KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

REPORTABLE
Case No: AR666/2009

In the matter between:

SOLVISTA INVESTMENTS (PTY) LTD APPELLANT

vs

SASOL FIBRES (PTY) LTD RESPONDENT

APPEAL JUDGMENT

MADONDO J

Introduction.

[1] This is an appeal from the judgment of Msimang J (as he then was) dated 6 July 2009, finding for the respondent on the main action with costs against the appellant. At the Court *a quo* the appellant lodged an application for leave to appeal which was refused. With the leave of the Supreme Court of Appeal the appellant has appealed to this Court. Ms Lennard appeared for the appellant and Mr Ungerer for the respondent.

Parties

[2] The appellant is Solvista Investments (Pty) Limited (a defendant in the Court *a quo* on the main action), a company with limited liability duly incorporated in accordance with the company laws of the Republic of South Africa with its business address at 2 Joyner Road, Prospecton, Durban, KwaZulu-Natal.

[3] The respondent is Sasol Fibres (Pty) Limited (a plaintiff in the Court *a quo* on the main action), a company with limited liability duly incorporated in accordance with the company laws of the Republic of South Africa with business address at 1 Sturdee Avenue, Rosebank, Johannesburg, Gauteng Province.

Factual Background.

[4] On 29 September 2003 and at Johannesburg the parties entered into a written sale agreement in terms of which the respondent sold to the appellant the immovable property described as Portion 48 of Durban Airport No. 14263 in extent of 9,71889 hectares (the property) for R7 500 000,00 which was payable upon registration of transfer of the property.

[5] The appellant took occupation of the property on 1 October 2003. However, the transfer of the property was only effected in June 2004. Prior to the transfer of the property the appellant was in terms of the agreement required to pay occupational interest as rental in the amount of R71 875,00 per month.

[6] It was agreed between the parties that the risk of the property, and the liability to pay all rates, taxes and other outgoings would pass to the appellant on the date of transfer. The benefit of the property including the right to receive all rents and other income (if any) would likewise pass to the appellant on the date of transfer.

[7] According to the respondent the appellant failed to pay occupational rental for the

months of January to May 2004. In July 2004 the respondent sued the appellant for the payment of the sum of R359 375,00 as an arrear occupational rental for the period calculated at the rate of R71 875,00 per month.

[8] In its plea to the Plaintiff's Particulars of Claim, the appellant admitted liability to pay the respondent occupational interest as rental. However, it disputed that the occupational interest payable by it to the respondent was R71 875,00 per month.

[9] It then alleged that the respondent was liable for all expenses in respect of the property, such expenses included but not limited to the costs in respect of security, garden services, general cleaning, fire protection and other related maintenance expenses, in compliance with clause 5.2 of the written agreement.

[10] Further, the appellant averred that it had paid an amount of R215 625,00 towards occupational rental and that it had also paid the amount of R271 227,66 on behalf of the respondent in respect of services rendered in relation to the property. It then claimed that the respondent should indemnify it for the expenses incurred in respect of the property. After setting off the amount it had paid on behalf of the respondent, a balance of R327 358,56 remained as the amount which was then due, owing and payable by the appellant to the respondent.

[11] Having adjusted its account the appellant in its counterclaim tendered the payment of R48 330,90 in full and final settlement of the respondent's claim against it.

[12] At the trial, it was common cause between the parties that the appellant expended the sum of R271 227,66 on various services, provided to the property over the period of six months, relating to security, gardening, general cleaning , fire protection and other maintenance services.

[13] However, the respondent contended that it was not liable for the aforesaid amount on the basis that the appellant was entitled to set off certain amounts incurred by it in respect of security services, garden services, general cleaning, fire protection and maintenance during the period December 2003 to May 2004, totaling R271 227,66.

[14] The respondent accepted the appellant's calculation of occupational rental and it then became common cause that the balance outstanding was R327 358,56. Also, the respondent accepted liability for the counterclaim in the amount of R7 500.00.

[15] In consequence thereof, the only issue the Court *a quo* had to determine was whether the expenses the appellant incurred in respect of security, gardening, general cleaning, fire protection and maintenance services constituted "other outgoings" within the meaning of clause 5.2 of the written agreement.

