OATORIAN PROPERTIES (PTY) LTD v MAROUN 1973 (3) SA 779 (A)

Citation	1973 (3) SA 779 (A)
Court	Appellate Division
Judge	Ogilvie Thompson CJ, van Blerk JA, Botha JA, Holmes JA and Potgieter JA
Heard	May 1, 1973
Judgment	May 21, 1973
Annotations	Link to Case Annotations

Flynote : Sleutelwoorde

Landlord and tenant - Lease - Breach of clause in - Material condition - What amounts to - Leased property being used for purpose other than that provided in lease - Clause breached - Lessor entitled to cancel lease - Materiality of breach irrelevant.

Headnote : Kopnota

Clause 4 of a written lease entered into between the appellant and the respondent in respect of a plot belonging to the respondent provided that 'the lessee shall have the right to utilise the area leased for the purpose only of parking of motor cars, cycles, motor cycles... and for no other purpose whatever'. Clause 11 provided that 'notwithstanding anything to the contrary herein contained, it is expressly agreed that. .. should the lessee contravene or permit the contravention of any one or more of the material conditions of this agreement... the lessor shall have the right and option... of declaring the lessee to be a monthly tenant, and upon written notification to the lessee to this effect the lease shall immediately thereupon be and become *ipso facto* a monthly tenancy, terminable by either party giving unto the other one calender month's written notice terminating the same...'. The appellant had converted the lease area into a parking area for motor vehicles but, in connection with a building operation on the plot owned by it, the building contractor had erected an open woodwork shed on a portion of the leased premises for the purpose of storing sand, stone, bricks and other building materials. The respondent regarded this conduct as a breach of clause 4, elected to declare the appellant a monthly tenant and thereafter gave him a month's notice terminating the lease. The appellant objected and refused to vacate the leased plot. Respondent applied for and obtained an order of ejectment which order was confirmed on appeal. In a further appeal on leave by the Court *a quo,*

Held, that the language of the lease was unambiguous and was capable of being resolved satisfactorily by ordinary linguistic treatment, that recourse to evidence of surrounding circumstances was unnecessary and that such evidence would moreover be inadmissible.

Held, further, as clause 11 was a *lex commissoria* or forfeiture clause whereby the respondent explicitly reserved the right to cancel the lease on a breach of a material condition of the lease, that, once there was such a breach, the materiality of the breach was irrelevant and the Court would not enquire into the conscionableness or unconscionableness thereof.

Held, further, that clause 4 was a 'material condition' within the context of clause 11.

Held, further, that the construction of the woodwork shed constituted a breach of the provisions of clause 4.

Held, further, that the appellant had permitted the lease premises to be used in contravention of the provisions of clause 4.

The decision in the Transvaal Provincial Division in *Oatorian Properties (Pty.) Ltd*. v *Maroun*, confirmed.

Case Information

Appeal from a decision in the Transvaal Provincial Division (MARAIS, J., HILL, J. and TRENGOVE, J.), upholding a decision in the Witwatersrand Local Division (NICHOLAS, J.). The facts appear from the judgment of POTGIETER, J.A.

D. Reichman, S.C., (with him *R. H. Zulman)*, for the appellant.

O. Rathouse, S.C., (with him *G. Essy)*, for the respondent.

Cur. adv. vult.

Postea (May 21st).

Judgment

POTGIETER, J.A.: In the Witwatersrand Local Division, the respondent, applicant in that Court, sought and obtained against the appellant an order with costs for ejectment and an order for the removal of an encroachment on the respondent's property. The appellant appealed to the Full Bench of the Transvaal Provincial Division against only the order for ejectment and costs. It is thus not necessary further to refer in this judgment to the question of encroachment. The appeal to the latter Court was dismissed with costs. With leave of the Court *a quo*, an appeal is now before this Court.

