REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG LOCAL DIVISION,
JOHANNESBURG

CASE NO. 6836/2013

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

_____ _____
DATE SIGNATURE

In the matter between:

ADVENTURE GOLF BRUMA CC Applicant

And

REDEFINE PROPERTIES LTD First Respondent

RURAL MAINTENANCE (PTY) LTD Second Respondent

JUDGMENT

OPPERMAN AJ

INTRODUCTION

[1] In February 2013 the Applicant had launched a two part application in terms of which it had sought, in Part A thereof, certain interdictory relief on an urgent basis and in Part B, which was to be heard in the normal course, declaratory relief. The parties had come to an interim arrangement regarding the relief sought in Part A thus rendering the urgent part of the application unnecessary in the circumstances.

[2] In Part B, the applicant seeks a declaratory order to the effect that a lease agreement concluded on 17 September 2010 between the applicant (as lessee) and the first respondent (as lessor), prohibits the first respondent from charging the applicant for its actual consumption of electricity, gas and water based on the readings of sub-meters and that it instead requires that the applicant be charged for utilities on a notional, pro-rata basis without reference to the actual consumption as measured by the sub-meters.

COMMON CAUSE FACTS

[3] A written lease agreement was concluded between the Applicant and the First Respondent ("**the lease agreement**"). In terms thereof, the Applicant took occupation of the leased property on 1 August 2010, being the commencement date. From the commencement of the lease agreement, up until about 1 June 2012, the Applicant received monthly statements of account in respect of services, calculated on a 100 square metres area and no amount was invoiced separately in respect of *"common area costs property taxes"*. From 1 June 2012, the Applicant received a secondary bill for electricity and ancillary charges from the Second Respondent, being the entity responsible for the invoicing and collection of monies on behalf of the landlord, the First Respondent.

THE DISPUTED CLAUSE

[4] The Applicant's obligations in terms of the lease agreement relating to additional charges over and above rental, are defined in clause 23.01 and reads as follows:

"23. CHARGES PAYABLE BY THE LESSEE

.01(a) Upon the Lessee taking occupation of the leased premises for whatever purpose it shall be liable for and shall on demand pay:

(i) any charges arising out of the use of gas and water in respect of the leased premises, as well as any charges arising out of or electricity consumed by it in or on the leased premises which shall include electricity consumed by air conditioning unit/s serving the leased premises;

(ii) the basic and service charges in respect of the services referred to in (i) above; and

(iii) the levy, rates or taxes contemplated in 23.02 (if then in force) or a contribution to such levy, rates or taxes, determined on the basis contemplated in 23.02 below.

> *(b) ~~The Lessee's consumption of electricity, gas and water shall be determined in accordance with separate sub-meters~~. If there are no sub-meters the Lessee's consumption of electricity, gas and water shall be calculated on a pro-rata basis, being the ratio which the rentable area of the leased premises bears to the total rentable area of the building.* ***The area being agreed upon is that of the Kiosk which totals 100 square metres.****"*

[5] It is the Applicant's case that on a proper interpretation of the aforesaid clause the First Respondent is not entitled to calculate the consumption of electricity, gas and water by the utilisation of installed sub-meters and is obliged to calculate the consumption of electricity, gas and water on a pro-rata basis calculated on an agreed area of the kiosk of 100 square metres.

[6] The Respondents contend that the failure to initially invoice separately in accordance with the meter readings was an administrative oversight and that they are accordingly entitled to invoice the Applicant based on the actual meter readings.

[7] The Respondents had initially contended that a material dispute of fact existed in relation to whether the sub-meters had been installed subsequent to the conclusion of the lease agreement or whether they had already been installed at the time of the conclusion of the lease agreement. The Applicant contended that it is factually irrelevant whether the sub meters were already installed at the time of the conclusion of the first lease agreement or thereafter. This was so, the argument ran, because the lease agreement provided for a fixed mode of calculating the service charges which fixed mode was recorded in clause 23.01(b) ie that the Applicant's consumption of electricity, gas and water be calculated at the ratio of 100 square meters to the total rentable area of the building.

[8] The nub of the Respondents' defence is that on a proper interpretation of the lease agreement they are entitled to calculate the consumption of electricity, gas and water by means of sub-meters and to charge the Applicant for such consumption accordingly. Respondents contend that where it is common cause (as it is in this instance) that there are in fact sub-meters, clause 23.01(b) has no application.

