A 239/94

B.J. PIETERSE VS C. S.J. THERON

1994/11/03

MULLER, AJ

CONTRACT

Lease agreement

Whether option is void for vagueness and therefore unenforceable.

"the fair market rental" not constituting a fixed or determinable rental

option void for vagueness.

jk Exercise of option

letter containing new proposals for new terms

not exercising option "on the same terms and conditions" **CASE**

*o £??nM

IN THE HIGH COURT OF NAMIBIA

In the matter between

BAREND JOHANNES PIETERSE **APPLICANT**

versus

CORNELIUS STEPHANUS JACOBUS THERON **RESPONDENT**

CORAM: MULLER, AJ.

Heard on: **1994.09.12**

Delivered on: **1994.11.03**

JUDGMENT

MULLER, AJ. : The applicant approached this Court by way of notice of motion for an order directing the respondent to vacate the property known as Erf 1284, Windhoek and for payment of the monthly rental due in respect of the premises in terms of the agreement of lease from 31st May 1994 to date of vacation thereof and costs. The respondent opposed the application and filed opposing affidavits, whereto the applicant in turn replied.

At the commencement of the hearing the respondent applied in limine for oral evidence to be led in respect of a limited issue, namely whether a specific letter namely that of 12 January 1994 had been received by the respondent. After an indication by the Court that it would not be in favour of oral evidence at this stage on a single issue, the respondent reconsidered his position and did not proceed with the point in limine, but decided that he would be prepared to argue the matter on the papers as filed.

Mr Mouton appeared on behalf of the applicant and Mr Oosthuizen represented the respondent.

Background

From the affidavits filed it appears that the applicant is the owner of the said Erf 1284, Windhoek and that the respondent rented the premises by virtue of a written agreement of lease dated the 19th November 1991. The respondent conducts a business called Pionerspark Central Supermarket. The lease commenced on the 19th November 1991. Paragraph 2(a) to (c) contains the following provision for an option for renewal of the lease by the lessee (respondent). Paragraph 2 reads as follows:

"(a) The lease shall be for a period of (2) two years and six months and eleven days, commencing on the 19th November 1991 and terminating on 31st May 1994, provided that should the LESSEE decide to rent the business premises after the termination of this lease on the 31st May 1994, the LESSEE shall have the option to renew this lease on the same terms and conditions as contained herein for a further period of five years.

(2) The LESSEE shall give written notice of such decision to the LESSOR by not later than 31st January 1994.

(3) Within 30 (thirty) days of delivery of the said written notice, the parties shall agree on the new rental payable for the business premises, which rental shall be the fair market rental for the said business premises."

The respondent was in occupation of the premises on the 19th November 1991 and is still in the occupation of it. The applicant in his application for ejectment of the respondent avers that respondent failed and/or neglected to give written notice to the applicant on or before the 31st January 1994 that he exercises his option to renew the lease as provided for in paragraph 2(b) of the said lease agreement. The respondent's right to occupy the property consequently terminated on the 31st May 1994, according to the applicant, but despite demand the respondent failed and/or neglected to vacate the said business property. The applicant further avers that he received a letter, dated 15 February 1994, from the respondent's attorneys endeavouring to exercise the option to renew the lease. This letter reads as follows:

1994/02/15

BJ PIETERSE P 0 BOX
11005 Klein Windhoek

Sir

LEASE: CSJ THERON/YOURSELF

We act on behalf of Mr Theron who instructed us to direct this letter to you.

We refer to the lease and herewith confirm that our client in terms of article 2(b) of the lease gives notice that he exercises his option to renew the lease for a further period

of 5 years. The renewal notice was forwarded to the address indicated in the lease, but we are not sure whether it has reached you, since it indicates a postal address in Windhoek.

With reference to your letter dated 25 January 1993 (which surely should be 25 January 1994) we should like to answer as follows:

a) Our client denies that it was agreed

verbally between you and our client that our client shall purchase the apparatus and accessories for R75 000.00. Our client is not interested in buying them for R7 5 000.00, but is prepared to lease them further as set out in article 12(a) of the lease, at the existing escalation of R100.00 p. a. From 1 June 1994 onwards until 31 May 1995 our client shall thus pay R975.00 per month for the rental of the machinery.

(b) Our client at present pays rent to the amount of R5484.00 per month until 31 May 1994. The rent increased annually by 12%.

Should you increase the rent to R10 000.00 per month, this would reflect an increase of 82.34% which is unacceptable to our client.