[16] The Learned Judge *a quo* construed the expression "other outgoings" as confined to rates, taxes or a statutory duty. Giving judgment in favour of the respondent the Learned Judge said:

> "The golden thread therefore running through the specific words preceding the general word *in casu* is that the "rates and taxes" are exacted by and for the support of a government, a characteristic which is missing in respect of the types of expenditures in respect of which the defendant wishes to hold the plaintiff liable. It is for this reason that I have been driven to the conclusion that those expenditures fall outside the purview of the word "outgoing" as contemplated by the parties in clause 5.2 and therefore that the plaintiff cannot be held liable for the same."

[17] A difference of opinion had arisen between the parties as to whether according to the true intent and meaning of the sale agreement the respondent was liable to pay the amounts of money the appellant expended on the security, gardening, general cleaning, maintenance and protection services in respect of the property.

[18] It has been contended on behalf of the respondent that it was liable only for such outgoings as related to rates and taxes or any other charge that was required by any authority or law and which was necessary for the transfer of the property.

[19] The answer to the question depends entirely upon the construction to be placed on clause 5.2 of the agreement.

[20] The principle of interpretation laid down in *Van der Merve v Jumper Deep Ltd 1902 TS 210* is that the intention of the parties to a contract should be gathered solely from the language used by them. The main object is to ascertain what the parties intended. In construing a document effect should, as far as possible, be given to every word and phrase which has a

sensible meaning.

[21] It is also a firmly established rule that where the persons have entered into a formal written agreement, their intention must be deduced from the writing, and from that alone, if the language used is clear and unambiguous effect must be given to it. It must be presumed that the parties knew the meaning of the words used. See *Consolidated Company Bultfontein Mines Limited 1910-17 GWLD 533,* at page 550 and *Scottish Union and National Insurance Co. Ltd v Native Recruiting Corporation Ltd 1934 AD 458 at 465-6.*

[22] In construing a written contract the court must give effect to the grammatical and ordinary meaning of the words used therein. In *Scottish Union case, supra,* at 465, ***Wessels CJ*** (as he then was) said the following:

> "In ascertaining the meaning we must give effect to the words used by the parties their plain, ordinary and popular meaning, unless it appears clearly from the context that both parties intended them to bear a different meaning. If therefore, there is no ambiguity in the words of the contract, there is no room for a more reasonable interpretation than the words themselves convey. If, however, the ordinary sense of the words necessarily leads to some absurdity or to some repugnance or inconsistency with the rest of the contract, then the court may modify the words just so much as to avoid that absurdity or inconsistency but not more …".

Interpretation of Clause 5.2 of the Written Agreement.

[23] Clause 5.2 of the agreement reads:

> "The risk in and to the property, and liability to pay all rates, taxes and other outgoings, shall pass to the purchaser on the date of transfer. Current rates and

> taxes shall be adjusted between the parties pro rata at the date of transfer. The benefit of the property, including the right to receive all rents and other income (if any) shall – likewise pass to the purchaser on the date of transfer."

[24] This Court must receive the construction which the language of the clause will permit, and which best effectuates the intention of the parties to be collected from the whole of the agreement.

[25] The words "the risk in and to the property" relate to the security and protection of the premises and the buildings. The risk might involve the insuring of the property and which was the responsibility of the respondent until transfer of the property. This is evidenced by clause 16 of the Lease Agreement between the respondent and Dryden Combustion Company (Pty) Ltd (Annexure "B") which provides that the insurance of the structure of the building would be the responsibility of the landlord and that the tenant would be responsible for the insuring of the contents of the premises. In terms of clause 11.2 of the said lease agreement the maintenance of the plumbing system in the building would also be the responsibility of the landlord.

[26] In the circumstances, it is reasonable to conclude that the seller and the purchaser of the commercial property would contemplate the expenses which were incurred regularly in respect of the property. The arrangements would then be made for the payment thereof until the registration of transfer of the property. This, in my view, provides sufficient proof that it was also the intention of the parties to provide for the payments of other expenses than rates and taxes.

[27] The first sentence of the clause under consideration continues to read:

> "… and liability to pay all rates, taxes and other outgoings, shall pass to the purchaser on the date of purchase."

[28] The words "rates" and "taxes" are not understood in the widest possible sense to cover all other expenditures relating to property. The Oxford English Dictionary Volume vii (Oxford: at Clarendon Press) defines the word "rate" as the value (of money, goods, etc.) as applicable to each individual piece of equal quantity. It also defines it as a standard value assigned to each class of article, and duty paid in accordance with this.