I proceed to set out the salient facts relevant to this appeal. The respondent is the owner of a property known as lot 193, Elmar Park, Edenvale. The appellant is the owner of the adjoining property known as lot 195. During 1967 the appellant planned the development of a shopping and business complex on lot 195. This proposed project was to consist of a building of some 25 floors containing a number of shops, offices, residental flats and a hotel. Undoubtedly the successful carrying out of such a comprehensive scheme required the provision for adequate parking facilities for customers transported to the building by motor vehicles. In order to attain this object the appellant entered into negotiations with the respondent for the lease of a portion of the respondent's property (adjoining lot 195). The parties, as a result of these negotiations, entered into a written contract of lease on 20th July, 1967, whereby a portion of the aforesaid lot 193 (an area of 150 x 400 ft. in extent) was let to the appellant by the respondent at a rental of R3 600 per annum.

There are quite a number of clauses in this lease which appear to be relevant in this appeal and I therefore deem it apposite at this stage to quote the clauses in the lease which might have a bearing in the consideration of this enquiry. I proceed therefore to quote *in extenso* what I consider to be the relevant clauses:

> '4. The lessee shall have the right to utilise the area leased hereby for the purpose only of parking of motor cars, cycles, motor cycles, trucks, buses and all such other motor vehicles

and for no other purpose whatever.

5. The area so leased shall be improved by the lessee at no costs to the lessor, to cater for such parking facilities and the minimum requirements of such improvements shall be the levelling, if so required, of the land and the covering of such land with tarmac together with a wall of at least 100 feet in length constructed of brick and mortar extending on the length of the area and thereafter for the additional 300 feet in respect of the length of the area, a split-pole fence in order to separate and to seclude the residential premises of the lessor's property from the parking area.

6. In respect of the rental for the hire of the ground the following amounts shall be payable:

(a) The amount referred to above being the R2 000 to be obtained by the lessor from the Attorneys Goldman & Savell shall be regarded as rental charges for a period of nine months to be calculated from the date of signature hereof.

(b) Thereafter the rental charged after the period of nine months stated in para. *(a)* above shall be the sum of R3 000 per annum payable quarterly in advance for the first period of five years.

(c) The lease shall be for a period of five years commencing from the date of signature hereof and terminating on 20th June, 1972.

(d) The lessee shall have a right to renew this lease for a further five years period as specified hereunder on the same terms and conditions but with an increase in rental calculated as follows:

(i) After the expiry of the lease period of five years, the lessee shall have a right to renew this lease for a period of a further five years but at a rental of R3 600 per annum payable as specified above.

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7. On expiry of the renewal period the parties record that the lessor may decide to sell the property leased...

8. The election to sell shall be entirely within the absolute discretion and arbitrary consideration of the lessor, but the lessee shall be bound to purchase and these presents are to be regarded as an open offer by the lessee to purchase, which offer may or may not be accepted by the lessor. :.

9. In the event of the lessor electing not to sell the lessor shall be bound to enter into a further lease with the lessee on the same terms and conditions as herein stipulated at a rental to be determined by an arbitrator, to be appointed as stated in paragraph above, who shall be bound by the same clauses stated above in determining the rental of the leased land. Such further lease shall be for a period of ten years.

10. At the expiry of the period of the ten years stated above, should such lease come into force and effect, the lessee shall have a right of the first refusal for the purchase of the entire property owned by the lessor. The lessor undertakes that immediately such *bona fide* offer has been made to him he shall submit in writing to the lessee a copy of the offer and the lessee shall be required within a period of 14 days after receipt to advise the lessor in writing as to whether he elects to purchase the property on the same terms and conditions and for the same amount as that contained in the offer to purchase. In the event of the lessee not so advising the lessor, the lessor shall be free to sell the property without further consultation or discussion with the lessee. Such right of first refusal shall be for a period of 20 years from the expiry of the ten-year period of lease if this comes into force and effect.