[9] After the matter was argued I requested counsel to provide supplementary heads of argument on the following: Having regard to, *inter*

alia, the following decisions *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) and *Bath v Bath* (952/12) [2014] ZASCA 14 (24 March 2014), what role, if any, the canons of interpretation as developed in our common law, now play in interpreting agreements. I requested that they address, in particular, the principle formulated in *Pritchard Properties (Pty) Ltd v Koulis,* 1986 (2) SA 1 (AD). I requested argument on the approach a court is to adopt in reconciling the 'new' approach formulated in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) in para [18] with the 'classic' rules of interpretation. I am very indebted to the assistance received from counsel in this regard.

[10] The aforegoing request came about primarily by virtue of applicant's counsel relying on deleted portions of the lease agreement for purposes of interpreting clause 23 and by virtue of Respondents' counsel wishing to have certain matter struck out due to such matter offending the parol evidence rule.

APPLICANT'S ARGUMENT

[11] The Applicant contends that it's construction of clause 23 of the lease agreement is correct, having regard to, inter alia:

11.1. the fact that clause 6, dealing with operating costs, had been deleted in its totality;

11.2. the fact that clause 23.01(a)(i) imposes an obligation on the Applicant to pay charges arising out of the use of electricity, gas and water;

11.3. the fact that the method of determining the aforesaid liability is to be found in clause 23.01(b) as amended by the deletion of the first sentence. Applicant argued that had the clause not been amended by the deletion of the first sentence, the liability would have been determined as per the Applicant's consumption of electricity, gas and water determined in accordance with separate sub-meters.

11.4. this part of the clause was however specifically deleted leaving the method of consumption to be calculated on a pro-rata basis being the ratio which the rentable area of the leased premises bears to the

total rentable area which had been agreed upon to be 100 square meters.

[12] Applicant places much reliance on the deletion of the first sentence of clause 23.01(b). The question which falls for determination is whether a court can have any regard to such deleted portion in interpreting the agreement.

[13] In *Pritchard Properties (Pty) Ltd v Koulis,* 1986 (2) SA 1 (AD) at Cillie AJA held as follows at 9I-J and 10A :

"In my view the clear and uncontradicted circumstance which emerges from the writing itself is that the parties by their deletion of the word and their initialing of the deletion indicated unequivocally that the word deleted was to form no part of this contract and that the clause should be so construed. To draw any further inference from the word and its deletion would be erroneous. The fact that the word could still be deciphered cannot affect the clear and unmistakable indication of the parties' agreement and intention, namely that the word had been expunged and forms no part of the contract."

[14] The question which then falls for consideration is whether the expunged portions of the agreement is matter which should be included in interpreting the agreement ie matter which could well resort under the rubric "context" and which a court would be obliged to consider having regard to the recent developments in our law.

CORRECT APPROACH TO INTERPRETATION

[15] In *Bothma Batho (supra)*, the Supreme Court of Appeal confirmed in para [12] (with reference to the summary in paragraph [18] of *Endumeni (supra)*), that the approach to interpretation summarised in *Coopers & Lybrand v Bryant,* 1995 (3) SA 761 (A) "*is no longer consistent with the approach to interpretation now adopted by South African courts in relation to contracts …"*. The "*new*" approach, which has been followed in a number of subsequent cases,[1] may be summarised as follows.

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[1] See for example *Communicare and Others v Khan and Another* 2013 (4) SA 482 (SCA) at para 31; *Kwazulu-Natal Joint Liaison Committee v MEC for Education, Kwazulu-Natal and Others* 2013 (4) SA 262 (CC) per Nkabinde J; *Strydom v Engen Petroleum Ltd* 2013 (2) SA 187 (SCA); *National Credit Regulator v Opperman & Others* 2013 (2) SA 1 (CC) per Cameron JA (dissenting); *Hubbard v Cool Ideas* 1186 CC 2013 (5) SA 112 (SCA) at para 14; CA Focus CC v *Village Freezer t/a Ashmel Spar* 2013 (6) SA 549 (SCA); *Cape Town Municipality v SA Pension Fund 2014* (2) SA 365 (SCA); *Mansingh v General Council of the Bar and Others* 2014 (2) SA 26 (CC).

