A 3. Die respondent is geregtig om 'n pleit op die meriete in die landdroshof te liasseer binne drie weke van die datum van hierdie uitspraak.

F H Grosskopf AR en Van Coller Wn AR het met die uitspraak van Botha AR saamgestem.

B Appellant se Prokureurs: *P C van Staden, Liston & Kie*, Port Elizabeth; *Dold & Stone*, Grahamstad; *Symington & De Kok*, Bloemfontein. Respondent se Prokureur: *Goldberg & De Villiers*, Port Elizabeth; *Nettletons*, Grahamstad; *Naudes*, Bloemfontein.

C

D

GENAC PROPERTIES JHB (PTY) LTD v NBC ADMINISTRATORS CC (previously NBC E ADMINISTRATORS (PTY) LTD)

APPELLATE DIVISION

BOTHA JA, HEFER JA, MILNE JA, VAN DEN HEEVER JA and NICHOLAS AJA

1991 November 12, 29

F *Landlord and tenant—Lease—Validity of—Clause in lease providing that 'landlord's maintenance and running expenses', listing eight specific categories thereof with a ninth being 'an amount not exceeding 5% of the aggregate of all the aforegoing . . .' to be paid in monthly payments by tenant to landlord—Clause defining such G expenses as 'the landlord's actual and reasonable maintenance and running expenses'—Previous clause providing for payment of stipulated rentals—Contention raised that maintenance and expenses clause void for vagueness as amounts payable in terms thereof not determinable with reasonable certainty—Word 'reason-H able' in clause used in relation to actual expenses and such use not creating uncertainty as actual expenses readily ascertainable and question whether they are reasonably capable of objective ascertainment—Although amount of expenses within control of landlord, expenses having to be reasonable in their nature and amount—Such to be objectively ascertained and is not subject to I will or whim of landlord—Thus not correct that landlord determines amount of expenses—Provision for addition of a surcharge in 'an amount not exceeding 5% of the aggregate of all the aforegoing expenses . . .' construed in favour of validity as meaning that agreed rate for surcharge was 5% but that landlord free to apply a J lower percentage if he wished—Maintenance and expenses clause*

*not void for vagueness—Lease accordingly valid—*Semble: *Difficult to see on what principle a sale for a reasonable price or a lease for a reasonable rent should be regarded as invalid.* A

In terms of lease entered into between the appellant, as landlord, and the respondent, as tenant, clause 5 provided for the payment of rental 'as set out in the table below', the table setting the rentals for each of the five years in which the lease was to endure. B Clause 6 provided that 'the landlord's maintenance and running expenses' were to be paid by the tenant monthly in advance in an amount equal to 11,3% of the landlord's estimate of the monthly maintenance and running expenses, provision also being made for the payment of additional amounts by the tenant or refunds by the landlord should the landlord's estimate be incorrect. The 'landlord's maintenance and running expenses' was defined in clause 6.1 as meaning 'the aggregate C of all the landlord's actual and reasonable maintenance and running expenses . . . in respect of the property and the building . . . including, without limiting the generality of the aforegoing' and the clause then listed eight specific categories of expenses, ending with a ninth item, 'an amount not exceeding 5% of the aggregate of all the aforegoing expenses and costs'. The landlord instituted an action in a Local Division claiming, *inter alia*, an amount for 'maintenance and running expenses as defined in the agreement'. In its plea the tenant pleaded that the lease D was void for vagueness in that, *inter alia*, 'the plaintiff's maintenance and running expenses as defined in clause 6.1 . . . cannot be determined with reasonable certainty'. The Local Division upheld the tenant's contentions and dismissed the claim. In an appeal the tenant supported the Local Division's judgment, contending *(a)* that, having regard to the use of the word 'reasonable' in clause 6.1, the quantification of the individual expenses enumerated in clause 6.1 was left entirely E in the air and could not be determined with reasonable certainty; *(b)* that the amount of the expenses had been left to the landlord for it was the landlord who determined in its sole discretion precisely which expenses would be incurred and, whether or not the landlord acted alone or with third parties, the tenant had absolutely no say in the selection of such third parties or the eventual amount of the expenses to be incurred; and *(c)* that the item in clause 6.1 providing for the surcharge of 5% on the F aggregate of all the aforegoing expenses and costs' left the determination of the ultimate amount of the expenses component to the discretion of the landlord which he could exercise 'capriciously without reference to any ascertainable factors or to an external standard' thus rendering the clause invalid. It was contended for the landlord, however, that on a proper construction of the provision the agreed rate of the surcharge was 5%, but that the landlord was free to apply a lower percentage if he wished. G

Held, as to *(a)*, that the word 'reasonable' was used in relation to the actual expenses, and its use in that context did not create uncertainty: the actual expenses were readily ascertainable from the landlord's financial records, and whether they were reasonable was also capable of objective ascertainment.

Semble: It is difficult to see on what principle a sale for a reasonable price, or a lease for a reasonable rent, should be regarded as invalid.

Held, further, as to *(b)*, that there were two qualifications to the landlord's right to H determine the amounts recoverable under clause 6: the first qualification was that the expenses should actually have been incurred; and the second qualification was that such expenses should have been reasonable, that is reasonable in relation to both the nature of the expenses and their amount.

Held, further, that the reasonableness of the expenses was to be objectively ascertained and was not subject to the will or whim of the landlord.

Held, accordingly, that it was wrong to say that under clause 6 the landlord determined I the amount of the expenses.

Held, further, as to *(c)*, that, if the provision in question was reasonably capable of the interpretation contended for by the landlord, that interpretation was to be preferred to one which would render the lease invalid.

The *dictum* in *Soteriou v Retco Poyntons (Pty) Ltd* 1985 (2) SA 922 (A) at 931G–H J applied.

Held, further, that, adopting such approach, the construction urged by the landlord was to be preferred.

Held, accordingly, that the lease was valid and enforceable. Appeal allowed.

