THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 323/2019

In the matter between:

HUGO, KIRSTEN & KIRSTEN (PTY) LTD **APPELLANT**

and

COLLOTYPE LABELS (PTY) LTD **RESPONDENT**

Neutral citation: *Hugo, Kirsten & Kirsten (Pty) Ltd v Collotype Labels (Pty) Ltd* (323/2019) [2020] ZASCA 21 (25 March 2020)

Coram: CACHALIA, ZONDI, PLASKET, DLODLO and MBATHA JJA

Heard: 11 March 2020

Delivered: 25 March 2020

Summary: Lease agreement – agreement contained clause providing for negotiation of new lease on expiry of current lease – clause void – effect of invalid clause on remainder of lease.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Langa AJ sitting as court of first instance):

1 The appeal succeeds with costs, including the costs of two counsel.

2 The order of the court below is set aside and replaced with the following order.

'(a) The questions formulated as the separated issues in terms of rule 33(4) of the Uniform Rules of Court are answered as follows:

(i) clause 3 of the lease agreement is void and unenforceable;

(ii) the invalidity of clause 3 does not have the effect of invalidating the lease agreement.

(b) The defendant is directed to pay the plaintiff's costs.'

JUDGMENT

Plasket JA (Cachalia, Zondi, Dlodlo and Mbatha JJA concurring)

[1] This is an appeal against an order of Langa AJ, in the Western Cape Division of the High Court, Cape Town, dismissing a claim, brought by the appellant, Hugo, Kirsten & Kirsten (Pty) (HKK) against the respondent, Collotype Labels (Pty) Ltd (Collotype), for damages arising from the breach of a lease agreement to which both were parties. Langa AJ refused leave to appeal but that was granted on petition by this court.

Background

[2] On 27 September 2004, the parties concluded a written agreement of lease in terms of which HKK let premises at 2 Jan van Riebeeck Avenue, Paarl (the premises)

to Collotype. In terms of clause 2, the lease was to endure until 1 October 2014 but, in terms of clause 3, Collotype was granted a qualified opportunity to negotiate a new lease.

[3] Clauses 2 and 3 of the lease provide:

'2 The Lease shall be for a period of 10 years and 3 months, commencing on 1 October 2004 and terminating on 31 December 2014.

3 The LESSEE has a first option to Lease the PREMISES for a further period of 10 years, subject to the following:

3.1 The LESSEE fulfilled his obligations in terms of this contract;

3.2 That the LESSEE renew his Lease by giving written notice to the LESSOR of his intention to do so 6 (SIX) months in advance.

3.3 A new rental Agreement, acceptable to the LESSOR be negotiated.'

[4] Having been in occupation of the premises since 1 October 2004 in terms of clause 2 of the lease, on 31 March 2012 – some seven and a half years later – Collotype vacated the premises. It has not paid any rental since that date.

[5] HKK alleged in its particulars of claim that Collotype's abandonment of the premises constituted a repudiation of the agreement. HKK terminated the lease and claimed damages arising from Collotype's breach. Collotype pleaded, inter alia, that the lease was invalid because clause 3 was a void option to renew that could not be severed from the rest of the agreement.

[6] It was agreed by the parties, and ordered by the court below, that the only issues to be dealt with in the trial were whether clause 3 was void and, if so, whether it had the effect of rendering the entire agreement unenforceable.

[7] Collotype accepted that it had the duty to begin. It closed its case without calling any witnesses. HKK called one witness, whose evidence is thus uncontroverted. That witness, Mr Denver Kirsten, was a director of both HKK and Collotype at the time the lease was concluded, and was able to testify as to the background and context relevant to the agreement. I shall deal with his evidence below.

[8] In the court below, Langa AJ took the view that clause 3 created an option and that, because the exercise of the option was 'dependent on the acceptance of the renewal by the lessor', it was void for vagueness. He found too that, clause 3 being an option, was an essential term of the lease and that, in the absence of clause 3, Collotype would not have concluded the lease at all. For these reasons he concluded that clause 3 was not severable from the remainder of the lease, with the result that 'the whole lease agreement is void as a consequence of the void renewal option clause'.

