

SOUTH AFRICA / JUDGMENT

# Berlein and Another v Seiti (11237/09)

## [2009] ZAKZDHC 77 (2 October 2009)

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**COURT**

Kwazulu-Natal High Court, Durban

**BEFORE**

Steyn

**CASE / FILE NUMBER**

11237/09

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IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

Case No: 11237/09

In the matter between

Brian Berlein .....First Applicant

Veena Berlein .....Second Applicant

versus

Stanley Seiti .....Respondent

**JUDGMENT**

Delivered on: 2 October 2009

STEYN J

- [1] This is an application for eviction under the Illegal Eviction from and Unlawful Occupation of Land Act, No. 19 of 1998 (hereinafter referred to as PIE<sup>1</sup>). The property belongs to the applicants and is situated at 7 Heaton Nicholls Road, Kloof. It is common cause that the applicants are the owners of the property and that the respondent is in possession of the said property.

- [2] The first Applicant alleges in his founding affidavit that on 4 September 2004 he entered into a lease agreement (for convenience I shall refer to this agreement as the ‘First Lease Agreement’) with the Respondent and that such lease was extended by the Extended Lease Agreement (this shall be referred to hereinafter as the ‘Extended Lease Agreement’) entered into on 25 July 2007. The Extended Lease Agreement recorded that the lease would be:

*“extended for a period of 6 months commencing with effect from 1 August 2007, and terminating on 31 January 2008. Thereafter the lease shall continue on the basis that either party shall give the other two months written notice to terminate the lease.”*

It is further recorded that all the terms in the First Lease Agreement are deemed to apply to the Extended Lease Agreement in the following way:

*“During the Extended Period/Notice Period all the terms and conditions of the Lease shall be deemed to apply and shall be observed by both parties as it specifically incorporated onto this Agreement, save where otherwise indicated in this Agreement.”<sup>2</sup>*

- [3] The Respondent has set up in his answering affidavit reasons for his current possession of the property. In my view these reasons are fairly confusing and contradictory. 3

On the one hand the Respondent is resisting the notice to vacate on the basis that clause one of the Extended Lease Agreement refers to termination of the lease whilst the notice, according to the Respondent, acknowledges the fact that there was no cancellation of the contract. On the other hand the Respondent resists the Notice to Vacate on the basis that it cannot be construed as a cancellation of the lease agreement. In his written heads of argument the Respondent also challenges the Applicants reliance on clause one as being resolute in nature.

- [4] In order to fully appreciate the respondent’s reasons it is necessary to analyse some of the correspondence between the parties and the annexures attached to the affidavits filed.
- [5] Initially, the applicants brought a PIE application in the Magistrates’ Court based on a breach of a lease between the applicants and the respondent. The applicants succeeded in their application in the Magistrates’ Court and orders were granted which were then appealed against by the respondent. The appeal was heard and judgment delivered on 5 June 2009. The appeal was upheld with costs and the orders of the Magistrate, were set aside and substituted by the following order:

*“The application by the applicants in the eviction application is dismissed with costs.”<sup>4</sup>*

- [6] On 29 May 2009 the day when the appeal was argued in the High Court the applicant’s attorney addressed a letter to the respondent, which reads as follows:

*“RE: CONDITIONAL TWO MONTHS NOTICE TO VACATE IN TERMS OF AGREEMENT TO EXTEND LEASE DATED 25 JULY 2007*

You have contended that the Lease Agreement between yourself and our clients, Mr and Mrs Berlein, has not been properly cancelled, and that the lease remains of full force and effect.

Our clients have disputed that contention.

Without conceding the correctness of your stance that the lease has not properly been cancelled, and without prejudice to our clients' contention that the Lease has indeed been properly cancelled, we hereby give you TWO CALENDAR MONTHS NOTICE, (i.e. the whole of June 2009 and July 2009) that you are required to vacate our clients' property at 7 Heaton Nicholls Road, Kloof, on 31 July 2009 in the event of your not being ordered to vacate the property by an earlier date wither as a consequence of:

1. your Appeal being refused; or
  2. our clients' Section 78 Application being granted; or
  3. any other Application that our clients may bring, for your eviction, being granted."
- [7] The respondent avers that the aforementioned notice is not an unequivocal exercise of termination by the applicants and hence the lease is still valid and operative. It appears that what the Respondent considers as a 'proper notice' is a Notice titled Cancellation/Termination of lease (contract), and since such words do not appear on the said Notice, the Notice fails to have any legal consequence. In my view this argument loses sight of the fact that a party only needs to communicate his/her intention to terminate to the other party.