The decision in the Witwatersrand Local Division in *Genac Properties Jhb (Pty) Ltd v NBC Administrators CC (previously NBC Administrators (Pty) Ltd)* reversed.

Appeal from a decision in the Witwatersrand Local Division (Cilliers AJ). The facts appear from the judgment of Nicholas AJA.

L I Goldblatt SC (with him *G E Turner*) for the appellant: The requirement of certainty in contracts means that the rights and duties established by a contract must be defined in such a way as to render the contract enforceable at the instance of the Courts. *Patel v Adam* 1977 (2) SA 653 (A) at 666; Farlam and Hathaway *Contract* 3rd ed at 314 and the authorities cited therein; Christie *The Law of Contract in South Africa* at 85–90. The first issue to be decided is whether clause 6 of the agreement leaves it to the lessor alone to decide what amount he wishes to recover from each lessee at the end of each financial year, with the result that a court of law would not be able to determine this amount. The learned Judge *a quo*, after consideration of the meaning and effect of clauses 6.1, 6.2 and 6.3 of the agreement, stated as follows: 'The aforegoing suffices to indicate that, subject to the lessor actually incurring the expenses and that they be reasonable, the lessor can without reference to the lessee determine the amounts recoverable under clause 6.' The learned Judge erred in finding that the lessor can without reference to the lessee determine the amounts recoverable under the lease. The amounts recoverable in terms of the lease are fixed and certain. They are the 'aggregate of all the landlord's *actual* and reasonable maintenance and running expenses . . .'. It is clear therefore that the landlord is only entitled to recover those amounts actually expended by it in the maintenance and running of the building. The only aspect which is left to the landlord alone to decide is which of the many categories of costs in the maintaining and running of the building it will actually incur. Even this decision is not entirely unfettered since the actual expenses incurred by the landlord as well as the decision to incur such actual expenditure on a particular item of maintenance must be 'reasonable' as well. The concept of 'reasonableness' is a well recognised concept in our law and has frequently been stated to be a matter that can be objectively tested. Reasonableness means 'considering the matter as a reasonable man normally would and then deciding as a reasonable man would normally decide', *per* Watermeyer CJ in *Vanderbijlpark Health Committee v Wilson* 1950 (1) SA 447 (A) at 458; *Herbert Porter & Co Ltd and Another v Johannesburg Stock Exchange* 1974 (4) SA 781 (W) at 790 in which it was stated that reasonableness is an objective test. Furthermore it is important to note in this regard that the 'actual' expenses incurred by the landlord can never, in each of the categories of expenses set out in clause 6.1, be solely determinable by the landlord since the third parties, towards whom the landlord incurs obligations in respect of the services of maintenance and administration of the premises, will themselves determine the amounts for which the landlord can obtain such services. This aspect was raised by the learned Judge *a quo* but the learned Judge nevertheless concluded that it was the lessor who solely determined the amount which he expended on such services of maintenance and

administration. It is in this respect that the learned Judge fundamentally erred and which led to a misapplication of the relevant law. The fact that the lessee has no say in the selection of the maintenance and running expenses in respect whereof the lessor chooses to incur obligations for the benefit of the building as a whole cannot invalidate the lease on the basis that a rental has not been determined. 'The contract is binding and not inchoate, for no further step is necessary to create *consensus*', *per* Murray J in *Van der Merwe v Cloete and Another* 1950 (3) SA 228 (T) at 231E–F. See also, *Farlam and Hathaway* (*op cit* at 316); *Odendaalsrus Municipality v New Nigel Estate Gold Mining Co Ltd* 1948 (2) SA 656 (O) at 665; *Mayfair South Townships (Pty) Ltd v Jhina* 1980 (1) SA 869 (T) at 872D–873E. In principle the selection of the manner in which the building was to be run and maintained is no different from the selection given to a party where such party has a generic obligation. There is no uncertainty. From the above it is clear that, although the lessor had the discretion of choosing the nature of the maintenance and running in respect whereof it would incur actual and reasonable expenditure, the quantification or amount of such expenditure was clearly capable of determination by a court of law. *Patel v Adam* (*supra* at 666B–C). From the above it is also apparent that the learned Judge misdirected himself in posing the following question:

> 'Accepting, as I do for the moment, that the amounts payable in terms of clause 6 are to be regarded as rental, the question resolves itself to this: Is a lease wherein part of the rental is described only as "reasonable", valid?'

For the reasons stated above the word 'reasonable' did not describe the rental but the expenses to be actually incurred. Thus the enquiry for the reasons already stated is entirely irrelevant once it is accepted that the lessor alone does not decide the quantification of the amount to be paid in respect of maintenance and running expenses. However, should this Court not accept the appellant's aforesaid contentions, the learned Judge nevertheless erred in regarding the amounts payable in terms of clause 6 of the agreement as 'rental'. Accepting the proposition that a stipulation to pay a reasonable rental is not sufficient to enable the parties to establish with certainty the ambit of their respective rights and obligations, they are, however one categorises the contractual obligations under which the amounts in clause 6 are paid, certainly not 'rental' in the sense referred to in the authorities relied upon by the learned Judge *a quo*. Rent, *merces*, may be defined as the consideration which the parties agree the lessee shall pay to the lessor for the use of the property let. It is a *quid pro quo* paid by the lessee for the use of the property. *Voet* 19.2.7; *Neebe v Registrar of Mining Rights* 1902 TS 65 at 86; *Uitenhage Divisional Council v Port Elizabeth Municipality* 1944 EDL 1 at 10. There are a number of indications that the expenses payable in terms of clause 6 of the agreement were not rental at all. The parties have stipulated for the rental in clause 5 of the agreement being the consideration payable by the lessee to the lessor in respect of the premises let. This is clearly for a fixed amount. Furthermore, the parties have specifically defined 'the premises' in respect of which that rental is paid. More importantly perhaps, the defendant in para 2(*b*)(iii) and (iv) of its plea does not contend that the lease is void for vagueness in that the rental cannot be determined with reasonable