Our client is prepared to accept an annual increase of 12.5% (per annum) which means that for the period 1 June 1994 until 31 May 1995 he will pay the amount of R6169.50 per month. The rent then increases by 12.5% per annum.

We look forward to hearing from you whether the terms are acceptable to you in order to enter into a new lease.

We trust that you will reply soon. Yours

faithfully
signed B. Viljoen pp Dr. Weder, Kruger & **Hartmann"**

The letter referred to in the second paragraph of that the above quoted letter of 15th February 1994 by means of which the respondent's attorneys averred that the respondent indeed exercised his option to renew the lease namely that of 12 January 1994 was never received by the applicant, according to his affidavit. The applicant then addressed a letter on the 28th February 1994 in reply to the respondent's letter of the 15th February 1994 in which he accused the respondent of creating a smoke screen by averring that the option had been exercised timeously and gave notice to the

respondent that he in fact breached the lease agreement and that the applicant regards that agreement as cancelled. The translated letter of the 28th February 1994 reads as follows:

By Hand B.J.
PIETERSE

28/2/94

Messrs. Weder, Kruger & Hartmann
P 0 BOX 864
WINDHOEK

Sir

LEASE: CSJ THERON/BJ PIETERSE

Firstly I refer to your letter Mr Viljoen LZV/93/1209 dated 15/2/94 which you used as a SMOKE SCREEN, seeing that for years already (I?) no longer use P.O. Box 11005 Windhoek, see letters 2/3/93, 14/3/93, to you, and letters to your client 15/2/93, 12/1/94 and many others, on which the above address appears, thus your client failed and for a smoke-screen to use Windhoek address (Afrikaans text intelligible).

I refer your client to article 2(b) that your client failed it reads as follows (sic!): "The Lessee shall give written notice of such decision to the Lessor by not later than 31st January 1994", I thus refer you to your letter dated 15/2/94, as you yourself are aware that your client did not fulfil his duty, you want to make me believe that Windhoek's postbox was used, see our letters, as already mentioned above, have a look at the address, it speaks for itself.

Secondly I refer you to article 2(c) where a new rent will be made applicable if your client complied with the contract, thus he failed, but am willing to accept new lease as follows:

(4) As new lease set out in my letter dated 25 January 1993 (should be 1994) to accept on or before 7/3/94 or his notice (b).

(5) I herewith give lessor (owner) B.J. Pieterse notice that lease with Mr C.S.J. Theron will be cancelled on 31 May 1994 and that lessor shall take the premises for his own use.

Thank you by anticipation
Yours faithfully
signed B.J. Pieterse
Copy to your client (per ha [...nd?]

I herewith acknowledge that I received letter to Messrs Weder, Kruger & Hartmann
from BJ Pieterse. signed Van Zyl
28/2/94"

The applicant finally avers that he received no response to the letter of the 28th February 1994, which allegation was denied by the respondent, alleging a number of occasions in which he attempted to contact the applicant, but in vain. This was in turn denied by the applicant. This was really the only issue in dispute except whether the letter of the 12th January 1994, which I shall soon refer to, was received.

The respondent in his affidavit pointed out that he in fact rented the same business premises in terms of an earlier lease agreement dated 1st June 1989 which was succeeded by the lease agreement of 19 November 1991. The respondent in his affidavit contended that he had already as far back as 2nd March 1993 through his attorneys of record given written notice to the applicant of his intention to renew the lease agreement on a long term basis. This letter reads as follows:

> 1993 03 02
>
> B J Pieterse 60
> Abelia Street
> Somerset West 7130
>
> Dear Sir
>
> LEASE AGREEMENT: C J S THERON/YOURSELF
>
> We refer you to the above matter and wish to inform you that we are acting on behalf of Mr Theron.
>
> With reference to your facsimile dated 15 February 1993, we would like to bring the following to your attention:
>
> (6) Mr Theron had already commenced preparations to have the premises painted and the project will be completed soon. We therefore wish to confirm that the Lessee is complying with the provisions of clauses 9 and 10 of the Lease.

(7) Mr Theron denies all allegations that he is engaged in selling the premises and/or the business. Our explicit instructions are that these are unfounded rumours that are being spread and we wish to confirm that this is definitely not the case.

You will realise that Mr Theron cannot sell the premises as you are the owner and Mr Theron is only the Lessee. Mr Theron is also well aware of clause 5 of the Lease in terms of which the Lessee is prohibited from sub-letting the premises or ceding it without your written permission. Our instructions are that Mr Theron is in no way considering such a possibility since he is using the premises to conduct his own business and intends doing so in future.