In *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* [2000] ZASCA 82; 2001 (2) SA 284 (SCA) the Supreme Court of Appeal dealt with the requirements of such communication:

*"The innocent party to a breach of contract justifying cancellation exercises his right to cancel it (a) by words or conduct manifesting a clear election to do so (b) which is communicated to the guilty party. Except where the contract itself otherwise provides, no*

formalities are prescribed for either requirement. Any conduct complying with those conditions would therefore qualify as a valid exercise of the election to rescind. In particular, the innocent party need not identify the breach or the grounds on which he relies for cancellation."5 (my emphasis)

- [8] To make their intention clear and unambiguous the applicants instructed their attorney to amplify the first Notice with a further Notice, which reads:

*"RE: CONFIRMATION OF NOTICE TO VACATE DATED 29 MAY 2009*

We are in receipt of your letter dated 23 June 2009, received on 2 July 2009, in which you:

challenge our clients' right to give you notice to vacate; and

contend that you are not required to vacate the property on

31 July 2009, on the grounds that you are not in unlawful occupation of the property.

We draw to your attention that a breach of the lease agreement is not a precondition for the lessors' entitlement to give you Notice to Vacate, under the Two Month Notice clause, set out in the Agreement to Extend the Lease, dated 25 July 2007.

All that is required, for valid Notice to be given under the Two Month Notice Clause, is that two full calendar months Notice be given by the lessor to the lessee, and that such notice is received by the lessee before the commencement of the Two Month Notice period.

In this instance:

you received and signed for the Notice to Vacate on 30

May 2009; the Notice to Vacate gave you two full calendar months, being June and July 2009;

the Notice was given by the Attorney of Record for the

lessors, on the lessors' instruction.

The Notice to Vacate was subject only to the fulfilment of the Resolutive Condition that you be found to be a legal tenant, and therefore, by operation of Law, entitled to receive two months Notice.

The Resolutive Condition was fulfilled immediately upon delivery of the Judgment of their Lordships, Mr Justice Ndlovu and Mr Justice Gorven, in terms of which you were held to be a legal tenant and accordingly, the Two Month Notice period, which had already commenced to run on 1 June 2009, then continued to run, and will continue to run for the remainder of the two months, ending on 31 July 2009.

In the circumstances, if you do not vacate on 31 July 2009, you will become an illegal occupant of the property with effect from 1 August 2009, and eviction proceedings will be instituted against you, out of the High Court, and an order for costs will be sought against you.

It is therefore in your interests to vacate the property, by due date."

In my view the Notice to Vacate, clearly conveys the intention of the applicants to terminate the lease agreement between the parties. It also gives the Respondent ample opportunity to voluntarily vacate the said property. Attached to the papers is a schedule of house to let in the area, should the Respondent wish to rent another property.<sup>6</sup>

[9] Is the respondent an 'unlawful occupier'?

Our Supreme Court of Appeal has dealt with the opposed interpretations of the expression 'unlawful occupier' in a number of decisions but more recently in the matter of *Ndlovu v Ngcobo; Bekker and Another v Jika* (1) [2002] ZASCA 87 (30 August 2002) and I don't intend repeating the different views held. Given the facts of this case it is however necessary to refer to the opposed interpretations. On the one hand 'unlawful occupier' refers to people who unlawfully took occupation of land and remain in unlawful occupancy, like informal squatters, and on the other hand it refers to people who lawfully took occupation of the land under a contractual right to do

so but then remain in occupation after their right to do so has come to an end. The facts of this case certainly fall within the latter category. The Applicants have tried for some time to claim back their lawful property at 7 Heaton Nicholls Road, Kloof without any success.

[10] It is abundantly clear that in terms of s 1 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, an unlawful occupier is defined as:

*“a person who occupies land without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such land, excluding a person who is an occupier in terms of the Extension of Security Tenure Act, 1997, and excluding a person whose informal right to land but for the provisions of the Interim Protection of Informal Land Rights Act, 1996 (Act No. 31 of 1996).”*

[11] In casu, the applicants, i.e. the registered owners of the property, have met the procedural requirements of PIE and approached the Court on the basis of ownership and claimed that the respondent is in unlawful occupation of the property.

[12] In terms of our common law, ownership of land is the most extensive and absolute real right, protecting an owner against unwanted intrusions and affording an owner an absolute right of eviction against those whom occupy property and whom the owner no longer wants on the property. I therefore align myself with the view of Olivier JA in *Ndlovu supra* where he considers the view of Professor van der Walt<sup>7</sup> as being correct:

*“The “normality” assumption that the owner was entitled to possession unless the occupier could raise and prove a valid defence, usually based on agreement with the owner, formed part of Roman-Dutch law and was deemed unexceptional in early South African law, and it still forms the point of departure in private law. However, it had disastrous results for non-owners under apartheid law, which developed the distinction between owners and non-owners of land and the implied preference for the former to establish and maintain apartheid land law: the strong position of ownership and the (legislatively intensified) weak position of black non-ownership rights of occupation made it easier for the architects of apartheid to effect the evictions and removals required to establish the separation of land holdings along race lines.”*

[13] On behalf of the applicants, Ms Lange, argued that clause one of the Extended Lease Agreement should be considered as resolute in nature. Such contention was opposed by the respondent. It was also disputed that it could be interpreted as a resolute condition.