A certainty, but contends that *the maintenance and running expenses* as defined in clauses 6.1 and 6.3 cannot be determined with reasonable certainty. A careful analysis of clause 6.1 of the agreement shows that, however one characterises the nature of the provisions of that clause, none of these items constitute 'rental' within the meaning contemplated by the parties in B the agreement, or pleaded by the defendant or by the legal definition thereof. The tenant agreed both to pay a rental for the premises occupied by it and to contribute to the running and maintenance of the building in which were situate the premises leased by it. The learned Judge therefore erred in concluding 'that not all the provisions of clause 6 can be regarded as providing for payment for services to be rendered, and that at least some C of those provisions must be regarded as relating to rental payable under the lease'. The error in the learned Judge's reasoning is further highlighted by the following conclusion:

> 'In view of the finding that certain of the provisions of clause 6 do not relate to remuneration for services rendered or to be rendered, it is not necessary to D characterise the nature of the other provisions of that clause, and I refrain from doing so.'

This is precisely what the learned Judge was required to do in order to bring the provisions of clause 6 within the general principle that rental under an agreement of lease must be fixed and determined. If the provisions of clause 6 are incapable of chracterisation as 'rental' then the E legal principles relied upon by the learned Judge cannot apply and the lease cannot be struck down as void for vagueness on the basis contended for by the defendant. There is clear authority in our law for the proposition that the stipulation for a 'reasonable' remuneration in contracts other than sale and lease is sufficient to render such contracts F valid and enforceable. *Middleton v Carr* 1949 (2) SA 374 (A); *Inkin v Borehole Drillers* 1949 (2) SA 366 (A); *Lobo Properties (Pty) Ltd v Express Lift Co SA (Pty) Ltd* 1961 (1) SA 704 (C); *Elite Electrical Contractors v The Covered Wagon Restaurant* 1973 (1) SA 195 (RA). There are also recent *dicta* from this Court to the effect that rental which had not been fixed in terms of a right of first refusal under an agreement of lease did not render G the agreement void for vagueness as there was an obligation on the lessor to act *bona fide* in determining the rental. This is no more than the application of the test of 'reasonableness' which the parties have expressly included in the lease presently under consideration. See *Soteriou v Retco Poyntons (Pty) Ltd* 1985 (2) SA 922 (A) at 932H–J. Furthermore, this H Court will be slow to categorise any of the obligations under clause 6 as 'rental' since the Courts are 'reluctant to hold void for uncertainty any provision that was intended to have legal effect'. See the *Soteriou* case *supra* at 931G–I and the authorities cited therein. This should be an overriding consideration in determining the issues raised in this appeal.

I In the result therefore it is unnecessary for this Court to decide whether the stipulation by parties for a 'reasonable rental' will render the lease void for vagueness since none of the items attacked by the defendant in para 2(*b*)(iii) and (iv) of the plea are capable of classification as 'rental' and constitute an undertaking to pay a fixed share of maintenance and running expenses actually and reasonably incurred by the building owner. This J Court's recent judgment in *Proud Investments (Pty) Ltd v Lanchem*

International (Pty) Ltd 1991 (3) SA 738 supports the arguments of the A appellant. The fact that the parties in the aforesaid matter left the determination of the reasonableness of the operating costs to be determined by the landlord's auditor acting as an expert does not distinguish the lease in that matter from the lease in the instant matter where a court, in contradistinction to the auditor, would be called upon to B decide the same matters that the auditor would have to decide, i e there is in the instant matter a mechanism for the objective determination of the 'actual and reasonable maintenance expenses' incurred by the lessor.

S L Joseph for the respondent (the heads of argument having been drafted by *G M Israel SC* (with him *S van Nieuwenhuizen*)): Clauses 6.1 and 6.3 of the lease are void for vagueness in that the quantification of the C individual expenses enumerated in clause 6.1 are left entirely in the air and cannot be determined with reasonable certainty. In addition, the amount of such expenses in the final analysis is left to the lessor for it is the lessor which determines 'in its sole discretion' (clause 8.4 of the lease) precisely which expenses will be incurred and whether or not the lessor acts alone D or with third parties with which it deals, the lessee has absolutely no say in the selection of such third parties or the eventual amount of the expenses to be incurred. In Roman law the contract for letting and hiring was regarded as a *locatio conductio* i e the *locatio conductio rei*. See Zimmermann *The Law of Obligations—Roman Foundations of the Civilian Tradition* at 338. It was a requirement of the *locatio conductio rei* that the E rent had to be *verum* and *certum*. See *Zimmermann* (*op cit* at 354). The requirement that the rent had to be fixed and certain is the same as the requirement under the law of sale that the price had to be certain. The objection to one party determining the rent or the price is the fact that the institutional check against the danger of gross and unreasonable F contractual imbalance, i e negotiation about the price/rent is absent. See *Zimmermann* (*op cit* at 254). The aforesaid principles also formed part of the Roman-Dutch law. See De Groot *Inleiding tot de Hollandsche Rechtsgeleerdheid* 3.19.7; Van Leeuwen *Het Rooms-Hollands-Regt* 4.21.2; Pothier *Treatise On the Contract of Letting and Hiring* para 37 (*Mulligan's* translation). *Voet* 19.2.7 follows the same approach. *Voet* states a similar G requirement in 18.1.23 with regard to price in the case of sale. The aforesaid principles have long been accepted in our modern law of sale. See *Erasmus v Arcade Electric* 1962 (3) SA 418 (T) at 419; *Adcorp Spares PE (Pty) Ltd v Hydromulch (Pty) Ltd* 1972 (3) SA 663 (T); *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) H at 574C–D and the cases quoted there; *Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd* 1991 (1) SA 508 (A) at 514G–H; Wessels *Law of Contract in South Africa* vol 1 2nd ed para 286; De Wet and Yeats *Kontraktereg en Handelsreg* 4th ed at 314; *Kamaludin v Gihwala* 1956 (2) SA 323 (C) at 327. Insofar as the qualification that the landlord's expenses I have to be 'reasonable' is concerned, such qualification cannot invest clause 6.1 with validity. On the basis that at the very least certain of the individual amounts payable in terms of clause 6.1 are to be regarded as rental, as the only criterion or yardstick for fixing such rental is one of reasonableness, such criterion does not fulfil the requirement of certainty required by Roman-Dutch authorities and our case law. *Erasmus v Arcade* J