11. Notwithstanding anything to the contrary herein contained, it is expressly agreed that in the

event of the lessee failing to pay the rental herein provided on due date and after receipt of seven days' notice requiring it to make payment of such arrear rental, or should the lessee contravene or permit the contravention of any one or more of the material conditions of this agreement, notwithstanding any previous waiver by the lessor, the lessor shall have the right and option, in addition to all other rights hereunder, of declaring the lessee to be a monthly tenant, and upon written notification to the lessee to this effect this lease shall immediately thereupon be and become *ipso facto* a monthly tenancy, terminable by either party giving unto the other one calendar month's written notice terminating the same, but subject otherwise to the provisions herein contained; or the lessor shall have the right and option to forthwith terminate this lease and of immediate re-entry and repossession of the leased land and the lessee shall nevertheless remain liable for the payment of any and all rental and other moneys that may or shall be owing under this agreement up to the date upon which the lessor may regain possession and delivery of the leased land and also for all damage sustained by the lessor by reason of the lessor's breach of contract and the lessor may proceed by way of motion in any competent Court to compel ejectment...

12. The lessee shall not sublet the leased land or any portion thereof, nor cede, assign, make over or alienate this agreement or any of the rights granted herein without the written consent of the lessor having been first had and obtained, which consent shall not be unreasonably withheld.

The lessee shall further not give up occupation or possession of the leased land or any portion thereof to any person, persons, or company or permit any person, persons, or company whether a licensee agent, occupier, custodian or otherwise to enter into possession and/or to occupy or take possession of the leased land or any portion thereof for either a definite or indefinite period or at all, without the written consent of the lessor having been first had and obtained, which consent shall not be unreasonably withheld.

13. The lessee shall not contravene or permit any contravention of any of the laws or regulations of the township, company, municipal, Provincial or Union Government, or the condition of the title under which the property is held by the lessor, and shall at all times conform to the same.

14. The lessee apart from the improvements specified above and such other improvements as may be regarded as subsidiary and ancillary to these improvements shall not make any further structural improvements on the property without the written consent of the lessor first had and obtained which consent shall not be unreasonably withheld.

15. The lessee shall bear the costs of preparing this agreement and the cost of stamping the same. The lessee shall also be liable for and shall promptly on the due date thereof pay the municipal or Government charges for electricity and/or power, water, gas, consumed by it, sanitary fees and refuse removal rates.

Where any such fees are paid by the lessee direct to the municipality by contract with the municipality, the lessee, shall if called upon to do so, exhibit

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to the lessor the receipts in respect thereof; and where any such fees are paid by the lessor, the lessee shall make repayment thereof to the lessor immediately upon demand.'

In January, 1968, the appellant began building operations on lot 195. For some reason, which does not clearly appear on the papers, these operations were for some time suspended. Be that as it may, the appellant had converted the leased property into a parking area for motor vehicles in accordance with the provisions of clauses 4 and 5 of the lease. In connection with the building operations the appellant, through its building contractors (which were companies associated with the appellant) during June, 1970, erected an open woodwork shed (or 'hoarding' as it is called in the building industry) on

a portion of the leased premises for the purpose of storing sand, stone, bricks and other building materials required in connection with the appellant's building operations on lot 195. Certain photographs, taken at the site, were attached to the papers which indicate that this hoarding consisted of wooden panels fixed to supporting pillars which were firmly embedded in the ground. I shall refer in greater detail to these photographs later in this judgment. At the same time the company also deposited on a section of the parking area immediately adjacent to the site where the building operations were then in progress, building material and equipment consisting of a number of steel girders and component parts for a steel crane. This equipment is clearly discernible on some of the photographs referred to above.

The respondent regarded this conduct as a breach of clause 4 of the lease and accordingly instructed his attorney to the appellant pointing out that its use of the leased premises constituted a breach of clause 4 of the lease and that he had elected to declare the lease a monthly one pursuant to clause 11 thereof. In consequence thereof the respondent's attorney on 10th June, 1970, despatched a letter to appellant the relevant portion whereof reads as follows:

> '*(c)* The specific purpose of the lease was the hire to you of an area of ground expressly for the purpose of parking for motor cars, motor vehicles, etc. No other purpose was provided for and it has now been drawn to my attention that there have been deposited on the leased property large steel girders which apparently are to be assembled into a steel crane. In addition on a portion of the leased premises has been constructed a type of woodwork shed which is apparently to be used for the storage of either sand, stone or bricks.
>
> In terms of para. 11 of the lease my client formally notifies you that he has elected to declare the lease as one on a monthly basis and accordingly furnishes the necessary notice herewith to you in terms thereof that the lease must now be regarded as a monthly one terminable upon one calendar month's notice in writing.'

