(20)

IN THE SEYCHELLES COURT OF APPEAL

HOTEL DES SEYCHELLES LTD APPELLANT

versus

VESNA PAPIC JANOSEVIC RESPONDENT

Civil Appeal No: 20 of 1998

[Before: Ayoola, Venchard & Adam, JJ.A]

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Mr. S. Rouillon for the appellant
Mr. P. Boulle for the respondent

JUDGMENT OF VENCHARD & ADAM, JJA

(Delivered by Adam JA)

The respondent under a written lease of agreement was to pay appellant rent half yearly in advance. Clause 9(i) of the written lease provided:-

> "....
> If the rent payable by the lessee ... shall at any time be in arrears and unpaid for more than one calendar month after the same shall have become due ... and shall not be paid within one week after the same shall be demanded by a written notice requiring payment of the same served upon the lessee by the usher of the Court or so served by sending it by prepaid registered post ... this lease shall thereupon become ipso facto forfeited and cancelled..."

Clause 9(iii) further provided:-

> "Any notice shall be valid and effectual ... and service shall be sufficient if any such notice ... is served by sending it by prepaid registered post to the lessee."

It was accepted by both parties that rent was to be paid on 1 January 1997; that it was in arrears and unpaid for one calendar month after the rent shall have become due on 5 February 1997. On 5 February 1997 the appellant caused a demand to be made by a written notice requiring payment of the rent that was in arrears and unpaid which written notice was sent by prepaid registered post on 5 February 1997. A cheque with a date on it of 10 February 1997 along with a letter of same date was put in the ordinary post. The postmark or the date stamp of the Post Office on that letter was not legible. The appellant's witness testified that the cheque was received by his lawyer on 13 or 14 February 1997 and agreed with the respondent's counsel that it was received on 13 February 1997. The respondent testified that she did not have personal knowledge when the payment of rent was made and did not know what date she received the written notice of demand by prepaid registered post. The Director of Postal Services called to give evidence on behalf of the respondent testified that his office issues a Registered Slip to the person who brings a letter for prepaid registered post. An advice slip is issued by putting it in his Post Box about 2 days after the registered slip is given informing the receiver of the registered letter that it is there for collection. He indicated that a letter posted by ordinary mail would have postmark or date stamp on the day it is put in the mail box.

Bwana J held that the written lease agreement spoke of the date of posting as being the effective date of service and it was not the date of receiving and so service of the notice of written demand was effective on 5 February 1997, the date it was sent by prepaid registered post. He then used sections 55(4) and 57 of the Interpretation and General Provisions Act (Cap 103) for purposes of the interpretation of Clause 9(i) of the written lease agreement and concluded that the respondent paid rent on 10 February 1997 which was within the prescribed period – "within one week" – calculated from 5 February 1997.

In the appellant's Memorandum of Appeal the grounds were that Bwana J was wrong in law to use the Interpretation and General Provisions Act (Cap 103) for purposes of interpretation and also wrong to make the finding that arrear rent was paid on time. In the respondent's Notice of Cross Appeal the grounds were that Bwana J erred in his interpretation that service of notice was effective

from the date of sending and not receiving which is the logical and commonsense interpretation of Clause 9(i) and section 55(4) of the Act is highly relevant in interpreting similar provisions and that on the evidence payment was made within a period of week after the written demand was made.

The Civil Code of Seychelles Act (Cap. 33) in section 9 provided:-

> "The Interpretation and General Provisions Act shall, subject to the provisions of this Act, apply in relation to the interpretation of this Act but shall not apply in relation to the Civil Code of Seychelles which shall be read and construed with the rules set therein."

Bwana J clearly offended against the explicit provisions of section 9 which called upon him peremptorily to read and interpret the Civil Code of Seychelles for all purposes in accordance with the rules in it. Article 1156 that concerns interpretation of contracts provides that in the absence of clear evidence, the Court shall be entitled to assume that the parties used the words in the sense in which they are reasonably understood. It would therefore have been correct to conclude that words such as "week", "demand", "written notice", "serve", "sending", registered letter", "service", "forfeited", "sufficient", "valid", "effectual" and "cancelled" in Clause 9(i) and (iii) of the written lease agreement were used in their reasonably understood sense. Looked in that manner non-payment within one week of the written notice demanding payment of arrear rent served on the lessee by sending it by prepaid registered post the lease shall thereupon become ipso facto forfeited and cancelled would reasonably be understood that the appellant must make a written demand that was delivered on the respondent by sending it by prepaid registered post. Therefore, the appellant was called upon to take it to the Post Office for prepaid registered post when it would have been issued with a registered slip. This, as Bwana J correctly held, was also consistent with Clause 9(iii) which required the written notice to be sent by prepaid registered post and so the date of posting or date of sending was the effective date of service and not the date of receipt of the written notice. The sending by prepaid registered post was what was required and the appellant would have had to provide proof of the written notice of demand having been

sent by the production of the registered slip given to it at the time when it was sent as prepaid registered post. If the parties intended that the written notice, when the Post Office was being used as the mode of service, was required to be received by the respondent the lease should have stated that arrear of rent not paid within one week of the receipt of the prepaid registered letter by the respondent. It must not be forgotten that the written lease agreement gave two ways in which the written notice of demand could be conveyed to the respondent. One of which was to have the usher of court go and serve it on the respondent and the other was by the sending it by prepaid registered post. This was a deliberate choice by the parties which meant that the appellant could either ask the usher of court to serve the written notice of demand or do it by sending it by prepaid registered post. In the latter case it would have been given a registered slip for the prepaid registered post. If the requirement was the receipt by the respondent of the written notice, sending it by prepaid registered post would not have been adequate and the production of the registered slip would not have constituted sufficient proof of delivery of it on the respondent and the appellant would have had to produce certificate of delivery. In order to make the appellant produce a certificate of delivery the written lease agreement would have had to be drafted differently to reflect that intention of the parties.

Moreover, it was the respondent who was in default with her rent being in arrear for more than one calendar month and so she was in a better position to have knowledge when the written notice of demand was received her rather than the appellant so that the respondent could abide by the covenants in the written lease agreement by making payment within one week of the written notice of demand. She would be in a better position to confront the appellant by producing the certificate of delivery of the prepaid registered letter which would establish the date the respondent received it and thereby satisfy the appellant that the respondent had made payment of the arrear rent within one week to satisfy the specific requirement of the written lease agreement. The onus would have had to be put on the respondent that the lease required written notice to be received by her for the simple reason that she would have the knowledge of receipt as between the two parties. In such an event the respondent as the defaulting party would have to show that the arrear rent was paid within one week of the receipt written notice of demand. There was no evidence led in this

case as to when the written notice of demand was received by the respondent and she could not remember the date so the respondent could not establish whether she made payment within a week. The respondent thus cannot take advantage of her own turpitude.

It follows that Bwana J should not have dismissed the appellant's case. His judgment is set aside and judgment in accordance with appellant's Plaint is entered. Accordingly this Court:

(a) declares that the lease agreement in respect of land Title H2798 has been lawfully forfeited and cancelled;

(b) orders the formal ejection of the respondent from that Title H2798;

(c) orders the Registrar General to make the necessary entry in the Lands Registry to reflect the forfeiture and cancellation of the written lease agreement;

(d) declares that pursuant to Clause 7(8) of the written lease agreement the construction on Title H2798 now belongs to the appellant;

(e) award costs to the appellant.

Dated this 4th day of ***December*** 1998.

L.E. VENCHARD
JUSTICE OF APPEAL

M. A. ADAM
JUSTICE OF APPEAL