A *Electric* (*supra*); Farlam and Hathaway *Contract* 3rd ed at 315 and the cases quoted by the authors, namely *Lombard v Pongola Sugar Milling Co Ltd* 1963 (4) SA 119 (D); *Adcorp Spares PE (Pty) Ltd v Hydromulch Ltd* (*supra*); *Trook t/a Trooks Tea Room v Shaik* 1983 (3) SA 935 (N); *South African Reserve Bank v Photocraft (Pty) Ltd* 1969 (1) SA 610 (C); *De Wet* B *and Yeats* (*supra* at 279 footnote 10). The view expressed in Cooper *The South African Law of Landlord and Tenant* (1973 ed) at 51 that a 'reasonable' rental is 'certain' is not a correct reflection of our law. The authority relied upon for this view, namely *Lobo Properties (Pty) Ltd v Express Lift Co (SA) (Pty) Ltd* 1961 (1) SA 704 (C) at 708 was a case *not* dealing with letting and hiring but a case dealing with use and occupation C of a property in which the owner of the property, to prevent the occupier being unduly enriched, was allowed to recoup himself by way of condiction in a reasonable sum for compensation for the occupier's use and enjoyment of the property (at 711A–D). Furthermore, as the learned trial Judge with respect correctly observed in his judgment a clear distinction D has to be drawn between leases of immovable property (as in the present case) and contracts for services or of services where 'fair and reasonable' remuneration might be permissible. *Farlam and Hathaway* (*op cit* at 315); *Inkin v Borehole Drillers* 1949 (2) SA 366 (A); *Middleton v Carr* 1949 (2) SA 374 (A); *Angath v Muckunlal's Estate* 1954 (4) SA 283 (N). Insofar as the three Rhodesian decisions in *Elite Electrical Contractors v The Covered* E *Wagon Restaurant* 1973 (1) SA 195 (RA); *Tribal Trust Land Development Corporation Ltd v Cone Textiles (Pvt) Ltd* 1978 (4) SA 659 (R) and *Cone Textiles (Pvt) Ltd v Tribal Trust Land Development Corporation Ltd* 1979 (2) SA 1051 (RA) at 1053H–1055C decided that a provision for a reasonable rental in a lease (in contradistinction to a reasonable F remuneration for services) which is not to be determined by a third party is valid, the learned trial Judge correctly held that such decisions were not consistent with our law. In considering the various provisions of clause 6.1 the learned trial Judge correctly came to the conclusion that at least one of the provisions (that relating to insurance premiums) did not relate to the provision of services to tenants but related to rental payable under the G lease and that accordingly such provision could not be salvaged on the basis that it provided for a reasonable remuneration for services to be rendered. Once one of the provisions of clause 6.1 was found to fall foul of the requirement of 'certainty' the learned trial Judge correctly came to the conclusion in the light of the agreement between the parties as to H 'non-severability' that the whole of clause 6.1 was accordingly rendered invalid. The similarities in the clauses of the contract in *Kriel v Hochstetter House (Edms) Bpk* 1988 (1) SA 220 (T) and the contract *in casu* are obvious. In the unreported judgment in the matter of *Proud Investments (Pty) Ltd v Lanchem International (Pty) Ltd* a similar approach was followed. (This matter is presently on appeal to the above Honourable I Court and the judgment is accordingly not annexed.) A different approach was however followed in the unreported judgment in *Sorec Properties Hillbrow (Pty) Ltd v Interlink Data Systems (Pty) Ltd and Others*. The partiarian lease is an historical exception to the principles relating to certainty and that the rental had to be fixed in a sum of money. See J *Zimmermann* (*op cit* at 354). The approach adopted in the *Sorec* case and

the comparison with wages which are determinable *ex post facto* and the A partiarian lease agreement are thus of no assistance. However, even assuming that the qualification of 'reasonableness' were to save from invalidity those provisions of clause 6.1 to which the qualification applied, then there is one remaining provision of clause 6.1 which is left untouched by such qualification and which provision renders the final amount B payable by the tenant as totally uncertain. The provision referred to is the very last provision of clause 6.1 whereby 'an amount not exceeding 5 % of the aggregate of all the aforegoing expenses and costs' is to be finally added by the landlord to all the other actual and 'reasonable' maintenance and running expenses. The qualification of 'reasonable' applies only to the aggregate of the actual maintenance and running expenses and clearly has C no application to the last provision of clause 6.1. One may legitimately enquire what the 5 % represents and on what basis does the landlord decide whether to add a final amount of 1 % or 5 %. The decision is entirely within the discretion of the landlord and is a decision that can be made capriciously without reference to any ascertainable factors or to an D external standard. It follows accordingly that, even if all the other provisions of clause 6.1 are saved from uncertainty by the use of the word 'reasonable', then the final provision renders the ascertainment of the final payment totally uncertain and the lease accordingly invalid.

The decision in *Proud Investments (Pty) Ltd v Lanchem International (Pty) Ltd* 1991 (3) SA 738 (A) is distinguishable from the present case. In E particular, that case provided for the reasonableness of the operating costs to be determined by the landlord's auditor acting as an expert. In this matter what is reasonable is determined by the landlord who is the arbiter of the costs of maintaining the building and/or the lifts and/or air conditioning. This is evidenced by clause 8.4 which leaves it to the F landlord's sole discretion whether repairs are necessary. The present case is distinguishable from the *Proud* case *supra* in that the phrase 'the landlord's maintenance and running expenses' includes not only actual and reasonable maintenance and running expenses, but also 'an amount not exceeding 5 % of the aggregate of all of the aforegoing expenses and costs'. It is simply an impossibility to equate the notions of 'actual and G reasonable maintenance and running expenses' with a sliding scale of up to 5 % which the landlord can add (clearly in his sole discretion) to the other expenses detailed in clause 6.1. The aforesaid introduces elements of vagueness which would render the contract void. Cf *Levenstein v Levenstein* 1955 (3) SA 615 (SR). In view of the fact that it is common H cause that the provisions of clause 6 in Part B of the lease are inseverable from the other provisions of the lease, including the other provisions relating to the basic rental, the whole lease is accordingly invalid and plaintiff's claim should fail.