15.1. Interpretation is an exercise in ascertaining the "*objective"*[2] "*meaning of the language of the provision itself*" - it is not aimed at determining the intention of the parties, whether common or otherwise, which is an "*unrelated"* concept,[3] that has "*no bearing on the analysis*"[4] and is "*irrelevant*".[5]

15.2. "*Interpretation is a matter of law and not of fact and … is a matter for the court and not for witnesses*".[6]

15.3. The meaning of a provision is determined with reference to its language and in the light of its factual context, which includes what has previously been referred to as "background circumstances" and "*surrounding circumstances"*.[7] Since interpretation is "*one unitary exercise"*,[8] the process requires the court "*from the outset*" to consider the language and context of the provision together,[9] "*whether or not there is any possible ambiguity*".[10]

15.4. The factual context is ascertained by reading the provision having regard to:

15.4.1. the document as a whole; and

15.4.2. the circumstances attendant upon its coming into existence.[11]

15.5. Consideration must be given to the following four aspects:[12]

15.5.1. "*the language used in the light of the ordinary rules of grammar and syntax*", although it must be recognised that words seldom have a single meaning;

15.5.2. "*the context in which the provision appears*" (including the provisions of the "*document as a whole*");

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[2] *Endumeni* (above) para 18.
[3] *Endumeni* (above) paras 20 – 24.
[4] *CA Focus* (above) para 18.
[5] *Bath v Bath* (above) para 15.
[6] *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA) para 39.
[7] *KPMG* (above) para 39; *Bothma-Batho* (above) para 12.
[8] Bothma-Batho (above) para 12.
[9] *Endumeni* (above) para 24; *KPMG (*above) para 16.
[10] *Bath v Bath* (above) para 7.
[11] *Endumeni* (above) para 18.
[12] *Endumeni* (above) para 18.

15.5.3. "*the apparent purpose to which [the provision] is directed"*; and

15.5.4. "*the material known to those responsible for its production".*

15.6. The *"inevitable point of departure*"[13] is the language of the provision and where "*more than one meaning is possible each possibility [i.e. each possible meaning] must be weighed in the light of all these factors*".[14] Where the court "*is faced with two or more possible meanings that are to a greater or lesser degree available on the language used … the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation*".[15]

15.7. It is, however, inappropriate to "*do violence to the language … by placing upon it a meaning of which it is not reasonably capable*"[16] and the language should not be "*unduly strained*".[17] Thus, while context may no longer be sacrificed at the altar of language, a cautionary note should be sounded against overcorrecting by giving context an exaggerated importance in order to distort and strain the language used in a document. The document should be given a meaning of which it is reasonably capable. The language adopted must be respected and some measure of fidelity must be shown towards it.[18]

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[13] *Kwazulu-Natal Joint Liaison Committee* (above) para 128.

[14] *Endumeni* (above) para 18. See also *National Credit Regulator* (above) paras 93, 100 & 104: "elementary meaning demands that we stop short of the extreme expedient of interpreting a provision against its own language".

[15] *Endumeni* (above) para 26.

[16] *Hubbard* (above) para 14.

[17] *Mansingh* (above) para 9.

[18] See Article by Michael Bishop and Jason Brickhill, "'In the beginning was the word': the role of text in the interpretation of statutes" SALJ (2012) 129 at pages 681 – 716. The authors endorse a contextual, purposive approach to statutory interpretation but all forms of interpretation in their view owe some degree of fealty to the words of the law with an interpretation required to be 'reasonably capable'. The Courts, in their opinion, often exceed their interpretive mandate by allowing interpretations at odds and incompatible with the text itself. The authors propose to modify Schreiner JA's two approaches expressed in *Jaga v Donges NO*, 1950 (4) SA 653 (A) at 662-664 and their suggestion is something of a combination of the two options. They suggest a two-stage process. First, judges should set out the possible meanings of a provision with full regard for both text and context. The

15.8. Although extrinsic evidence of a provision's context, purpose and material known to those responsible for its production is admissible, "*one must use it as conservatively as possible*".[19] The reason for this admonishment is clearly to avoid unnecessarily taking up court time and parties' costs in pursuit of extrinsic evidence in cases where a clear answer is provided by the intrinsic evidence such as the document as a whole, the provision's immediate context or its apparent purpose.