[29] The word "tax" is defined in the Oxford English Dictionary Volume xi, as compulsory contribution to the support of government, levied on persons, property, income, commodities, transactions, etc, now at fixed rates, mostly proportional to the amount on which the contribution is levied.

[30] The words "rates, taxes, assessments and duties" only apply to recurring charges. See *Farlow v Stevenson [1900] 1 CH. 128 at 136.*

[31] The term "taxes" in English language is used as an umbrella word for all charges, assessments, impositions, contributions, burthens, duties, levies, tariffs and services excluding all other general expenditures in respect of the property. See *Oxford English Dictionary Volume xi page 119; Tidswell v Wintworth [1867] LR20 at 326* and see also section 1 of the Provincial Tax Regulation Process Act no.53 of 2001 and section 75A of the Local Government:

Municipality Systems Act no. 32 of 2000.

[32] The word “other” is defined in the South African Concise Oxford Dictionary (Edited by the Dictionary Unit for South African English: Oxford University Press) as used to refer to a person or thing that is different from one already mentioned or known; that is distinct from, different from or opposite to something or oneself.

[33] The use of the word “other” in conjunction with the word “outgoings” in the clause under consideration imports that the outgoings contemplated were not *ejusdem generis* with specific words “rates” and “taxes” referred to in the clause.

[34] In the second sentence of the clause, the parties omitted the inclusion of the word “outgoings” and that, in my view, is an indication that the parties did not intend the word to form part of the preceding words “rates” and “taxes”.

[35] In addition, only “current rates and taxes” could be adjustable on a pro rata basis between the parties on the date of transfer. This puts it beyond doubt that “other outgoings” did not form part of the words “rates and taxes” specifically mentioned in the first and second sentences of the clause.

[36] The word “outgoings” originated from English Law. It was inherited into our legal system and is frequently used to refer to expenses relating directly to the property or premises.

[37] In South Africa the word "outgoings" has not been the subject of much judicial controversy. The only decided authority in point is *Consolidated Company Bultfontein Limited v De Beers Consolidated Mines Limited, supra.* In this case the court was asked to decide whether or not the income and dividend taxes should be held to include "duties, rates, taxes and other outgoings" which were to be paid by the defendant company or in respect of which it would indemnify the plaintiff company in terms of the written agreement. The court found that since both the income tax and the dividend tax were taxes on the profits of the plaintiff company in respect of its business and that as such they did not constitute "duties, rates, taxes and other outgoings' which were to be paid by the defendant company in terms of clause 4 of the written agreement. The court also held that the taxes were payable by the plaintiff company and that it was not entitled to claim any indemnity from the defendant company in this respect.

[38] Since in this case the court did not determine the meaning of the word "outgoings" and the extent of its application, for the ascertainment of its true meaning, the extent of its application and for its proper construction recourse must be had to the well known authoritative English dictionaries and English decided authorities in point.

[39] The South African Pocket Oxford Dictionary (3rd Edition) Impression published by Oxford University Press south Africa (Pty)Limited 2006 defines the word "outgoing" as the money that has to be spent regularly.

[40] South African Concise Oxford Dictionary defines it as one's regular expenditure. The Oxford English Dictionary defines "outgoing" as money which goes out in a way of expenditure,

outlay expenses and charges.

[41] In *Crosse v Raw (1874) LR90 EX 209 at 212* the word "outgoing" was defined as something which has gone out, an expense which the tenant has been at in respect of the premises, an expense imposed on him.

[42] South African concise Oxford English Dictionary defines "expenses" as costs incurred in the performance of a job or task or something on which money must be spent.

[43] The word "charges" referred to in the definition of the word "outgoing" by the English Oxford Dictionary covers all taxes, rates, duties levies, assessments, impositions, contributions, burdens, and services which are taxed, rated levies, assessed or imposed on the property or in respect of the property. See *Provincial Tax Regulation Process Act and the Local Government Municipal System, supra.*

[44] On the contrary, expenses are expenditures other than charges that are incurred by the owner or occupier in relation to the property. See *Crosse's case, supra.*

[45] The term "outgoing" has been held to be of very wide import and including not merely rates, taxes, repairs and ordinary expenses though of a capital nature of works executed by local authorities under their sanitary and other expenses which are recoverable from the owner and are also, in general charged on the property. See *34 Halsbury's Laws 3rd Edition, and also Saunders (ED) Words and Phrases, Legally Defined (1969) 2ed Butterworths' London.*