Goldblatt SC in reply. I

Cur adv vult.

Postea (November 29).

Nicholas AJA: This appeal concerns the interpretation of a clause in an agreement of lease. The parties were Genac Properties Jhb (Pty) Ltd (a J

A company in the General Accident group) as 'the landlord' and NBC Administrators (Pty) Ltd (since re-named NBC Administrators CC) as 'the tenant'. The leased premises consisted of the total lettable area on the second floor of General Building, 110 Jorissen Street, Johannesburg. Clause 3 which was headed 'Period of lease' provided that it should B commence on 1 January 1986 and terminate on 31 December 1990. Clause 5 which was headed 'Rental' stated that the 'rental in respect of the premises shall be as set out in the table below', which provided for rentals increasing from R7 018 in the first year to R9 906,70 in the last year of the lease. The rental was payable monthly in advance to the landlord at 8th Floor, General Building.

C Clause 6 in Part B of the lease reads as follows:

6.1 For the purposes of this clause "the landlord's maintenance and running expenses" means the aggregate of all the landlord's actual and reasonable maintenance and running expenses, after the recovery of such expenses from tenants in the building, in respect of the property and the building in each of the financial years of the landlord, including, without limiting the generality D of the aforegoing, the assessment rates payable in respect of the building and/or the property; any levies of whatever nature imposed in respect of the ownership of immovable property or the improvements erected thereon; the salaries and wages of the landlord's employees in or about or in connection with the building and/or the property, including, without limiting the generality of the aforegoing, security guards, cleaners, parking garage E attendants and manager/supervisor/superintendent; the cost to the landlord of cleaning the building (whether contractual, statutory or otherwise); the premiums payable by the landlord in respect of the insurance of all risks normally covered by owners of immovable property, including loss of rent, public liability and political riot cover on, in connection with or relating to the building for a total cover as the landlord may reasonably determine; the F landlord's costs of maintaining and/or servicing the lifts and/or air conditioning in the building; the costs of electricity consumed on the property and in the building which is not contractually recoverable from tenants; the cost of water consumed on the property and in the building; an amount not exceeding 5% of the aggregate of all of the aforegoing expenses and costs.

G 6.2 With effect from the commencement date the tenant shall pay monthly in advance an amount equal to 11,3% of the landlord's estimate of the monthly maintenance and running expenses for each of the landlord's financial years as notified by the landlord to the tenant from time to time, it being recorded that the tenant's share of the estimated monthly maintenance and running expenses at the date of signature hereof is R1,50 per m^2 per month and that such amount shall be payable pending any variation thereof by the landlord.

H 6.3 Within a reasonable period after the end of each financial year of the landlord, the landlord shall determine the maintenance and running expenses for that financial year and within 30 days after notice thereof has been furnished to the tenant, the tenant shall pay to the landlord any shortfall between the amounts paid by the tenant on account of such maintenance and running expenses and the tenant's shares of such expenses, and vice versa.

I 6.4 . . .
6.5 . . .
6.6 . . .'

On 15 April 1987 the landlord issued a summons against the tenant out of the Witwatersrand Local Division in which it made various claims J including claims for 'maintenance and running expenses as defined in the

agreement of lease'. Further claims were later added by amendment. They A included a claim for damages alleged to have been suffered as a result of the tenant's repudiation of the lease in December 1987.

In para 2(*b*) of its plea the tenant asserted:

'2(*b*) The lease is void for vagueness in that
(i) the identity of the tenant;
(ii) the premises leased; B
(iii) the plaintiff's maintenance and running expenses as defined in clause 6.1; and
(iv) the defendant's share of the plaintiff's maintenance and running expenses payable in terms of clause 6.3,
cannot be determined with reasonable certainty.' C

At the pre-trial conference it was agreed that:

'3(*a*) The only issue to be decided by the Court is whether the lease is enforceable as contended for by the plaintiff or whether it is void for vagueness and invalid as contended for by the defendant in para 3(*b*) (*sic*) of its plea.'

Agreement was also reached on the amount to be awarded to the landlord D if it should be found by the Court that the lease was valid and enforceable. It was agreed finally that the original lease would be made available to the Court at the trial and that no evidence would be led by either party. At the hearing the issues were still further limited to those raised in paras 2(*b*)(iii) and (iv) of the plea.

In his judgment the learned Judge *a quo* held *inter alia* that E

'. . . if the provisions of clause 6 are regarded as provisions relating to the payment of rental . . . these provisions and the whole lease are invalid'.

He made an order dismissing the landlord's claims with costs, including the costs of two counsel. The landlord now appeals with the leave of the trial Court. F

Counsel for the tenant summarised his submissions in the first paragraph of his heads of argument:

'1. It is submitted that clauses 6.1 and 6.3 of the lease are void for vagueness in that the quantification of the individual expenses enumerated in clause 6.1 (is) left entirely in the air and cannot be determined with reasonable certainty. In G addition the amount of such expenses in the final analysis is left to the lessor for it is the lessor which determines "in its sole discretion" . . . precisely which expenses will be incurred and whether or not the lessor acts alone or with third parties with which it deals, the lessee has absolutely no say in the selection of such third parties or the eventual amount of the expenses to be incurred.'

Clause 6.1 is a definition clause. It defines 'the landlord's maintenance H and running expenses' as meaning

'. . . the aggregate of all the landlord's actual and reasonable maintenance and running expenses . . . in respect of the property and the building in each of the financial years of the landlord . . .'.