15.9. Finally, a sensible meaning should be preferred to one "*that leads to insensible or unbusinesslike results*", or one that undermines the apparent purpose.[20]

THE 'NEW' APPROACH AND THE PAROL EVIDENCE RULE

[16] In *Johston v Leal*, 1980 (3) SA 927 (AD) Corbett JA observed at 942 H – 943B as follows :

"*As has been indicated, the parol evidence rule is not a single rule.*

It in fact branches into two independent rules, or sets of rules: (1) the integration rule, described above, which defines the limits of the contract, and (2) the rule, or set of rules, which determines when and to what extent extrinsic evidence may be adduced to explain or affect the meaning of the words contained in a written contract: see, for example, the exposition by SCHREINER JA in Delmas Milling Co Ltd v Du Plessis 1955 (3) SA 447 (A) at 453 - 5. (For convenience I shall call this latter rule "the interpretation rule".) Neither rule, in my opinion, affects the matter under consideration."

[17] While the "*new*" approach to interpretation referred to herein has clearly abolished one of the "*branches*" of the parol evidence rule i.e. the "*interpretation rule*", which stated that extrinsic evidence was not admissible in order to determine the meaning of a written instrument,[21] it in no way affects the operation of the other "*branch*" of the parol evidence rule, being the so-called "*integration rule*",

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second stage requires the judge to rely on the contextual factors. It would appear that the use of the word "possible" twice by Wallis JA in *Endumeni* (paras 18 and 26) is indicative that the "new" approach to interpretation is consistent with this in substance, if not in form.

[19] *KPMG* (above) para 39.

[20] *Endumeni* (above) para 18.

[21] *Johnston v Leal* 1980 (3) SA 927 (A) at 943A.

which determines the content or (in the words of Corbett JA in *Johnston v Leal*), the "*limits*"[22] of a written instrument.

[18] It is apparent from *KPMG v Securefin*[23] (which was specifically identified by Wallis JA in *Bothma-Batho* as being representative of the "new" approach to interpretation[24] that the integration rule remains good law. See too See *Brisley v Drotsky*, 2002 (4) SA 1 (SCA).

[19] Although the applicant's initial heads of argument stated that "*the terms of the lease agreement are set out in the written document*", it does appear to be the applicant's contention that the lease agreement includes content that was not part of the signed written lease agreement:

19.1. In paragraph 9 of the founding affidavit, the applicant alleges that the "*terms of the agreement of lease*" include the crossed-out portions of clause 23.01(b);

19.2. In paragraph 10.3 of the founding affidavit the applicant alleges that the parties "*agreed to revive*" the leased premises (which it contended was "a common area to the centre") and "*improve the area to the benefit of the ... shopping centre"*; and

19.3. In paragraph 10.5 of the founding affidavit, the applicant alleges that "*it was part of the pre-negotiations to the conclusion of the agreement of lease that the applicant would not need to pay for the entire consumption of water and electricity at the leased premises as these were already a cost to the first respondent for an area not receiving an income".*

[20] Since it cannot be doubted (especially in view of the "*whole agreement*" term contained in clause 32.01 of the lease agreement) that the

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[22] *Johnston v Leal* (above) at 943A.

[23] *KPMG (above)* at para 39. It appears that Harms JA's use of the word "meaning" in this paragraph was erroneous: it is clear from the relevant passage in *Johnston v Leal* (which is the basis of the dictum) that the sentence should more correctly read "[i]f a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its terms". See also *ABSA Technology Finance Solutions (Pty) Ltd v Michael's Bid A House CC and Another* 2013 (3) SA 426 (SCA) at paras 18 – 23; *Kingswood Golf Estate (Pty) Ltd v Witts-Hewinson* 2013 JDR 2722 (SCA) paras 20 – 22.

[24] *Bothma-Batho* (above) at para 11.

parties intended the document to be conclusive as to the terms of the transaction, it is clear that these allegations regarding the content of the lease agreement cannot be accepted and would offend the integration rule.

[21] The unanimous decision of the Appellate Division judges in *Pritchard Properties (supra)* that the deleted portions of a contract cannot be regarded as part of its content must remain good in view of the integration rule.[25]

[22] As noted by Watermeyer JA in *Union Govt v Vianini*, 1941 AD 43 at 47, the integration rule is regarded by the South African Courts as a rule of evidence and allegations that contravene it are inadmissible.

[23] I would grant the application to strike out allegations which seek to alter the content of the lease agreement contrary to the integration rule. I do not intend sifting through the application to strike out, picking out such allegations, but will disregard such evidence in adjudicating this matter as such matter is clearly inadmissible.