We trust that your enquiries regarding the matter have been clarified.

Our further instructions are that the current lease agreement expires on 31 May 1994 and that you and Mr Theron have already discussed renewal of the lease, as well as the possibility of amending certain clauses in the lease agreement. Mr Theron has also instructed us to put the following proposals to you in view of the new lease:

1. Mr Theron would like to enter into a long-term lease for twenty (20) years as the previous contracts as well as the current one provided only for short periods of about two (2) years. Consequently, the lease agreement must be renewed regularly and this entails unnecessary paper work. Such short-term contracts create uncertainty with both parties involved, especially seen in the light of long-term planning.

   You may therefore deduce that Mr Theron in no way intends selling the business, but would prefer to plan its long-term establishment in the existing premises.

   You will also realise that such a long-term lease presents a financial asset to you as it may be utilised as security for loans, bonds, etc.

2 . With reference to clause 13 of the lease agreement, we were instructed that Mr Theron is experiencing several problems with the refrigeration installation which he is also renting from you. Attached is a copy of a letter from Messrs Marting Refrigeration regarding the general condition of such installation.

   Our instructions are that Mr Theron wishes to remove the installation, which is no longer serviceable, from the shop and replace it with his own installation. You will see from the attached letter that the installation can no longer be repaired economically.

   We would like to hear from you regarding your intention about what is to be done with the unserviceable installation, as it will be kept in available storage.

3. Further hereto, with reference to clause 12(a), we would like to hear from your regarding your opinion should the rent for the installation and equipment be included in the rent for the premises. Instead of an

additional amount calculated as rent for the equipment, we therefore propose an all-inclusive amount as rent. In such a case, clauses 12(a) and (b) will therefore lapse, and be included in the provisions of clause 3 of the current lease agreement.

Mr Theron thus offers an amount of R5 700.00 per month with effect from 1 June 1994 for the first year of the new period of lease, with an annual automatic rate of escalation of 10%.

4. Our client would, as in the case in the current clause 2(a), like to have the option to renew the lease.

We look forward to hearing from you regarding your viewpoint on the proposals by Mr Theron, as well as the clauses you would like to be incorporated in the new lease agreement. We would appreciate it if you would furnish the necessary information so that a new lease agreement may be drawn up in time, or if you prefer to draw up the contract yourself, to provide us with a copy for submission to Mr Theron.

We thank you for your co-operation and await your reply.

Yours faithfully
DR WEDER, KRUGER & HARTMANN
Signed B Viljoen"

The applicant's reaction to that letter appears from a letter dated

14 March 1993, which I quote:

14/3/93

B J Pieterse 60 Abelia Street
Heldervue Somerset West 7130

Messrs Dr Weder, Kruger en Hartmann
P 0 BOX 864
Windhoek
Namibia
9000

Dear Sir

INSTRUCTION: LEASE AGREEMENT C J S THERON AND B J PIETERSE

With reference to letter from your Mr Viljoen, LZV93/1209 dated 2/3/93, I wish to draw your attention to clause 14 to be read with clause 13. This replies to your letter and is self-explanatory .

I also wish to refer you to your letter, page 2, paragraph 2 which reads as follows: (a) Lessee inspected all items properly and found them to be in a sound condition. Lessee regularly had items serviced and they were still serviceable.

(b) If the lessee buys new articles for use, these items becomes the property of the lessor - see clause 14. (c) No mention is made anywhere in the lease agreement of lessor of any items replaced and stored or kept by the lessee.

All items referred to by you as per attached letter from Messrs Marting Refrigeration are to be maintained in a proper working order by the lessee. Should the lessee replace any items at his own expense, the new item replaces the old -see clause 14.

Regarding the renewal of the contract, the lessee may decide later.

I trust that the lessee will comply with the terms of the lease and duly replace any items and that such items will become the property of the lessor - the replaced item may be taken by the lessee. No mention is made anywhere of items
Lessee is to keep or store for Lessor. All items to be maintained in good working order by the Lessee.

Thanking you in advance.

Yours faithfully

Signed B J Pieterse
LESSOR"

Nothing apparently happened for the next 10 months when the respondent avers he instructed his attorneys to write a letter to the applicant which reads as follows:

1994.01.12

B J Pieterse P 0 BOX
11005 Klein Windhoek

Sir

C J S THERON/YOURSELF

We are acting on behalf of Mr Theron who instructed us to direct this letter to you.