To this letter the appellant's attorneys replied on 16th June, 1970, as follows:

> '3. *Ad* para. *(c):* The items complained of by your client are required in connection with the completion of the erection of the buildings on our client's adjoining property, and do not affect or damage the leased property in any way. However, in view of the fact that your client is unhappy about the position, our clients are taking immediate steps to remove the offending items from the leased property. Our clients deny emphatically that your client is entitled, as he has purported to do, to declare the lease to be a monthly tenancy and in particular in view of the fact that our clients have not contravened or permitted the contravention of any one or more of the *material* conditions of the agreement of the lease.
>
> Our clients contend that the agreement of 20th July, 1967, remains of full force and effect on the basis originally contemplated, namely until 19th July, 1972, with an option to our clients to renew for a further period of five years

> from 20th July, 1972, to 19th July, 1977, at an increased rental of R3 600 per annum, with the further rights to our clients set out in clauses 8, 9, 10 and 17 of the agreement.'

On 18th June, 1970, the respondent's attorneys wrote to the appellant's attorneys giving the appellant a month's written notice as from 1st July, 1970, of the termination of the lease. The appellant was also notified that should he fail to vacate the property by the end of July, 1970, proceedings for ejectment would be instituted. The appellant refused to vacate the leased premises and the respondent thereupon instituted

proceedings in the Witwatersrand Local Division.

In that Court NICHOLAS, J., was satisfied, on the papers before him, that the appellant had permitted the company concerned to use the leased premises in the manner described above and held that this conduct constituted a breach of the provisions of clause 4 of the lease and that this clause was a 'material condition' of the lease in terms of clause 11 thereof. He consequently came to the conclusion that the respondent was justified in terminating the lease and in the result issued an ejectment order.

On appeal the Court *a quo* found that the outcome thereof turned on a decision on three fundamental issues, namely: *(a)* whether clause 4 of the lease was a 'material condition' of the lease within the context of clause 11; *(b)* whether the conduct of the construction company, in erecting the hoarding and depositing the building material and equipment on the leased property, constituted a breach of the provisions of clause 4; and if so, *(c)* whether the appellant had permitted the company to use the leased premises in the manner described above. The Court *a quo, per TRENGOVE, J., (MARAIS and HILL, JJ., concurring) answered all three issues in favour of the respondent.*

I propose to deal with these fundamental issues in the same order as the learned Judge *a quo*. As to the issue whether clause 4 is a 'material condition' within the meaning of clause 11, there is one subsidiary point that has to be disposed of first. According to the judgment of NICHOLAS, J., counsel for the appellant, at a late stage in his argument, applied for leave

> 'to call evidence as to surrounding circumstances concerning the contract in order to assist the Court in deciding whether clause 4 is a 'material condition''. NICHOLAS, J., refused the application and said:
>
> 'The question of the materiality of clause 4 had been raised by the respondent's a torneys, in their letter dated 16th June, 1970, from which I have already quoted. The applicant's affidavit contained his evidence relating to the question of materiality. The deponent to the affidavit filed on behalf of the respondent did not deal with this evidence but contented himself with saying:
>
> 'I also deny that any interpretation of clause 4 of the lease which would prohibit the offloading of goods onto the leased property for a temporary period pending their transfer to the respondent's property, would be a material condition of the agreement.'
>
> There is, therefore, no dispute of fact on this question, so that Rule 6 (5) *(g)* of the Uniform Rules of Court does not apply.'

In the Court *a quo* the matter was again raised and TRENGOVE, J., agreeing with NICHOLAS, J., said:

> 'I am not persuaded that on the papers before the Court there is any real dispute of fact on any matter relevant to the question of the materiality of clause 4, and there are, in my view, no valid grounds for interfering with the exercise of the discretion of the learned Judge *a quo* in refusing to grant the application. (*Cuthbert v Peterson*, 1945 AD 428; *Scott v Scott*, 1947 (2) SA 345 (T); *van der Merwe v Meyer*, 1971 (3) SA 22 (AD)).'