There follow, 'without limiting the generality of the aforegoing', eight I specific categories of expenses. The list ends with a ninth item—'an amount not exceeding 5% of the aggregate of all the aforegoing expenses and costs'—which is not itself a category of expenses, but is in the nature of a surcharge.

Clause 6.2 provides for monthly payments in respect of the landlord's maintenance and running expenses equal to 11,3% of the landlord's J

estimate of the monthly maintenance and running expenses in respect of the property and the building for each financial year as notified by the landlord to the tenant from time to time. These are provisional payments which are subject to adjustment under clause 6.3.

In terms of clause 6.3 the landlord is required to determine the actual maintenance and running expenses for each financial year, as defined in clause 6.1, and to give notice to the tenant of such determination. The tenant must then pay to the landlord any shortfall between the actual and estimated expenses, or the landlord must pay to the tenant any excess of the estimated expenses over the actual expenses, as the case may be.

It is basic to the tenant's argument that the amounts payable in terms of clause 6 constitute rent. This was contested by counsel for the landlord. He pointed to the fact that the parties had dealt with rental in clause 5 of the lease. In my opinion, however, the answer depends not on what the parties chose in their contract to call rental, but on whether the amounts payable by the tenant in terms of clause 6 are rent within the legal meaning of the word.

Cooper *The South African law of Landlord and Tenant* at 37, gives the following definition:

> 'Rent, *merces*, is the consideration which the parties agree the lessee shall give the lessor for the use and enjoyment of the property let.'

This accords with judicial definitions.

> 'Rent is a *quid pro quo* paid by the lessee for the use of the article let.'

(*Neebe v Registrar of Mining Rights* 1902 TS 65 at 86 *per* Wessels J; see also *Uitenhage Divisional Council v Port Elizabeth Municipality* 1944 EDL 1 at 10).

> 'Die woord "huurgeld" (rent) het 'n bepaalde betekenis. Dit is die vergoeding of beloning wat 'n huurder aan 'n verhuurder betaal of gee vir die gebruik van die verhuurde eiendom.'

(*Nelson v Botha* 1960 (1) SA 39 (O) at 44B–C *per* De Villiers J.)

Usually, a lease provides for rent in one specified amount. In arriving at that amount, the lessor ordinarily takes into account his required return on capital invested and the expenses to be incurred. There is, however, no reason why instead of a provision for rent in a specified amount, the parties should not agree on a dichotomy into separate components.

I am inclined to think that that is what was done in the present lease. Clause 6 deals with the expenses component and clause 5 deals with 'rental'. Together they constitute the *quid pro quo* for the use and enjoyment of the property let. It is not necessary, however, to express a firm opinion on this point, and I shall assume, in favour of the tenant and against the landlord, that the amounts payable by the tenant under clause 6 are a component of the rent.

It is a general principle of the law of contract that contractual obligations must be defined or ascertainable, not vague and uncertain. Cf *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) at 574D–E. More specifically, there can be no valid contract of sale unless the parties have agreed, expressly or by implication, upon a purchase price:

> 'They may do so by fixing the amount of the price in their contract or they may agree upon some external standard by the application whereof it will be possible to determine the price without further reference to them. There can be no valid contract of sale if the parties have agreed that the price is to be fixed in the future by one of them.'

(*Per* Corbett JA in the *Westinghouse* case *supra* at 574C–D.) In *Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd* 1991 (1) SA 508 (A) Hoexter JA said at 514G–H:

> 'It is no doubt a general principle of the law of obligations that, when it depends entirely on the will of a party to an alleged contract to determine the extent of the prestation of either party, the purported contract is void for vagueness. Obvious examples of the application of the principles are afforded by the law of sale. If, for example, it is left to one of the parties to fix the price the contract is bad.'

It was held by the Full Bench of the Transvaal Provincial Division in *Erasmus v Arcade Electric* 1962 (3) SA 418 (T) that a contract to sell for a reasonable price is invalid (see at 419G–420B). There is, however, no unanimity on the point. Differing views have been expressed in decided cases, and in textbooks on the law of sale and other academic writings. See for example Mackeurtan *Sale of Goods in South Africa* 5th ed at 18 ('the law on the point cannot be regarded as settled'); and Kerr *The Law of Sale and Lease* at 27 ('whether or not the formula "a reasonable price" is acceptable is debatable').

The learned Judge *a quo* conceived that he was bound by *Erasmus v Arcade Electric*. He went on to deal with the application of the principle to contracts of lease. He said that

> 'the Roman-Dutch authorities treat the need for certainty (which includes *certum est quod certum reddi potest*) about the rental in leases in the same way as the need for certainty about the price in sales',

and concluded that

> 'the rule in regard to certainty of the rental in contracts of lease is as strict as the rule in regard to the certainty of price in contracts of sale. . . .'

There is no general agreement that a lease for a reasonable rent is invalid. The question is moot. See the discussions by *Kerr* (*op cit* at 174–6) and *Cooper* (*op cit* at 51).

It is difficult to see on what principle a sale for a reasonable price, or a lease for a reasonable rent, should be regarded as invalid. Myburgh J said in *Adcorp Spares PE (Pty) Ltd v Hydromulch (Pty) Ltd* 1972 (3) SA 663 (T) at 668F–G that in his view an agreement to pay a fair and reasonable price was too uncertain to give rise to a valid contract of sale, and he posed a series of questions:

> '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 the ultimate result will depend on the opinion of some undetermined person or persons. What is to happen if they differ?'

But, as Professor Zeffertt pointed out in a note 'Sales at a Reasonable Price' in (1973) 90 *SALJ* 113:

> 'While it is clear law that the price will not be certain if it has either to be fixed by the parties themselves in the future, or by an unnamed third party, . . . it does not follow that there cannot be a sale at a reasonable price: that which can be reduced to certainty is certain and an agreement to pay a reasonable price may be capable of being reduced to certainty if the court is able to determine what is reasonable in the circumstances of a particular agreement.'