We refer to the lease agreement between yourself and our client, and we wish to confirm that the client wishes to exercise his option as stated in clause 2(b) of the lease. Our client therefore intends renewing the lease agreement for a further period of 5 years with effect from 1 June 1994.

We look forward to hearing from you in this regard.

Yours faithfully

DR WEDER, KRUGER AND HARTMANN

Signed B Viljoen"

This is the letter which the applicant avers in his affidavit he never received. About this letter the respondent in his answering affidavit says in paragraph 7(7):

> "This was not meant as the original notice, it was a mere repetition in order to get applicant to respond."

Also in paragraphs 10, 11(3), 12(3) and 12(6) of the respondent's affidavit he clearly states that he in fact exercised his option by means of the letter of the 2nd March 1993 and that the letter of the 12th January 1994 was a mere confirmation of the earlier letter. The respondent then continues by denying that any material term of the contract was breached and that the applicant is obliged to enter into a further lease agreement for another 5 years on the same terms and conditions as that contained in the lease agreement, qualified only in respect of the rental payable, which shall be the fair market rental for the said premises. The respondent avers that "nothing more than N$7 500 per month" would constitute a fair rental. The respondent also attached to his affidavit a letter received from the applicant dated 25 January 1993 which according to respondent was the first reply to his letter of 2nd March 1993. The letter of the 25th January 1993 reads as follows:

"B J Pieterse 60 Abelia Street
SOMERSET WEST 7130

2 5 January 1993

Dr Weder, Kruger & Hartmann
P 0 BOX 864
WINDHOEK
9000

Dear Sir

LEASE AGREEMENT: C J S THERON AND MYSELF

With reference to your letter, Mr Viljoen LZV 93/1209 dated 2 March 1993, and my letter dated
14 March 1993, I refer to the following:

The discussion between your client and myself:

a. The renewal of a new lease on 1 June 1994: That the installation and equipment will no longer be leased, but become the property of the Lessee upon payment of R75 000.00 (seventy five thousand Rand) to the Lessor.

b. The new rent with effect from 1 June 1994 will amount to R10 000.00 (ten thousand Rand) per month escalating at 12V2% per annum for a period of 5 (five) years, to include the following: "Pioneer Central Super Market, servants' quarters, double garage next to said servants' quarters and outside toilet." Further, the lease agreement to remain the same excluding clauses 11, 12(a), (b) and 13, which will no longer apply.

I trust this replies to your letter and I await your client's application.

Thank you.

Signed B J Pieterse"

The respondent also denies that the **R10 000** per month rental referred to in the said letter constitutes fair market rental for the said business premises.

In his replying affidavit the applicant dealt with the letter of 2 March 1993 which the respondent avers was the instrument of exercising his option. The applicant made the point that as this letter proposed a renewal of the lease on different terms and conditions than that contained in the lease agreement, it was not a proper exercise of the option as provided for in clause 2(a) of the lease agreement. Applicant denied that he received the letter of the 12th January 1994 and although he concedes that his Windhoek

Post Box number was still functional it was not used by himself anymore and that the respondent corresponded with him at his Somerset West address. Applicant also avers that the content of the letter of 12 January 1994 was totally different from that of the 2nd March 1993 letter. Applicant denies that the fair market rental for the business premises is N$7500 and states that it is N$10 000 per month. It also appears from his affidavit that applicant was in fact in Windhoek during the period 9 January 1994 until 2 February 1994 and during that period visited and inspected the leased premises. During these occasions the appliances were discussed but the respondent didn't inform him about the exercising of the option which he had the opportunity to do. The dispute about the fair market value also appears from a letter by respondent's attorneys to the applicant dated 15 February 1994 to which I have referred earlier herein and which according to the applicant was addressed to him in response of his letter of 25 January 1993 a quoted supra.

Determining the issues on the papers

As mentioned before the parties were satisfied that the issues be determined on the papers as filed. In determining the issues I am conscious of the so-called Stellenvale rule as set out in Stellenbosh Farmers Winery v Stellenvale Winery (Pty) Ltd 1957(4) SA 234(C) at 235E-G where the following was said in Afrikaans of which the English translation was quoted in Plascon-Evans Paints v Van Riebeeck Paints 1984(3) 623(A) at 634F:

> "... where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicants affidavit justified such an order .... Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted."