#### Interpretation of the Extended Lease Contract

[14] Since much reliance was placed on the interpretation of the said lease contract, and because of the issues raised by the Respondent, I shall briefly deal with the rules of interpretation that find application in dealing with contracts. In South African law the two important rules of interpretation that apply to the interpretation of contracts are the parol evidence or integration rule and what for convenience can be termed the extrinsic evidence rule. In *Rand Rietfontein Estates Ltd v Cohn* 1937 AD 317 at 326, Watermeyer AJA succinctly explains these two rules and their connection as follows:

*“These rules limit the material which can be placed before the Court in order to ascertain the intention of the parties. In the first place there is the well known rule (parol evidence or integration) that when a contract has been reduced to writing no oral evidence may be given to contradict, alter, add or vary the written terms, and in the second place there is another rule (extrinsic evidence) the effect of which is that when the terms of a contract are clear and unambiguous no evidence may be given to alter such plain*

meaning.” (My emphasis)

[15] The technique of interpretation mainly favoured by our courts in interpreting written documents has been what has become known as Lord Wensleydale’s golden rule set out in *Grey v Pearson* (1857) 10 ER 1216 at 1234:

*“In constructing wills indeed statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther.”*

(Also cited in *Crispette and Candy Co Ltd v Oscar Michaelis NO and Leopold Alexander Michaelis NO* 1947

(4) SA 521 (A) at 543; *N&B Clothing Manufacturers (Pty) Ltd v British Trading Insurance Co Ltd* 1966 (2) SA 522 (W) at 525C; *Kalil v Standard Bank of SA Ltd* 1967 (4) SA 550 (A) at 566D; *Western Credit Bank Ltd v Van der Merwe* 1970 (3) SA 461 (C) at 463H; *Sassoon Confirming and Acceptance Co (Pty) Ltd v Barclays National Bank Ltd* 1974 (1) SA 641 (A) at 646B, *Coopers and Lybrand v Bryant* [1995] ZASCA 64; 1995 (3) SA 761 (A) at 767E.)

[16] Ascertaining the grammatical and ordinary meaning of the word or phrase is the first step in the four step technique of interpretation and application of the golden rule. The remaining three steps were summarised by Joubert JA in *Coopers & Lybrand v Bryant*, supra, at 767E-768E as:

*“The correct approach to the application of the golden rule of interpretation after having ascertained the literal meaning of the*

word or phrase in question is, broadly speaking, to have regard to:

- (a) the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract;
- (b) the background circumstances which explain the genesis and purpose of the contract, i.e. to matters probably present to the minds of the parties when they contracted;
- (c) apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their intentions”

- [17] I am however mindful of the fact that the four steps of this technique should, however, not be applied or followed rigidly. Each case must be considered on its own merits.
- [18] The four step technique of interpretation as a guide is necessary to determine, firstly, the grammatical and ordinary meaning of the disputed segments of the consent paper, secondly the context of the segments in relation to the consent paper as a whole including the nature and purpose of the contract, and in that process the court may well have consideration of, thirdly, any background circumstances under which the contract was concluded which may explain the purpose of the contract and lastly, any surrounding circumstances. (See *Coopers and Lybrand supra* at 767 E – 768 E.)
- [19] In construing a contract to determine “the grammatical and ordinary sense of the words” used by the contracting parties, the court seeks to establish the common intention of the parties at the time of entering the contract. Common intention must therefore be distinguished from actual intention that may or may not have been in the mind of any contracting party at the time of the signing of the contract. Solomon J in *Hansen, Schader & Co v De Gasperi* 1903 TH 100 103 elaborates on this distinction as follows:
- “Now, it is not for this Court to speculate as to what the intentions of the parties were when they entered into the contract. That must be gathered from their language, and it is the duty of the Court as far as possible to give to the language used by the parties its ordinary grammatical meaning”*
- [20] Common intention is thus to be gleaned from the wording of the contract that has been agreed to by both parties. It is common to both of the contracting parties so if it speaks with sufficient clarity it must be taken as expressing their common intention. (See *Total South Africa (Pty) Ltd v Bekker* [1991] ZASCA 183; 1992 (1) SA 617 (A) at 624G-625B)
- [21] Once the ordinary grammatical meaning of a word or phrase has been established, such meaning cannot be departed from unless such ordinary grammatical meaning leads to inconsistency, repugnancy or an outcome contrary to public policy. If there is no ambiguity in the words of the contract there is no room for a more reasonable interpretation than the words themselves convey. (See *Wessels CJ in Scottish Union supra*).
- [22] In seeking the grammatical and ordinary meaning of words the court may refer to dictionaries but as pointed out by Lewis JA in *Seven Eleven Corporation of SA (Pty) Ltd v Cancun Trading* No 150 CC 2005 (5) SA 186 (SCA) dictionary definitions, as has so often been said, are not always helpful, let alone conclusive. The learned judge went on to state:

*“At [24] ... the Court examined the words in isolation, without having regard as a whole. Particular attention was paid to dictionary definitions of the words ‘discount’ and ‘rebate’, without considering the entire business system set out in the document and in the projections on turnover and profit given to Fouché before the contracts were concluded. The Court considered that the word ‘discount’ included rebates. It is true that the dictionary definitions of rebate indicate that it is a retro-active discount. Indeed, The Concise Oxford English Dictionary gives as one of its meanings ‘a deduction or a discount on a sum due’ without reference to the aspect of retro-activity. But dictionary definitions, as has so often been said by this Court, are not always helpful, let alone conclusive.”*

[23] I shall now apply the aforesaid rules to the facts of this application. It is clear from the heading of Clause 1 of the Extended Lease Agreement which reads “It is agreed that:”, that the clause intends dealing with the consensual terms adopted by both parties to regulate the lease in future. Clause 1 deals in specific detail with the specific period of the extended lease and the termination of the lease. The latter part of the clause deals with the process governing the continuation of the lease period.

The clause regulates the lease regime between the parties in future. To contend that it should be interpreted as being anything other than stipulating the process of termination of the lease in future, once a specific condition has been fulfilled, namely two months notice be given, would have no basis in fact or law.

In the context of the contract and the nature of the Extended Lease Agreement, I find the clause to be resolute in nature.<sup>8</sup>

[24] In the circumstances I find that the applicants have established that they are the owners of the property and that the respondent is in occupation. I find that the respondent has failed to show that he is entitled to the occupation of the said property, he has refused to vacate the property within the two months given to him and hence is in unlawful occupation of the property. The Respondent does not fall into any of the categories for which special allowance is made in terms of s 5(7) of PIE, and cannot in the given circumstances make a claim the property. Having met all the procedural requirements, the applicants are entitled to an order for eviction under PIE, with costs.

[25] It is therefore ordered:

The Respondent and any and all persons occupying under him are hereby ordered to vacate the immovable property bearing the physical address: 7 Heaton Nicholls Road, Kloof, within thirty (30) days of the service of this Order upon the Respondent.

In the event of the Respondent and/or any person occupying by, through or under him, failing to comply with the Order set out in paragraph one hereof, the Sheriff of this Court is authorised and directed to eject the Respondent and/or any person occupying by through or under him, from the property and to hand vacant possession thereof to the Applicants.

The Respondent is to pay the costs of this Application.

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Steyn, J

Date of Hearing: 23 September 2009

Date of Judgment: 2 October 2009

Counsel for the applicants: Adv N D Lange

Instructed by: Sarah Pugsley & Associates

c/o Taverner & Co.

Counsel for the first respondent: Mr S Seiti (in person)

1This legislation has its roots, inter alia, in s 26(3) of the Constitution of the Republic of South Africa, 1996, which provides that ‘no one may be evicted from their home without an order of court made after consideration of all relevant circumstances’. See Cape Killarney Property Investment (Pty) Ltd v Mahamba 2001 (4) SA 1222 (SCA) at 1229E.

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2See Clause 4 of the Extended Lease Agreement.

3This affidavit is listed by the Respondent as an Opposing Affidavit.

4See Seiti v Berlein and Another, unreported KwaZulu-Natal High Court, case Pietermaritzburg number AR151/2009, dated 5 June 2009.

4See Seiti v Berlein and Another, unreported KwaZulu-Natal High Court, case Pietermaritzburg number AR151/2009, dated 5 June 2009.

5Op cit at 299F-G.

6See Annexure M of the papers.

7See Van der Walt ‘Exclusivity of ownership security of tenure and eviction

### **orders:**

A model to evaluate SA land reform legislation’ 2002 TSAR 254.

7See Van der Walt ‘Exclusivity of ownership security of tenure and eviction

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A model to evaluate SA land reform legislation’ 2002 TSAR 254.

8See Badenhorst v Van Rensburg 1986(3) SA 769(A) and De Villiers v Van Zyl [2002] 4 All SA 262 (NC) at 279.

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