A There is authority in this Court for the view that, where there is an agreement to do work for remuneration and the amount thereof is not specified, the law itself provides that it should be reasonable. See *Chamotte (Pty) Ltd v Carl Coetzee (Pty) Ltd* 1973 (1) SA 644 (A) at 649C–D, citing, *inter alia*, *Middleton v Carr* 1949 (2) SA 374 (A). See also *Inkin v Borehole* B *Drillers* 1949 (2) SA 366 (A). In other jurisdictions it is not considered that a contract of sale for a reasonable price is too vague to be enforced. Section 8(2) of the English Sale of Goods Act 1979 states that where the price is not determined as mentioned in s 8(1) the buyer must pay a reasonable price; and what is a reasonable price is a question of fact dependent on the circumstances of each particular case. This was also the rule at common C law. (Benjamin *Sale of Goods* 3rd ed para 179.) And in the United States of America it is stated in Corbin on *Contracts* (para 99) that an agreement to pay a 'reasonable price' is sufficiently definite for enforcement.

It is not, however, necessary to decide the question in this appeal. The reason is that clause 6 does not provide for payment by the tenant of a D reasonable amount in respect of the landlord's maintenance and running expenses. The word 'reasonable' is used in relation to the actual expenses, and its use in that context does not create uncertainty. The actual expenses are readily ascertainable from the landlord's financial records. Whether they are reasonable is also capable of objective ascertainment. The cases E are legion in which awards for damages have included medical expenses reasonably incurred by the plaintiff as a result of physical injury. See Corbett and Buchanan *The Quantum of Damages* vol 1 at 37–8. And where a claim includes the cost of repairing damage caused to a motor car,

> '(t)he wrongdoer is required to pay for the repairs which are rendered necessary in consequence of the damage and it follows, I think, that the plaintiff must prove not F only what repairs are necessary but what the reasonable cost of effecting them would be . . .'.

(*Scrooby v Engelbrecht* 1940 TPD 100 at 102 *per* Ramsbottom J.) In such cases the Courts have experienced no difficulty in applying the concept of a reasonable cost.

G It was argued on behalf of the tenant that clause 6 was invalid on another ground, namely that it left the determination of the amount payable to the discretion of the landlord. The learned trial Judge agreed. He said that an analysis of clause 6.1 showed that, provided expenses were actually and reasonably incurred, the lessor could without reference to the tenant H determine the amounts recoverable under clause 6. The question, which he regarded as crucial, was whether this feature invalidated the lease. He considered that it did:

> 'Thus, whether one concludes that the lessor is ultimately free to determine the amount of the maintenance and running expenses, or that the lessor determines the said amount together with a third party or third parties whom he, without the I consent of the lessee, selects, the result is that legally there is no valid determination of the rental.'

It is a truism that the nature and amount of the expenses incurred in carrying on a business are determined by the person who operates it. See *Port Elizabeth Electric Tramway Co v Commissioner for Inland Revenue* J 1936 CPD 241: '. . . businesses are conducted by different persons in

different ways' (at 245); '. . . one man may conduct his business A inefficiently or extravagantly, actually incurring expenses which another man does not incur . . .' (at 244).

This, however, has nothing to do with the validity of the lease. It is question-begging to say that provided the expenses are actually and reasonably incurred, the landlord can without reference to the tenant B determine the amounts recoverable under clause 6. The first qualification is that the expenses should be actually incurred. The amount of these, it is true, is within the control of the landlord. The second qualification is that such expenses should be reasonable—reasonable, that is, in relation to both the nature of the expenses and their amount. That is something which is to be objectively ascertained and is not subject to the will or whim C of the landlord. It is therefore wrong to say that under clause 6 the landlord determines the amount of the expenses.

The last submission on behalf of the tenant was that the final item in clause 6.1 (which provided for the addition of 'an amount not exceeding 5% of the aggregate of all the aforegoing expenses and costs') left the D determination of the ultimate amount of the expenses component to the discretion of the landlord. This discretion he could exercise 'capriciously without reference to any ascertainable factors or to an external standard' and the clause was in consequence invalid.

The contrary argument by counsel for the landlord was that on a proper E construction the final item meant that the agreed rate for the surcharge was 5%, but that the landlord was free to apply a lower percentage if he wished.

If the item is reasonably capable of the interpretation contended for by the landlord's counsel, that interpretation is to be preferred to one which would render the lease invalid. See *Soteriou v Retco Poyntons (Pty) Ltd* F 1985 (2) SA 922 (A) at 931G–H, where it was said:

> 'The Courts are "reluctant to hold void for uncertainty any provision that was intended to have legal effect" (*Brown v Gould* 1972 Ch 53 at 56–8). Lord Tomlin said in *Hillas & Co Ltd v Arcos Ltd* [1932] All ER Rep 494 (HL) at 499H–I that
> ". . . the problem for a Court of construction must always be so to balance G matters that, without the violation of essential principles, the dealings of men may as far as possible be treated as effective, and that the law may not incur the reproach of being a destroyer of bargains" . . .'.

Adopting this approach, I consider that the construction urged by the landlord's counsel is to be preferred (cf *Public Carriers Association and* H *Others v Toll Road Concessionaries (Pty) Ltd and Others* 1990 (1) SA 925 (A) at 953).

My conclusion is that the lease is valid and enforceable. Consequently effect should be given to para 3(*b*) of the minutes of the pre-trial conference: I

> '3 (*b*) It was recorded that the parties agree that if the Court should find that the lease is valid and enforceable then the plaintiff is entitled to judgment against the defendant in the sum of R120 000 in respect of plaintiff's various claims. This amount shall be fixed and no further interest shall accrue thereon. In the event, however, of plaintiff obtaining judgment against the defendant, plaintiff will be entitled to interest on the amount of J

A R94 665,59 calculated at the rate of interest prescribed in terms of the Prescribed Rate of Interest Act 55 of 1975 from date of judgment to date of payment.'