Corbett JA (as he then was) amplified this well known rule in the Plascon-Evans Paints case on page 634G - 635C in the following words:

> "This rule has been referred to several times by the Court (see Burnkloof Caterers (Pty) Ltd v Horseshoe Caterers (Green Point) (Pty) Ltd 1976(2) SA 930(A) at 938A-B; Tamarillo (Pty) Ltd v B N Aitkin (Pty) Ltd 1982(1) SA 398(A) at 430-1; Associated South African Bakeries (Pty) Ltd v Oryx & Vereiniqte Backereien (Pty) Ltd en Andere 1982(3) SA 893(A) at 923G-924D) . It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof requires some clarification and, perhaps, qualification. It is correct, that wherein proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949(3) SA 1155(T) at 1163-5; Da Mata v Otto NO 1972(3) SA 858(A) at 882D-H) . If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court (cf Petersen v Cuthbert & Co Ltd 1945 AD 420 at 428; Room Hire case supra at 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg Rikhoto v East Rand Administration Board and Another 1983(4) SA 278(W) at 283E-H). Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers (see the remarks of Botha AJA in the Associated South African Bakeries case, supra at 924A)."

The material facts in this matter are not really in dispute. As mentioned earlier herein, the main dispute between the parties is whether the letter dated 12 January 1994 was received by the applicant. The other disputes are in connection with the allegations by the respondent of his attempts to get hold of the applicant in order to negotiate a fair market rental for the continued lease of the said property as well as the applicant's denial thereof. As will become more clear further on in this judgment, the receipt by the applicant of the letter of 12 January 1994 is not a material factor which would determine the main issues in this application and that the other disputes are not really material at all in the determination of the real issues. The real material issues in my opinion revolve mainly on the legal position pertaining to this particular situation as well as the contents of certain correspondence as well as the undisputed facts on the affidavits.

In the light of the aforesaid I believe this is a matter where a robust approach is necessary and advisable.
See Wiese v Joubert 1983(4) 182(0) at 202E - 203C; Reid v Wittrup 1962(4) 437D at 443;
Carrara & Lecuona (Pty) Ltd v Van Den Heever Investments Ltd and Others 1973(3) SA 716(T) at 719G;
von Steen v von Steen & Another 1984(2) SA 203(T) at 205D-E;
Rawlins & Another v Caravan Truck (Pty) Ltd 1993(1) SA
537(A) at 5411 - 542A;
Michael Hill v Hildebrandt & 1 Other unreported case no. A128/94 Namibia High Court, p.4.

I am therefore satisfied that I can deal with this application and the issues involved on the papers before me.

Arguments

Mr Mouton's first argument was not one which was contained in the affidavits. However, this argument formed part of the submissions in his heads of argument which were served on the respondent's counsel. During the course of the arguments before me it was apparent that Mr Oosthuizen was prepared to deal with this argument. The first argument advanced by Mr Mouton was that the option contained in clause 2(a) of the lease agreement did not constitute a valid option, as it was void for vagueness. In this regard Mr Mouton contended, as I understand his argument, that one of the essentialia for a valid contract such as this is that the price, in this instance the rent, must be fixed or determinable from the wording of the contract provisions itself. Mr Mouton submitted that the rental provided for in clause 2(c) is too vague to constitute compliance with this legal requirement and that as such it is unenforceable and therefore renders the whole option void for vagueness. The words complained of as being to vague to constitute firm rental are "the fair market rental".

Mr Oosthuizen conceded the principle that an option may be a void for vagueness if the price or the rental is not fixed **or determinable as set out in the particular contract, but he contended that the words used in this particular contract constituted a rental that is determinable or that by using a "fair market rental", it provides for a method to determine such rental. Mr Oosthuizen submitted that if the provision only provided for a "reasonable rental", it would have been too vague, but**

contended that the words used in this particular contract and particularly clause 2(c) thereof takes it out of that sphere. I shall deal with this argument and the legal position pertaining to it later on herein.

Mr Mouton's second argument is that on the papers and in particular the respondent's answering affidavit he based his averment that he in fact did exercise the option to renew the lease on the letter of 2nd March 1993 . This letter, Mr Mouton submitted, is clearly not in accordance with what is required in clause 2(a) of the said contract, because that letter contained an offer for a new lease on different terms and conditions and not as is required in clause 2(a) namely, "to renew this lease on the same terms and conditions as contained herein . . . " . Mr Oosthuizen countered this argument by submitting that if it is found that that particular letter of 2 March 1993 didn't constitute a proper exercise of the option in terms of the agreement of lease, then the respondent did exercise his option by virtue of the letter dated 12 January 1994.