[46] Therefore, it follows that the word "outgoing" cannot be confined to rates, taxes or a statutory duty. See *Associated Newspaper Limited and Corporation of the City of London [1916] 2AC 429 at 461.*

[47] In re *Duke of Cleveland, Wolme v Forrester [1894] 1CH 164,* it was held that the word "outgoing" ought not be construed in such a case as confined to rates, taxes, tithes, rent charge, and other outgoings (if any) which were recoverable by process of law as against the premises out of which rents were claimable.

[48] The real question to be decided *in casu*, is whether the services paid for by the appellant fall under the description of "other outgoings" the respondent undertook to pay. The appellant must stand or fall by the expression "other outgoings" and must satisfy the Court that the services provided to the property were contemplated and included in the expression as used in clause 5.2 of the agreement.

Expression "other outgoings"

[49] In order to arrive at the intention of the parties it is necessary to consider and interpret the expression "other outgoings" used in the clause. The word "outgoings" must be interpreted according to the natural and ordinary sense of the language used in the clause under consideration unless the context clearly shows that it was used in a different sense. Effect must also be given to every word in the clause. See *Kangara Holdings (Pty) Ltd v Minister of Water Affairs [1998] 3 All SA 227 {SCA), 1998(4) SA 530 (SCA), and National Screen Print (Pty) Ltd v*

Minister of Finance 1978(3) SA 501 (C) 506B.

[50] The present case is one to which the golden rule of interpretation applies. The "golden rule" of interpretation is that the language in the document is to be given its grammatical ordinary meaning, unless this would result in some absurdity or some repugnancy or inconsistency with the rest of the instrument. See *Principal Emigration Officer v Hawabu and another 1936 AD 26 at 31, Scottish Union and National Insurance Co. Ltd case, supra, at 465-6, Kalil v Standard Bank of South Africa Ltd 1967(4) SA 550 (A) at 556D.*

[51] The correct approach to the application of the "golden rule" of interpretation is fully set out in *Coopers and Lybrand and Others v Bryant 1995(3) SA 761(A) at 767A-E* and it can be summed up as that after having ascertained the literal meaning of the word or phrase in question regard must be had to:

(a) the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract;

(b) the background circumstances which explain the genesis and purpose of the contract, i.e. to matters probably present to the minds of the parties when they contracted.

[52] Extrinsic evidence regarding the surrounding circumstances must be applied when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties showing the sense in which they acted on the

document save direct evidence of their own interpretation. See *Delmas Milling Co. Ltd v du Plessis 1953(3) SA 447(A) at 454 G-H and 455A; Van Rensburg en Andere v Tante en Andere 1975(1) SA 279(A) at 305 C-E.*

[53] The weight of English decided authorities has shown that the word "outgoing" is a word of wide ambit and that it must be widely construed to include not merely rates, taxes and assessments imposed on the property but also insurance premiums, mortgage instalment repayments, repairs, utilities housekeeping and house hold expense. See *Midgley and Another v Coppock (1879); re Duke of Cleveland, Wolmer, supra, Dependable Upholstery Limited v Brasted (Mckenzie)Third Party [1931] 1KBD 29; Re Jacobs and Steadmans Contract [1942] All ER 195; Chamberlain v Chamberlain [1974] 1 All ERCA 3 and Jones v Kernott [2010] 3 All ER 423.*

[54] All this demonstrates that the word "outgoing" is larger than the words "rates, taxes" specifically referred to in the clause under consideration. When a word of general import is used the doctrine of *ejusdem generis* does not apply. See *Arding v Economic Printing and Publishing Co. 79 LT 420 at 622.*

[55] The word "outgoing" in its widest sense may cover even more than what the parties to an agreement could possibly have contemplated. The word "outgoing" has been held capable of a wider meaning than words such as "rates, taxes and assessments" which are only applicable to periodical recurrent charges in respect of the premises. See *Foulger v Arding [1902] 1KB 702-703 at p707.*

[56] The words “rates, taxes” establish and complete the genus of all charges, duties, impositions, levies and tariffs on the property in question.