The appeal is upheld with costs including the costs following upon the employment of two counsel. The order made by the Court *a quo* is set aside B and there is substituted therefor:

'Judgment for the plaintiff for:

(*a*) payment of the sum of R120 000;

(*b*) interest on the amount of R94 665,59 calculated at the rate of interest prescribed in terms of the Prescribed Rate of Interest Act 55 of 1975 from date of judgment to date of payment;

C (*c*) costs including the costs of two counsel.'

Botha JA, Hefer JA, Milne JA and Van den Heever JA concurred.

Appellant's Attorneys: *Werksmans*, Johannesburg; *Israel & Sackstein*, Bloemfontein. Respondent's Attorneys: *Israelsohn-Von Zwiklitz*, Johan- D nesburg; *Goodrick & Franklin*, Bloemfontein.

E

F GENERAL ACCIDENT INSURANCE CO SOUTH AFRICA LTD v XHEGO AND OTHERS

APPELLATE DIVISION

JOUBERT JA, VAN HEERDEN JA, SMALBERGER JA, F H GROSSKOPF JA and VAN COLLER AJA

G 1991 November 18, 29

Motor vehicle accidents—Compensation—Claim in terms of s 8(1) of Motor Vehicle Accidents Act 84 of 1986—Whether injuries '... caused by or arising out of the driving of a motor vehicle ...' H *as intended in s 8(1)—Claimants' injuries (fire burns) caused by petrol bomb attack on bus—Buses having been stoned or petrol-bombed on same route a number of times during previous four days—Route having been closed for some months due to unrest situation and only opened some three weeks before present* I *incident—Sufficiently close link between injuries and driving of bus to conclude that injuries arose out of such driving—Reasonable owner of bus would have realised that real possibility of serious attack on bus on route in question existed—Precautionary measures taken not sufficient—Injuries sustained by claimants due* J *to negligence of owner of bus.*

On 11 October 1986 the respondents sustained serious fire burns when the bus in which A they were fare-paying passengers was attacked with petrol bombs. In an action in terms of s 8(1) of the Motor Vehicle Accidents Act 84 of 1986 for damages for such injuries instituted in a Provincial Division, the appellant, as defendant, pleaded that the injuries were not caused by nor arose out of the driving of the bus as intended in s 8(1) and it was also denied that the owner or driver of the bus had been negligent. It appeared that during the four days prior to the attack in question, 13 buses had been stoned or petrol-bombed along the same part of the route taken by B the bus in which the respondents were passengers, or in that vicinity. The route had for some time during the 1985–1986 unrest not been used by the bus-owner, but the latter had started using that route again from 22 September 1986. It had not been contended in the Provincial Division that the respondents' injuries had been 'caused by' the driving of the bus as intended in s 8(1) of the Act, but the Court found that the injuries arose out of the driving of the bus and held the appellant liable. In an C appeal, the question for decision was whether the respondents had suffered injuries 'arising out of the driving of' the bus as intended in s 8(1) of the Act.

Held, applying ordinary, common-sense standards, that there was a sufficiently close link between the injuries and the driving of the bus to conclude that the injuries had arisen out of the driving of the bus: the bus was not merely being driven when the injuries were sustained, but it was the very driving of the bus along the particular route which elicited the petrol-bombing thereof. D

Dicta in *Wells and Another v Shield Insurance Co Ltd and Others* 1965 (2) SA 865 (C) at 869B–C, 869F–H, 870A–B and 870D–F applied.

Held, further, having regard to the history of attacks on buses along the route in question, that the reasonable bus-owner would have realised that a real possibility of a serious attack on buses on that route existed; and it made no difference whether stones or petrol bombs were used.

Held, further, on the facts, that the precautions taken by the bus-owner had not been E sufficient.

Held, accordingly, that the Court *a quo* had correctly found that the fire burns sustained by the respondents were due to the negligence of the owner of the bus. Appeal dismissed.

The decision in the Cape Provincial Division in *Xhego and Others v General Accident Insurance Co South Africa Ltd* confirmed. F

Appeal from a decision in the Cape Provincial Division (Nel J). The facts appear from the judgment of Van Coller AJA.

B M Griesel for the appellant referred to the following authorities: *South African Railways v Symington* 1935 AD 37 at 44; *Herschel v Mrupe* 1954 (3) SA 464 (A) at 477A–C, 490F; *Hoffmann v South African Railways and* G *Harbours* 1955 (4) SA 476 (A) at 478F; *Petersen v Santam* 1961 (1) SA 205 (C) at 209C–H; *Philander v Alliance Assurance Co Ltd* 1963 (1) SA 561 (C) at 564E–H; *Wells and Another v Shield Insurance Co Ltd and Others* 1965 (2) SA 865 (C) at 868F–H, 869B, 870A–B; *Goabashe v Uniswa* 1966 (1) PH O29 (D); *Khoza v Netherlands Insurance Co of SA Ltd* 1969 (3) SA 590 (W) H at 591F–592H; *Ngedle v Marine & Trade Insurance Co Ltd* 1969 (4) SA 19 (W) at 23A–D; *Van Wyk and Others v Netherlands Assurance Co of SA Ltd and Others* 1971 (2) SA 264 (W) at 269A–C; *Santam Versekeringsmaatskappy Bpk v Kemp* 1971 (3) SA 305 (A) at 332F–333A; *Roos v AA Mutual Insurance Association Ltd* 1974 (4) SA 295 (C) at 299D–300F; *Kemp v Santam Insurance Co Ltd and Another* 1975 (2) SA 329 (C) at 331B–332E; I *Sehire v Central Board for Co-operative Insurance Ltd* 1976 (1) SA 524 (W); *Mfihlo v Port Elizabeth Municipal Council* 1976 (3) SA 183 (SE); *Samson v Winn* 1977 (1) SA 761 (C); *Protea Assurance Co Ltd v Matinise* 1978 (1) SA 963 (A) at 971C–972D; *Pillay v Santam Insurance Co Ltd* 1978 (3) SA 43 (D); *Groenewald v Protea Assurance Co Ltd* 1979 (1) SA 354 (C) at J