In a slight variation on this second argument Mr Mouton argued that the letter of 2 March 1993 clearly contained a counter proposal to the existing terms of the agreement and that as a result of this counter proposal the original offer falls away so that the respondent wasn't in a position anymore to exercise this option. Mr Mouton contended that this also pertains to any further purported exercise of the option, e.g. the letter of 12 January 1994. Mr Oosthuizen on the other hand, submitted that if the letter of 2 March 1993 should be regarded as a counter offer invalidating it as a proper exercise of the option, then the letter of 12 January 1994, constituted a separate exercise of the option. I shall also deal with this argument later herein.

The final argument advanced by Mr Mouton was that the letter of 12 January 1994 was not received by his client and was never written and that the probabilities favours a conclusion to that effect. Mr Oosthuizen submitted that it was never the case of the applicant that this letter was never written or sent, but only that the applicant didn't receive it. He further referred me to certain authorities with regard to delivery and submitted that the respondent in fact complied with this requirement by posting it to the address contained in the lease agreement and that the applicant still had the particular post box facility and could have received the letter.

Analysis of the arguments presented.

One of the requirements for a valid sale is that the price must be fixed or determinable and if it appears from the contract that it is still necessary to negotiate and agree on the price, no valid, agreement of sale came into operation. The same principle applies to an agreement of lease with regard to the rental payable.
See Biloden Properties (Pty) Ltd v Wilson, 1946 NPD 736; Hattingh v Van Rensburg 1964(1) SA 578(T) at 582C; Aris Enterprises (Finance) (Pty) Ltd v Waterberg Koelkamers (Pty) Ltd 1977(2) SA 425(A) at 434;
Soteriou v Retco Poyntons (Pty) Ltd 1985(2) 922(A) at 931G; South African Reserve Bank v Photocraft (Pty) Ltd 1969(1) SA **610**(C) at 613D - H.

In Wasmuth v Jacobs 1987(3) SA 629 (SWA) Levy J. summarised it at 633G - 634D as follows:

"Therefore, if an offer which is an essential element of any option is vague or capable of more than one meaning, it is open to the offeror to contend that it is not capable of being accepted and thereby converted into a binding contract. Where there is an 'offer' which provides that certain terms are to be 'reviewed' or to be 'negotiated' or 'to stand over' for decision at a later stage, then pending agreement on such outstanding terms neither party has any rights against the other. OK Bazaars v Bloch 192 9 WLD 37; Wilson Bros Garage v Texas Co (SA) Ltd 1936 NPD 3 86; Scheepers v Vermeulen 1948(4) SA 884(0); Potchefstroom Municipal Council v Bouwer NO 1958(4) SA 382(T).

In Hattingh v Van Rensburg 1964(1) SA 578(T), a provision in a lease, which provided that the lessee had the right and option to purchase certain premises at such price as the parties may agree upon, was held to be of no force or effect until a price had been agreed upon. There was a similar decision in Biloden Properties (Pty) Ltd v Wilson 1946 NPD 73 6, where the provision for the Court's consideration was 'upon terms to be arranged' while in South African Reserve Bank v Photocraft (Pty) Ltd 1969(1) SA 610(C) the Court held that an agreement which purported to give the tenant an option 'at a rental to be mutually agreed upon,' in fact did not give the tenant a 'valid and subsisting option' which he could exercise. In the South African Reserve Bank case (at 613H) Steyn J added:

'Neither, in my opinion, was there any obligation on applicant "to negotiate" with respondent in order to determine a rental for any further period. It seems to me to be quite irrelevant that this provision is contained in an existing contract providing for a possible renewal of terms in certain respects should the parties agree on a rental.'

I respectfully agree with this. In the present case, there was no obligation on appellant to engage in any negotiations (review proceedings) in order to arrive at a rental whether such rental was to be fair and reasonable, or not. (See also Trook t/a Trook's Tea Room v Shaik and Another 1983(3) SA 935(N); Aronson v Sternberg Brothers (Pty) Ltd 1985(1) SA 613(A).)

For these reasons I have come to the conclusion that there was no valid and enforceable option contained in the original agreement of lease concluded by the parties. Furthermore respondent's purported exercise of the option did not create a valid and binding contract."