THE FACTS: CONTEXT OF THE LEASE AGREEMENT

[24] In the absence of a referral to oral evidence, the relief sought by the applicant is final in nature and the correct approach to the evidence is that the court must determine the matter on the basis of "*those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent*".[26]

[25] Such facts will include:

25.1. The premises leased under the lease agreement ("**the leased premises**") are located in a shopping centre where they are identified as "*shop 51*". The leased premises did not form part of the "*common area*" of the shopping centre as alleged by the applicant.

25.2. In the period prior to the conclusion of the lease agreement, the leased premises were unlet and unoccupied. The first respondent, as owner, was "*paying and absorbing*" the costs associated with the

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[25] *Pritchard Properties (Pty) Ltd v Koulis* 1986 (2) SA 1 (A). The source of disagreement amongst the judges in this case was whether the pre-conclusion alterations to the draft agreement may be taken into account (as context) for the purposes of considering the meaning of the content of the agreement. In casu, Cillié AJA, Trengove and Kotzé JJA all took the view that they could not be taken into account, Jansen JA took the view that they could and Boshoff JA declined to consider the question.

[26] *Plascon-Evans Paints Ltd v Van Riebeeck Paints* (Pty) Ltd 1984 (3) SA 623 (A) at

premises, including the water and electricity costs, and would have had to do so for as long as they remained unlet.

25.3. The applicant concedes that the court should accept as a matter of fact that sub-meters were already installed at the time of the conclusion of the lease agreement, and requests that the matter be decided on this basis.

25.4. There were several meetings between representatives of the applicant and the respondent prior to the conclusion of the lease agreement.

25.5. "*Part*" of these negotiations related to whether applicant "*would not need to pay for the entire consumption of water and electricity … as these were already a cost to the first respondent for an area not receiving income*", but I do not find for the reasons advanced herein before, that an actual agreement was reached in this regard.

25.6. Prior to the conclusion of the lease agreement and as "*part of the negotiation process*", Mr Lombard, on behalf of the applicant, signed an "*offer to lease*" the leased premises. This document:

25.6.1. "*specifically recorded that the lessee shall be responsible for the payment of electricity, water/sewerage and refuse charges*" during the "*period of beneficial occupation*" prior to the commencement of the lease; and

25.6.2. stipulated that the lessee would be liable for "the pro-rata or metered cost of electricity, water, gas, sewerage and refuse including the basic and service charges in respect of these services and other services consumed by it in or on the leased premises.

25.7. It is apparent that a draft version of the lease agreement was then prepared, certain portions of which were crossed out prior to the signature of the document

25.8. Following the conclusion of the lease agreement, the applicant was billed no amount at all in respect of water prior to March 2012 and no amount at all in respect of electricity prior to June 2012. After these

dates, the respondents sought to bill the applicant on the basis of the sub meter readings.

25.9. Before concluding this section on the relevant factual context, it must be emphasised that although the respondents were not able to dispute the allegation (which was within the applicant's knowledge) that it was a "*key and overriding factor*" in the applicant's decision to conclude the lease that the first respondent was "*currently paying and absorbing the costs of the utilities*" for the premises, this allegation is irrelevant and inadmissible. This is because contractual interpretation involves the determination of the objective meaning of the agreement that was actually concluded, and not of one (or even both) of the parties' subjective intentions, understanding and beliefs. As such, the allegations are disregarded.

THE MEANING OF THE PROVISION WHEN READ IN CONTEXT

[26] According to Wallis JA in *Endumeni (supra)*, *"… where more than one meaning is possible each possibility must be weighed*" in view of the "*language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production"*

The language used, in the light of the ordinary rule of grammar and syntax

[27] The "*inevitable point of departure*"[27] is the text of the clause sought to be relied upon and interpreted, namely clause 23.01:

"If there are no sub meters the lessee's consumption of electricity, gas and water shall be calculated on a pro rata basis, being the ratio which the rentable area of the leased premises bears to the total rentable area of the building. ***The area being agreed upon is that of the Kiosk which totals 100m2."***

[28] On a plain grammatical reading, the phrase "*If there are no sub meters*" in clause 23.01(b) operates as a conditional qualifier. It is only in circumstances where the condition is met (i.e. that there are no sub-meters) that the lessee's consumption must be calculated on the *pro rata* basis.

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[27] *Endumeni* (above) at para 18.

[29] Those are however, not the facts of this case. It is common cause that there are sub-meters, that they have been installed for some time and that they are operational. Indeed, the applicant concedes that it is irrelevant whether the sub-meters were already installed at the time of the conclusion of the lease agreement and accepts, for purposes of the application, that this was indeed the case.