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In this Court counsel for the appellant likewise submitted that the linguistic approach was not sufficient to enable the Court to interpret clauses 4 and 11. He urged that in this case there is a dispute as to the lessor's reasons for a total prohibition of any use other than parking and that those reasons must be known before the question of materiality could be decided. He submitted furthermore that there was a dispute as to what the

parties understood the lease to mean. Therefore, so he argued, a sufficient dispute had been raised to have required evidence to be permitted of these surrounding circumstances.

In this regard I find myself in full agreement with the remarks of the learned Judge of first instance and with those of the Judge *a quo*. In any event, if the language of the lease is unambiguous and is capable of being resolved satisfactorily by ordinary linguistic treatment, recourse to evidence of surrounding circumstances is unnecessary and such evidence would moreover be inadmissible. (See *Richter v Bloemfontein Town Council*, 1922 AD 57 at p. 70; *Delmas Milling Co. Ltd*. v *Du Plessis*, 1955 (3) SA 447 (AD) at p. 454F - H).

I proceed at once to deal with the relevant clauses in the lease and in so doing shall endeavour to show that the words 'material conditions' in clause 11 read in the context of the whole document are unambiguous and are capable of being resolved by linguistic treatment.

Counsel for the appellant, in contending that clause 4 of the agreement is not a material condition of the lease, submitted that according to the common law a material term is one that goes to the root of the contract, so that failure to perform it would render the performance of the contract something different from what was stipulated for - in other words, so he contended, an important factor is whether the respondent would not have entered into the agreement unless the appellant had undertaken such obligations. For this proposition counsel for the appellant relied on the decisions in *Foster v Hillman Bros.*, 1932 W.L.D. 222 at p. 228; *Aucamp v Morton*, 1949 (3) SA 611 (AD) at p. 620, and *Strachan v Prinsloo*, 1925 T.P.D. 709 at p. 717.

The decisions relied upon by counsel deal, however, with the position at common law where there is no *lex commissoria* or forfeiture clause. According to the well-known principles there enunciated rescission of a contract is only permissible if a breach occurred of a term which goes to the root of the contract and the materiality of the breach is according to those authorities also a relevant factor in the determination of whether rescission should be ordered or not (cf. *Spies v Lombard*, 1950 (3) SA 469 (AD) at p. 488). I do not consider, however, that these authorities assist counsel for the appellant in the problem of resolving the question whether clause 4 is a 'material condition' within the meaning of clause 11. The respondent does not rely on the common law but solely on the interpretation of clause 4 and 11 of the lease read as a whole. According to the judgments in both the Courts below it seems as though it was expressly argued there that clause 11 is merely a restatement of the common law. In this Court counsel for the appellant did not expressly put forward that contention but, on the footing of his submission that a 'material condition' was one which goes to the root of the contract in this case permitting rescission

was correct, his argument amounted to no more than a contention that he equated the respondent's right under clause 11 with a lessor's right under the common law. That, in my judgment, indicated a misinterpretation of clause 11.

In my view clause 11 is a *lex commissoria* or forfeiture clause and its provisions are clearly a departure from the common law. I conceive clause 11 to be, in the words of JANSEN, J., in *North Vaal Mineral Co. Ltd*. v *Lovasz*, 1961 (3) SA 604 (T) at p. 606,

'... a *lex commissoria* (in the wide sense of a stipulation conferring a right to cancel upon a

breach of the contract to which it is appended, whether it is a contract of sale or any other contract). It confers a right (viz. to cancel) upon the fulfilment of a condition. The investigation whether the right to cancel came into existence is purely an investigation whether the condition, as emerging from the language of the contract (a question of interpretation), has in fact been fulfilled (*Rautenbach v Venner*, 1928 T.P.D. 26)'.

By this clause the respondent explicitly reserved to himself the right to cancel the lease on a breach of a material condition of the lease. Once there is such a breach, the materiality of the breach is irrelevant and the Court will not enquire into the conscionableness or unconscionableness thereof. (See *Human v Rieseberg*, 1922 T.P.D. 157 at p. 163).