The issues

[9] It is necessary to interpret clause 3 within the context of the lease as a whole in order to determine whether the findings and conclusions of the court below are correct. The starting point, as always, is the language that the parties used to express their common intention. But first, it is necessary to sketch the background to the conclusion of the lease. That background is to be found in the evidence of Mr Kirsten. He signed the lease on behalf of HKK, while Mr Thys Hugo, who, like Mr Kirsten, was also a director of both companies, signed it on behalf of Collotype.

[10] Mr Kirsten testified that originally Collotype leased the premises from Meyer Middeldorp Beleggings (MMB) in terms of a series of leases. The basis of its agreement with MMB was that it leased the premises for a fixed period – two, three or four years – and prior to the expiry of the period concerned, negotiated with MMB for a new lease. As a matter of course, Collotype would give MMB notice that it wished to negotiate a new lease, negotiations would ensue and eventually a new lease would be concluded.

[11] At some point, after proper disclosure by HKK to Collotype's Australian holding company, HKK purchased the premises and let them, in terms of the agreement with which this case is concerned, to Collotype. The lease followed the earlier leases between MMB and Collotype in all respects but two; and clause 3 was taken verbatim from those earlier leases. The only differences were that the duration of the lease was ten years and three months, and the possible renewal period was a longer period, namely ten years.

[12] It had been alleged by Collotype that the 'option' in clause 3 'was clearly a material term' and in its absence, Collotype would not have concluded the lease. It was stated that without clause 3, 'it would not have been possible for [Collotype] to have achieved the object of the lease, ie to ensure a tenancy of no less than 20 years for [Collotype] at its election'.

[13] This aspect was dealt with by Kirsten. He testified that HKK wanted a lease of ten years to enable it to finance the purchase of the premises. In regard to Collotype's attitude to a ten year lease, he said:

'It was a very difficult one to sell to be honest with you M'Lord. Ten years was extended – this is an Australian company that has just bought into a South African company and we asked them for ten years. It was one of the first acquisitions they had done overseas and they were quite risk averse to be honest with you but the one thing that got us through for the ten year period was the relationship that they had with my chairman, incredibly transparent and there was a huge element of trust. And they agreed to the ten years, M'Lord.'

[14] His evidence concerning clause 3 had been that, first, it had worked well in relation to the lease with MMB in the past and, secondly, that it allowed for both parties to review their respective positions and decide on how to proceed into the future. In this there would have been no difference in how Collotype dealt with MMB in the past.

[15] When Mr Kirsten was asked what Collotype's view would have been if it had been told that a 20-year lease or 'option for the further ten' was not possible, he answered:

'Mr Loots, there is no ways that Collotype would have taken a 20-year lease just investing in the business. The fact, M'Lord, that we got ten years through was an intense board meeting in itself. That was a challenge in itself. 20 years was certainly not on the cards. However, we were open to negotiation post ten years . . . '

[16] I turn now to the lease. The use and enjoyment of the premises, a commercial property, was granted to Collotype for ten years in return for rental, the amount of which was set out, year by year, in clause 4. For the rest, there is nothing out of the ordinary in the remaining clauses. They are typical of what one would expect of a lease of this type.

[17] That brings me to clause 3. It follows the clause in which the duration of the lease was stipulated. Clause 3 speaks of Collotype being granted a 'first option' to lease the premises 'for a further period of 10 years', but that 'right' is made subject to three conditions.

[18] Those conditions are that Collotype fulfilled its obligations in terms of the lease; that if it wished to 'renew' the lease, it was required to give HKK written notice of that fact six months before the expiry of the lease; and that, then, a 'new rental Agreement acceptable to [HKK] be negotiated'.

[19] When clause 3 is considered in context and holistically, it is clear that what the parties intended was not an option – a binding agreement subsidiary to the lease agreement to keep open an offer to renew the lease[1] – despite the use of the word 'option' in the clause. Instead, they put in place a mechanism to regulate the negotiation of a new lease shortly before the expiry of the current lease, if that is what Collotype wished to do. In this sense, clause 3 is akin to a right of pre-emption: it purported to give Collotype a 'right' to a preference over other potential lessees.[2]

[20] The purported effect of clause 3 was thus that if Collotype wished to continue in occupation of the premises after the expiry of ten years, and it gave notice timeously, HKK could not let the premises to anyone else unless the negotiations for a new lease had come to naught.

---

[1] *Du Plessis NO and Another v Goldco Motor & Cycle Supplies (Pty) Ltd* 2009 (6) SA 617 (SCA) para 15; G B Bradfield *Christie's Law of Contract in South Africa* (7 ed) (2016) at 66.