[30] For as long as there are such sub-meters, the requirement to calculate the charges on the pro-rata basis contemplated in clause 23.01(b) simply does not arise, and the residual provisions of the lease agreement are relevant.

[31] Of overriding relevance in this regard is clause 23.01(a) of annexure A, which requires that the applicant (as lessee):

> "… *shall be liable for and shall on demand pay: -*
>
> *(i) any charges arising out of the use of gas and water in respect of the leased premises, as well as any charges arising out of all electricity consumed by it in or on the leased premises which shall include electricity consumed by any airconditioning unit/s serving the leased premises.*
>
> *(ii) the basic and service charges in respect of the services referred to in (i) above …"*

[32] The applicant's contention that the amount payable for the services should be calculated on the pro-rata basis (and without reference to the applicant's actual "*use*" or "consumption") even though the condition in clause 23.01(b) is not met, is at odds with the clear and unambiguous ordinary grammatical meaning of the lease agreement as concluded.

[33] It would not be absurd for a lease agreement to require a tenant to pay for its actual consumption of electricity, water or gas. Where the agreement does not provide for a method to establish such consumption, it is open to the landlord to do so by reference to sub-meters. In this particular case, the specific reference in clause 23.01(b) to the possibility that sub-meters might exist places it beyond doubt that the parties contemplated that the utility charges would be calculated with reference to such sub-meters if they existed (which they do).

[34] The meaning the applicant seeks to ascribe to this clause is as follows:

"If there are sub meters the lessor shall not be entitled to calculate the lessee's consumption of electricity, gas and water by utilisation of such sub meters, but shall be bound and obliged to calculate such consumption on a pro rata basis, being the ratio which the rentable area of the leased premises bears to the total rentable area of the building. ***The area being agreed upon is that of the Kiosk which totals 100m2.****"*

[35] On a plain reading of the clause, the requirement to calculate the applicant's consumption on the pro-rata basis only arises in circumstances where "*there are no sub-meters*".

[36] This is simply not the case in the current matter. Not only is it common cause that there "*are*" sub-meters (i.e. at the time that the respondents seek to charge the applicant for its consumption), the applicant concedes that the court should accept as a matter of fact that they were already installed at the time of the conclusion of the lease agreement, and requests that the matter should be decided on this basis.

[37] The language of the clause relied upon by the applicant contains no textual support for interpretation contended for by it. Indeed, the text of the clause specifically states that it applies to factual circumstances that simply do not arise in the current matter.

The context in which the provision appears

[38] While it is accepted that nothing in clause 23.01(b) or any other clause of the lease agreement prevents the first respondent (if it so chooses) from charging the applicant on the pro-rata basis in circumstances where sub meters are installed, that is not the question which the court is required to answer. Instead, the question is whether respondents are compelled by the lease agreement to do so and are prevented from charging on the basis of actual consumption. This is not the case. In fact, the contrary is true: the respondent is under no compulsion as to the method of charging when there are sub meters. It is only when there are not such sub meters that any such compulsion or prohibition arises.

[39] The primary purpose of the lease agreement is to regulate the terms upon which the applicant leases "shop 51" from the first respondent on a commercial basis. There can be no suggestion that this purpose supports either of the competing interpretations in this matter.

[40] As may be expected, an important secondary purpose of the lease is to regulate the parties' respective obligations in relation to the payment for utilities, including water and electricity.

[41] This purpose is advanced by means of at least two other clauses in the lease which expressly relate to the applicant's duty to pay for utilities on the basis of its consumption:

Clause B.01 : "Notwithstanding [that the commencement date of the agreement is 1 August 2010], the lessee shall be given beneficial occupation of the premises from 1st April 2010 until commencement. All terms and conditions of the lease shall apply save for the payment of basic rental, Clause C and rates and taxes, Clause G. It is specifically recorded that the lessee shall be responsible for the payment of electricity and water and other charges as from the date of beneficial occupation".

Clause 23.01(a) "Upon the lessee taking occupation of the leased premises for whatever purpose it shall be liable for and shall on demand pay:-

(i) Any charges arising out of the use of gas and water in respect of the leased premises, as well as any charges arising out of all electricity consumed by it in or on the leased premises which shall include electricity consumed by any air-conditioning unit/s serving the leased premises.

(ii) The basic and service charges in respect of the services referred to in (i) above …".