The question then is whether, as a matter of construction, clause 4 is a material condition. In construing that phrase the Court must have regard to the ordinary grammatical meaning of the words used read in the context of the document as a whole. The *Oxford Dictionary* gives *inter alia* the following meanings of the adjective 'material' namely, 'of serious or substantial import; of much consequence; important'.

In *Webster's Dictionary* the following meaning is *inter alia* given:

'being of real importance or great consequence'.

The lease under consideration consists of twenty clauses dealing with the rights and obligations of the parties and it is clear that some of these clauses are more important or of greater consequence to the parties than others. Leaving aside for the moment clause 4, clauses 12 (prohibiting sub-letting) 13 (prohibiting contravention of the laws and regulations of the township) 14 (prohibiting the making of further structural improvements) could be examples of conditions of real importance or essential terms; whereas clause 15 dealing with the liability for the costs of preparing the agreement, etc. may be regarded as an example of a relatively unimportant term. If these two categories of conditions are compared it seems to me that clause 4 would essentially fall in the category of material conditions. It is important to bear in mind that the contract under consideration is one of letting and hiring and according to the common law the use to which the leased property is to be put is of real and substantial importance. In his *Treatise on the Contract of Lease*, Pothier states:

'22. It is of the essence of the contract of lease that there be a certain enjoyment or a certain use of a thing which the lessor undertakes to cause the lessee to have during the period agreed upon, and it is actually that which constitutes the subject and substance of the contract.

The kind of enjoyment which is conferred by the lease either is or is not stated therein. When it is stated, the lessee may not put the thing to a use other than to that stated in the lease.'

(Mulligan's trans.). See also Kerr, *The Law of Lease*, p. 3.

But, in my view, the strongest indication that clause 4 is a 'material condition' is the language of the clause itself. It is beyond doubt that the appellant was granted a very limited and restricted use of the

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leased premises. It is not only stipulated that the property should be used 'for the purpose *only* of parking' but also significantly, '*and for no other purpose whatever*'. (I italicise). I am in full agreement with the following remarks of the learned Judge *a quo* in this connection:

'The addition of these words seems to me to be an indication that the parties wanted to emphasise, in clear and unmistakeable language, the very limited scope of the appellant's rights under this agreement.'

Counsel for the appellant also submitted that clause 4 was not intended to restrict the use of the leased premises to parking of vehicles on the whole of the leased premises inasmuch as words similar to those used in clause 12, viz. 'the leased land, *or any portion thereof*' (I italicise) are not used in clause 4. The latter clause is couched in positive language and in its context, in my view, can have only one meaning, namely, that the restriction on the use of the leased premises applies to the whole thereof. The words in clause 12 are used in quite a different context and I do not consider that the language employed in that clause can be relied upon to construe clause 4 in the manner contended for by counsel for the appellant.

For all the aforegoing reasons I come to the conclusion that the parties intended clause 4 to be one of the material conditions of the lease within the meaning of clause 11 thereof.

I turn now to the second, namely whether the conduct of the construction company in erecting the hoarding and depositing the building material and equipment on the leased property, constituted a breach of the provisions of clause 4.

Counsel for the appellant contended that, inasmuch as the respondent, despite his knowledge, never objected to the erection of the hoarding and the depositing of the building material equipment until the letter of 10 June, 1970, therefore it was understood by the parties that the appellant's conduct was not to be regarded as a breach. This argument is, however, in my judgment, completely answered in the judgment in *Poort Sugar Planters (Pty.) Ltd*. v *Umfolozi Co-operative Sugar Planters Lta.*, 1960 (3) SA 585 (AD) at pp. 598G - 599H, where OGILVIE THOMPSON, J.A., said:

'So far as concerns the conduct of the parties relied upon by respondent's counsel, it is enough to say that, since the words 'free at loading point' are clear, the past conduct of the parties, falling short of the conclusion of any new agreement, and not amounting to a representation placing a particular construction on the words in question (see *Sampson v Union and Rhodesia Wholesale Ltd.*. 1929 AD 468) cannot alter the plain meaning of those words; cf. *Consolidated Diamond Mines v Administrator of S.W.A.*, 1958 (4) SA 572 (AD) at p. 632 and cases there cited, and see *The North Eastern Railway Co*. v *Hastings*, 1900 A.C. 260 (H.L.). In the latter case HALSBURY, L.C., said at p. 263:

'The chief argument used to give an unnatural construction of the words is that the parties have so acted during a period of forty years that the only reasonable inference to be derived from their conduct is that they have understood and acted on their bargain in a sense different from that which the words themselves convey. I am of opinion that if this could be truly asserted it is nothing to the purpose. The words of a written instrument must be construed according to their natural meaning, and it appears to me that no amount of acting by the parties can alter or qualify words which are plain and unambiguous.''