[2] *Van Pletzen v Henning* 1913 AD 82 at 95. Innes J said of a right of pre-emption in a deferred sale agreement: 'The grant of a right of pre-emption does not compel the grantor to sell: it only compels him to give the grantee the preference in case he sells at all. And consequently it too prevents him from selling to third parties during the existence of the right.' See too *Owsianick v African Consolidated Theatres (Pty) Ltd* 1967 (3) SA 310 (A) at 316C-E in which Ogilvie-Thompson JA compared rights of pre-emption and options. He said: 'A right of pre-emption is well known in our law . . . and it is to be distinguished from an option to purchase. Upon exercise of the latter by the holder of the option, the granter of the option is obliged to sell. The granter of a right of pre-emption cannot be compelled to sell the subject of the right. Should he, however, decide to do so, he is obliged, before executing his decision to sell. to offer the property to the grantee of the right of pre-emption upon the terms reflected in the contract creating that right.'

[21] Clause 3.3 referred to a new lease agreement being negotiated that was acceptable to HKK. Because it contemplated no more than an agreement to perhaps agree in the future, the cases are clear on its effect: in *Premier, Free State and Others v Firechem Free State (Pty) Ltd*,[3] Schutz JA stated that '[a]n agreement that the parties will negotiate to conclude another agreement is not enforceable, because of the absolute discretion vested in the parties to agree or disagree'. (The position is different if the parties include a deadlock-breaking mechanism in their agreement to agree.[4])

[22] The unenforceability of clause 3 does not end the matter. I turn now to the effect of its invalidity on the lease. In my view, when the lease agreement is interpreted in context and holistically, it is clear that clause 3 was not a material term. I say this because the principal purpose of the agreement was to establish a lease that was to endure for ten years and three months. Clause 3 was incidental to that purpose. It was a mere mechanism for possible negotiations in the future to conclude a new lease.

[23] What is more, that is how Collotype had always understood and applied the exact predecessors of clause 3 in its earlier leases with MMB. As Leach JA held in *Unica Iron and Steel (Pty) Ltd and Another v Mirchandani*,[5] 'the way in which the parties to a contract carried out their agreement may be considered as part of the contextual setting to ascertain the meaning of a disputed term . . . because the parties' subsequent conduct "may be probative of their common intention at the time they made the contract"'. In other words, Collotype never considered clause 3 to be an option that was an essential part of the agreement. What is more, given the plain meaning of clause 2, and Mr Kirsten's evidence, Collotype never intended to contract for a 20-year lease. Put differently, the parties would have concluded the lease for a ten year period even in the face of the invalidity of clause 3. The unenforceability of clause 3 does, therefore, not result in the invalidity of the entire lease.

---

[3] *Premier, Free State and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) para 35.
[4] *Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 (2) SA 202 (SCA) paras 11-16; *Roazer CC v The Falls Supermarket CC* 2018 (3) SA 76 (SCA) para 13.
[5] *Unica Iron and Steel (Pty) Ltd and Another v Mirchandani* 2016 (2) SA 307 (SCA) para 21.

[24] In the light of this finding, there is no need to formally sever clause 3 from the rest of the lease. It is not an option upon which the validity of the rest of the lease is reliant.

Conclusion

[25] The appeal must succeed. The order of the court below must be set aside and the two questions that were formulated as the separated issues in terms of rule 33(4) must be answered in the light of the findings made above.

[26] I make the following order.

1 The appeal succeeds with costs, including the costs of two counsel.

2 The order of the court below is set aside and replaced with the following order.

‘(a) The questions formulated as the separated issues in terms of rule 33(4) of the Uniform Rules of Court are answered as follows:

(iii) clause 3 of the lease agreement is void and unenforceable;

(iv) the invalidity of clause 3 does not have the effect of invalidating the lease agreement.

(b) The defendant is directed to pay the plaintiff’s costs.’

_____

C Plasket

Judge of Appeal

APPEARANCES

For the appellant:	L S Kuschke SC and J H Loots Instructed by: Norton Rose Fullbright South Africa Inc, Cape Town Phatshoane Henney Attorneys, Bloemfontein
For the respondent:	R van Riet SC and J R Whitaker Instructed by: Van der Spuy and Partners, Paarl Symington & De Kok, Bloemfontein