[42] Nothing in these clauses prevents the first respondent (if it wished) from charging the applicant on the basis of its actual consumption of utilities. It would be perfectly entitled to do so. Not only is the word "*consumed*" used repeatedly, a distinction is drawn between "*basic*" and service "*charges*". In the context of the clause, this distinction can only refer to those charges which remain constant every month on the one hand and those charges which vary as a result of the changes in actual consumption on the other.

The apparent purpose to which the provision is directed

[43] The fact that clause 23.01(a) sets out a "default" position that allows the first respondent to choose the manner in which it may calculate the applicant's consumption (and for which the applicant is liable to pay) gives an insight into the specific purpose of clause 23.01(b).

[44] Clause 23.01(b) operates as an exception to the default position: In certain defined circumstances (i.e. if there are no sub meters), the first

respondent does not have an option – it is required to calculate the consumption in a particular manner.

[45] The inclusion of this exception in clause 23.01(b) is not surprising. In the absence of meters, the calculation of the applicant's consumption (for which, it is common cause, it is liable and must be charged under clause 23.01(a)) would be open to speculation and would most probably give rise to endless disputes between the parties as to the actual consumption.

[46] The clear purpose of clause 23.01(b) is therefore to avoid disputes between the parties regarding the applicant's consumption of water and electricity in circumstances where there is not an objective means of measuring such consumption.

[47] That purpose is irrelevant in circumstances where there is an objective means to measure the applicant's consumption.

The material known to those responsible for the provision's production

[48] In considering "*the material known*" at the time of the conclusion of the lease, it is significant that there appears to have been some uncertainty about whether sub meters were or were not installed in relation to the leased premises. This confusion is evident from -

48.1. The respondents' evidence that although it turned out that electricity sub meters had been installed prior to the conclusion of the contract, the applicant's consumption was "*erroneously*" not calculated in accordance with their readings; and

48.2. The fact that, even in its replying papers, the applicant makes the factual concession but does not pertinently admit the respondents' contentions.

[49] The removal of the first sentence of clause 23.01(b) is entirely understandable in the light of this uncertainty: if it had not been crossed out, the first respondent would have imposed upon itself an obligation (and not merely be entitled) to install separate sub meters to measure consumption.

[50] It is true that both parties were aware prior to the conclusion of the lease that the first respondent was "*currently*" (i.e. immediately prior to the conclusion of the agreement) "*absorbing*" the cost of utilities on the leased premises. This, however, gives no contextual support to the interpretation

that the applicant contends for in the light of the fact that the only reason why this was so was the fact that the premises were unlet and unoccupied.

[51] The remaining evidence on the papers regarding the knowledge of the parties at the time of the conclusion of the lease agreement relates to the negotiations that took place. The evidence in this regard favours the respondent's interpretation of the contract:

51.1. Firstly, given that the question of whether the applicant "*would not need to pay for the entire consumption of water and electricity"* was specifically discussed, it would be expected that the parties would take care to carefully record such an agreement if it was ultimately reached.

51.2. Secondly, the fact that Mr. Lombard had actually signed a lease for the premises (albeit one incorrectly identifying the parties) which provided that the lessee would be liable for "*the pro-rata or metered cost of electricity, water, gas, sewerage and refuse …"* demonstrates that he accepted that the landlord would be entitled to charge on the basis of sub meters in circumstances where they were installed.

The conduct of the parties following the conclusion of the contract

[52] The applicant was at no stage during the currency of the lease agreement charged for water and electricity on the basis that it contends is required by the agreement and that it was latterly charged on the basis of its actual consumption as per the sub-meters. This contextual evidence regarding the parties' behaviour following the conclusion of the contract favours the respondents' interpretation of the contract. At the very best for the applicant it is a neutral fact.

CONCLUSION

[53] I conclude, that the applicant has failed to show that clause 23.01(b) of Annexure A to the lease agreement prohibits the first respondent from charging the applicant for its actual consumption of electricity, gas and water on the readings of sub meters.

ORDER

The application is accordingly dismissed with costs.

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I OPPERMAN

Acting Judge of the High Court

Heard: 20 March 2014
Additional heads requested: 15 April 2014
Additional heads received: 23 May 2014
Judgment delivered: 02 September 2014
Appearances:
For Applicant: Adv BE Gradidge
Attorneys: Dadic Attorneys
For Respondent: Adv R Moultrie
Attorneys: Trevor Swartz Attorneys