It has also been held that "a reasonable" price or rental contained in an option does not constitute a fixed or determinable rental or a price and that such a term would be too vague to be enforceable.

See Erasmus v Arcade Electric 1962(3) SA 418(T);

Lombard v Pongola Sugar Milling Co Ltd 1963(4) SA 119D at 128B and

Adcorp Spares P.E. Ltd v Hydromulch Ltd 1972(3) SA 663(T). In Trook t/a Trook's Tea Room v Shaik & Another 1983(3) 935(N) at 939A Page J. says in this regard:

> "Suffice it to say that, taking all the arguments to the contrary into account, I remain entirely unconvinced that a stipulation to pay a reasonable rental is sufficient to enable the parties to establish with certainty the ambit of the respective rights and obligations. I find myself respectfully in accord with those South African Decisions which held that such a stipulation is void for vagueness."

Mr Oosthuizen, however, contended that the word "fair" used in clause 2(c) is not the same as "reasonable". In my opinion the effect of both words are the same when it's used in the context of a price or rental to be paid. In both instances these words imply some uncertain and potentially arbitrary measure still to be fixed. Used in the context of an offer which forms part of an option I can see no room for rights to be enforced if the "fairness" or "reasonableness" still has to be determined or may lead to a difference of opinion. It is apt to refer in this regard to the summary of this position by Myburgh J. in the Adcorp Spares case supra at p.668F - H:

> "From the authorities it appears that the price if not specifically agreed must be determinable by reference to something which in itself is certain. Such would be the market price of the merx if in fact it has a market price which is readily ascertainable. The same would apply to the usual price. An agreement to pay a fair and reasonable price, in my view, is too uncertain to give rise to a valid contract of sale. What is the true meaning of a fair and reasonable price? Who must determine it? How is it to be calculated? These are all questions which in person or persons. What is to happened if they differ? The usual price refers to a factual position. That fact can be proved, and is not like a fair and reasonable price dependent on opinion. Such an

> agreement to deliver against payment of a fair and reasonable amount of money would, in my view, be actionable as an innominate contract. Such a contract will have its own elements of risk and obligations as to delivery which would not necessarily coincide with such elements in a contract of sale."

Mr Oosthuizen submitted that in clause 2(c) a mechanism is in fact provided for determining the new rental namely "the fair market rental for the said business premises." In my opinion, however, the addition of the word "fair" in that sentence makes it uncertain and may lead to a difference of opinion of what is "fair" in market rental and what is not. If the word "fair" was omitted, Mr Oosthuizen may have had a point because market rental can perhaps be determined by way of a proper evaluation by a qualified property evaluator with experience of a rental applicable to business premises in that particular area. That my expectation that the determination of what a "fair" market rental would be for the said premises would still be open to dispute is borne out by the correspondence between the parties and allegations contained in their own affidavits. The respondent says a fair market rental for the said premises is N$7500 while the applicant maintains that it is N$10 000 and it is clear that they have disagreed on this for a considerable period and were unable to reach an agreement.

Consequently I hold that the option contained in paragraph 2 of the lease agreement is too vague to be enforceable and that the first argument advanced by Mr Mouton has to succeed.

With regard to Mr Mouton's second argument, it is clear on the papers that the respondent's case is that he exercised his option by way of the letter dated 2 March 1993 . In paragraph 7(2) of his answering affidavit he says the following:

> "In a letter dated 2 March 1993, my attorneys of record, acting on my instructions, gave the applicant written notice of my intention to renew the lease agreement on a long term basis."

This is repeated in paragraphs 7.5, 10 and 11.3. The latter **reference reads:**

> **"I reiterate that I already exercised my option during March** 1993."

I've already quoted the letter of 2 March 1993 in extenso, but it is necessary just to highlight the paragraph with which respondents attorneys introduced certain new proposals:

"Our further instructions are that the current lease agreement expires on 31st May 1994 and that you and Mr Theron have already discussed renewal of the lease, as well as the possibility of amending certain clauses in the lease agreement. Mr Theron has also instructed us to put the following proposals to you in view of the new lease;" (My underlining)

The last paragraph of that letter also underlines that this letter merely contained new proposals for a new agreement of lease:

"We look forward to hearing from you regarding your view point on the proposals by Mr Grant, as well as the clauses you would like to be incorporated in the new lease agreement. We would appreciate it if you would furnish the necessary information so that a new lease agreement may be drawn up in time, or if you prefer to draw up the contract yourself, provide us with a copy for submission to Mr Theron." (My underlining)