There is no suggestion on the papers nor was it submitted by counsel that the conduct of the parties was such that the conclusion of a new agreement could be inferred therefrom.

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Counsel for the appellant further submitted that the probabilities favour the view that the prohibition in clause 4 was not intended to cover a mere temporary use because such use would fall within the category of mere incidental, casual or fortuitous use and that

the use of the leased premises amounted to no more than that. Counsel referred to a number of cases, notably *Powell v Kempton Park Racecourse Ltd.*, 1899 A.C. 143; *Rex v Cunningham*, 1946 T.P.D. 241 and *Sweet v Parsley*, 1970, A.C. 132. The learned Judge *a quo* adequately dealt with these cases and came to the following conclusion:

> 'In the light of the views expressed in these cases, I accept that the phrase 'utilise... for the purpose only for parking... and for no purpose whatever' in clause 4. was not intended to refer to mere incidental, casual or fortuitous use of the leased property. But even if this meaning is given to the phrase under consideration, it does not assist the appellant in any way for on the facts of the instant case, the use complained of was certainly not a mere incidental, casual or fortuitous use. The undisputed facts show that one of the building constructors had deliberately been making use of a portion of the leased property, at the time of the complaint, for the purpose of depositing and storing building equipment and material. This use was clearly use by design. It was not disputed that the hoarding was a structure which had been firmly embedded in the ground. It was erected for the purpose of storing building materials required in connection with the building operations on the adjacent lot. It is clear from the facts, and this was conceded by counsel for the appellant, that had the respondent not complained, the hoarding would have remained on the parking area and would have been used for the purpose of storing building materials for the duration of the building operations which, at that stage, were expected to extend over a period of many months. That being so, the leased property was, in my view, being used, designedly and deliberately, for an unauthorised purpose. This use of the property constituted a breach of the provisions of clause 4.'

I can find no fault with this lucid reasoning and cannot usefully add anything further to the remarks of the learned Judge.

It is true that the photographs, referred to above, show that the erection of the hoarding and the depositing of the steel girders and the crane equipment interfere with parking of vehicles to a relatively insignificant extent. I have, however, already pointed out that, owing to the *lex commissoria* contained in clause 11, materiality of the breach is irrelevant. At the same time the photographs show that, although parking is interfered with to a relatively limited extent, counsel's argument that the maxim *de minimis non curat lex* applies cannot, in my judgment, be sustained.

I proceed to deal with the third and final issue, namely whether the respondent has shown that the appellant had permitted the property to be used in breach of the provisions of clause 4. It is quite clear on the papers that the managing director of the appellant company was fully aware of the conduct of the construction company and did not complain. That counsel for the appellant conceded. He contended, faintly however, that, although the managing director had that knowledge, there was nothing to indicate that the company had that knowledge. The answer to that contention is, however, that, in the circumstances of this case, the knowledge of the managing director is to be imputed to the company (cf. *Town Council of Barberton v Ocean Accident and Guarantee Corporation Ltd.*, 1945 T.P.D. 306).

All the issues are therefore answered in favour of the respondent and consequently the appeal cannot succeed.

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The appeal is dismissed with costs including the costs consequent upon the employment of two counsel.

OGILVIE THOMPSON, C.J., VAN BLERK, J.A., BOTHA, J.A. and HOLMES, J.A., concurred.

Appellant's Attorneys: *Werkmans*, Johannesburg; *Rosendorff, Venter & Brink*,

Bloemfontein. Respondent's Attorneys: *B. Lebos*, Johannesburg; Van der Merwe & Sorour, Bloemfontein.