurder en die huurder nadat daar aan paragrawe 3.1 en 3.2 voldoen is, indien ooreenkoms dan nog nie bereik is nie, verplig sal wees om oor 'n verdere tydperk van drie kalendermaande bereken vanaf die eerste dag van die maand opvolgend op die maand waartydens aan paragraaf 3.2 voldoen is, redelikerwys, sonder vooroordeel

en *bona fide* onderhandelinge te voer ten einde te poog om ooreenkoms te bereik oor die voorwaardes waarop 'n verdere verlenging van die huurkontrak tot en met 30 September 2012 kan geskied.

4 Gedurende die tydperk in paragraaf 3.3 gemeld, sal dit die partye vrystaan om die Hof te nader vir 'n verlenging van sodanige tydperk, mits en indien dit sou blyk dat enige van die partye in versuim is om redelikerwys, sonder vooroordeel en *bona fide* onderhandelinge omtrent die verdere verlenging van die huurkontrak tot en met 30 September 2012 en die voorwaardes daarvan, te voer.

5 Indien die verhuurder en die huurder daarin sou slaag om 'n ooreenkoms te bereik omtrent die verlenging van die huurkontrak tot en met 30 September 2012, sal sodanige ooreenkoms in skrif vervat word en deur die verhuurder en die huurder, of hul gemagtigde verteenwoordigers, onderteken word, alvorens dit bindind sal word.

6 Hangende die duur van die onderhandelinge voormeld hetsy gedurende die aanvanklike termyn of enige verlenging daarvan, of gedurende die beregting van enige aansoek om 'n verlenging van die termyn waartydens onderhandelinge gevoer moet word, en tot tyd en wyl 'n skriftelike huurkontrak soos in paragraaf 5 beoog gesluit is, of tot tyd en wyl die onderhandelinge ingevolge die bepalinge van hierdie bevel tot 'n einde sou kom, sal die bepalinge en voorwaardes van die huurkontrak *mutatis mutandis* van toepassing bly, en sal sodanige huurkontrak alleen ten einde loop indien die partye nie 'n skriftelike oorenkoms bereik nie. In sodanige omstandighede sal die huurkontrak beëindig word op die laaste dag van die maand onmiddellik opvolgende op die maand waartydens die onderhandelingstydperk, of enige verlenging daarvan, verstryk het.

7 Die respondente word gesamentlik en afsonderlik, die een te betaal die ander vrygestel te word, gelas om die applikante se koste te betaal.'

[10] This appeal against the judgment and order of Wright J is before us with the learned Judge’s leave.

[11] The matter is essentially one of interpretation. According to the 'golden rule' of interpretation the language in a document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument.[2]

[12] The first difficulty in the interpretation of the relevant words in clause 2 is created by the use of the expression 'and/or'. Those words must in the context of the clause be read disjunctively as well as conjunctively.[3] If that is done, then it is clear that what the clause envisages is a second option to renew on either:

(a) the same conditions; or

(b) new conditions; or

(c) a combination of (a) and (b).

It is not in dispute that the qualifier, 'as will be mutually agreed', which is couched in the future tense, is applicable to a renewal in terms of either (b) or (c). The sole issue for determination therefore is whether it applies as well to a renewal under (a). Upon a natural construction of the words of clause 2 they do not signify, I think, that the qualifier is rendered inapplicable to (a). There appears to be no reason for the limitation of the ordinary grammatical meaning of the phrase. It has not been shown why such a limitation of the ordinary meaning of the phrase is either necessary or desirable or what absurdity or repugnancy would arise should the phrase be given its ordinary grammatical meaning.

[13] The qualifier 'as will be mutually agreed' follows syntactically on the reference to the conditions upon which the lease agreement may be extended for the second

---

[2] *Coopers & Lybrand and Others v Bryant* 1995 (3) SA 761 (A) at 767.
[3] *Berman v Teiman* 1975 (1) SA 756 (W) at 757D-G; *Du Toit en 'n Ander v Barclays Nasionale Bank Bpk* 1985 (1) SA 563 (A) at 570G-I.

time, which may be the same or new, or a combination of both the same and new conditions. In other words, the phrase plainly qualifies both 'the same and/or new conditions'. I thus remain unpersuaded that the clause can be made, on any permissible technique of interpretation - as was urged upon us on behalf of the appellant - to yield the following intelligible meaning: 'on the same conditions or new conditions as will be mutually agreed'.

[14] It follows that the appeal must fail. There being no counter-appeal, it is unnecessary to consider whether the order of the court below is a competent one.

[15] In the result the appeal is dismissed with costs.

V M PONNAN
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	D J van der Walt
	Instructed by: Molenaar & Griffiths Sasolburg Symington & De Kok Bloemfontein
For Respondent:	I V Maleka SC
	Instructed by: The State Attorney Bloemfontein