Clause 2(a) clearly provides for an option to renew the lease "on the same terms and conditions" as contained in the old existing lease agreement. I agree with Mr Mouton that the content of the letter of 2 March 1993 can certainly not be construed as conveying to the applicant that the respondent is thereby exercising the option to renew the lease on the same terms and conditions as contained in the existing lease agreement. The purpose of the said letter is undeniably one of putting forward certain proposals to be incorporated in a new lease agreement to be entered into between the parties. That this was also what the applicant understood from that letter is borne out by the content of the applicant's letter to the respondent's attorneys dated 14 March 1993. In that letter the applicant clearly referred to the letter of 2 March 1993 and then continued to deal with certain problems and arguments regarding equipment. However, in the fourth paragraph applicant said the following:

> **"Regarding the renewal of the contract, the lessee may decide later."**

From this it is clear that applicant, having regard that the time for exercising the option was still far ahead considered any reference to that as premature at that stage.

I do not find it necessary to deal with Mr Mouton's argument that because the letter of 2 March 1993 contains a counter proposal the option was no longer valid. In my opinion the respondents purported exercise of this option by means of the letter of 2 March 1993 cannot be accepted as a proper exercise of the option provided for in clause 2 of the lease agreement on the same terms and conditions as contained therein.

The only other possible instrument of proof that the

respondent indeed exercised his option timeously with regard to clause 2 (b) of the lease agreement is the letter of 12 January 1994. This is the letter that the applicant denied receipt of. I'm also of the opinion that it is not

necessary to deal with Mr Mouton's third argument namely that it should be held that he never received this particular letter. The respondent made it abundantly clear in his answering affidavit that he exercised his option by means of the letter of 2 March 1993 and not by means of the letter of 12 January 1994. I have already referred to and quoted several extracts from respondent's answering affidavit in this regard but the following two paragraphs in that affidavit make it absolutely clear that the respondent's purpose was never to exercise the option by way of the letter dated 12 January 1994. Paragraph 7(5) reads as follows:

> "Due to applicants non committal attitude after I caused notice to be given to him as set out in annexures "CJST 1" and "CJST 2", I instructed my attorney to repeat the notice during January 1994 . "

Paragraph 7.7. reads:

> "This was not meant as the original notice, it was a mere repetition in order to get applicant to respond."

"(The underlining in both paragraphs is my own)."

Although Mr Oosthuizen attempted during argument to distinguish between the two letters when he became aware of the problems with

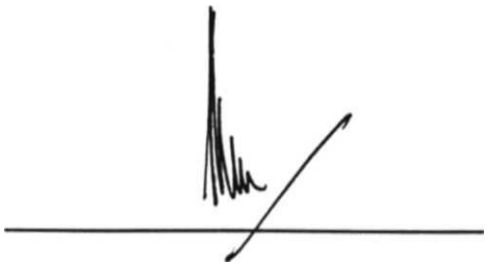
regard to his argument that the exercise of the option was contained in the letter of 2 March 1993 and to fall back on the letter of 12 January 1994 as proof of the exercise of the option in its own right, this is clearly not what his client's attitude is and what his client in fact says under oath.

Conclusion

In the result the application must succeed with costs. I am, however, of the opinion that to provide only 7 days for the respondent, who is conducting a running business, to vacate the property would be unfair. It may also not be to the advantage of the applicant to have to find a new lessee at such short notice. In all the circumstances a reasonable time would be until the end of December of this year, leaving approximately 2 months to the respondent to make arrangements to vacate the property. The following order is made:

1. The respondent is ordered to vacate the said property known as Erf 1284, Windhoek on 31 December 1994;

2 . Respondent is responsible for payment of the monthly rentals due in respect of the said premises as provided for in the lease agreement until 31 December 1994;



MULLER, ACTING JUDGE

3. Respondent is ordered to pay the costs of this application.

ADV. FOR THE APPLICANT: ATT. FOR THE APPLICANT: C.J. MOUTON THEUNISSEN & VAN WYK

ADV. FOR THE RESPONDENT: ATT. FOR THE RESPONDENT:
G.H. OOSTHUIZEN
WEDER, KRUGER & HARTMANN

THE STATE VS CORNELIUS KOOPER 1994/09/22

Muller A.J.

CRIMINAL LAW

MURDER - dolus eventualis - deceased stabbed with broken bottle neck in the neck.

SENTENCE - 15 years imprisonment.

(Leave to appeal refused).