[57] The object in using the expression “and other outgoings” in the clause under consideration was to make it clear that the expression was intended to include all other expenditures incurred in relation to the property which were not specifically mentioned in the clause. Accordingly, the word “other” does not extend some case of *ejusdem genesis* with the proceeding words “rates, taxes”.

[58] The expression “and other outgoings” immediately follow the specific words “rates, taxes” and this shows that the parties intended to use it in its widest possible sense. See *Peter v Minister of Law and Order 1990 (4) SA 6(E) at 10B.*

[59] The object in using the expression “and other outgoings” was to make it clear that the clause was intended to exclude rates, taxes and any other charges of any kind which would become payable after the transfer of the property.

[60] As a corollary to the right of ownership and the right to receive rent, the respondent was duty bound to secure, protect, maintain and to keep the property in an acceptable condition and in a state fit for rent and it was required to bear and pay such regular expenditures until the transfer of the property to the appellant. It, therefore, follows that the said regular expenditures were in the contemplation of the parties and thereby falling within the purview of the written agreement. This is evident from the testimony of Tisdal

(respondent's project manager) that the outgoing expenses were to be paid by the respondent until the transfer of the property. In the reconciliation statement dated 15 June 2004, the expenses relating to security, garden services, general cleaning, fire protection and maintenance are itemized and classified as outgoing expenses.

[61] The taxes paid by the owner of the property in respect of his or her ownership are not incidental or *ejusdem genesis* with the expenses of management. See *Glasgow Corporation [1898] AC 631 at 640.*

[62] The expression in question intended to include all other expenditures in relation to the property other than rates, taxes and charges of any kind which might be imposed on the property after the transfer of the property though were not *ejusdem genesis* with rates and taxes which existed on the date.

[63] The expenses relating to security, gardening, general cleaning, maintenance and protection of the property may not fairly come within the meaning of rates, taxes, assessments or impositions payable by the owner or the occupier in respect of the property.

[64] The expression "other outgoings" did not intend to cover rates and taxes but it was inserted in order to cover "other" expenses viz. those relating to security, fire protection, general cleaning, gardening and maintenance of the property which were on the date of the agreement regular expenses payable by the respondent. It therefore stands to reason that the only reasonable inference to be drawn in the circumstances is that these expenses were in the

contemplation of the parties. In the premises, the parties were reasonably expected to provide for the payment of expenses other than rates and taxes.

[65] The expenditure incurred by the appellant was connected with the ordinary occupation of the premises. The work has, in fact, been done and paid for. The expenses incurred by the appellant, in paying for such services, were supposed to have been paid by the respondent as the owner. The appellant did not have the right to deduct the impositions and the payments it had made for the services rendered on the property from its rental. The appellant is entitled, as it has paid for such services, to recover from the respondent.

[66] The parties made an agreement in perfectly clear and unambiguous terms that apart from the rates and taxes, the respondent would bear and pay all "other outgoings" until the registration of transfer of the property. I therefore, see no ground whatever for thinking that the word "outgoings" as used in the clause under consideration is intended to be used other than in its ordinary general meaning and that it must be confined to rates and taxes which might be imposed on the property. See *Tubbs v Wynne [1897] 1 QB 74 at 77-80; Stockdale v Ascherberg [1904] 1KB 447 CA at 449-50.* This cannot be the only meaning attached to the word "outgoing".

[67] In my view the expression "other outgoings" ought to be construed in the larger and popular sense as including every expense in relation to the property which in the ordinary course of occupation and management would be required in order to maintain, protect, secure and to keep it in a fit state for rent. See *re Duke of Cleveland Estates, Wolmer (Viscount) v*

Forrester (1894) 1CA, 164.

[68] The expenditures in relation to security, gardening, general cleaning, maintenance and protection services were properly incurred and reasonably necessary to keep the condition of the property at an acceptable standard. See also *Trust Company of Australia Ltd v Skiwing (Pty) Ltd (2006) 68 NSWLR366; [2006] NSWCA 387. Skiwing (Pty)Ltd vTrust Company Ltd (RLD) [2010] NS WAD TAP73 paragraph 5.*

[69] According to Abdoola, the garden services, clearing of the vegetation and general cleaning were purely done in order to keep the property in a presentable state for the lessees. There was a lot of vegetation growing on the premises and it needed continuous maintenance. There was also a water pipe burst which had to be fixed and the sprinkler system to be maintained regularly.

Conclusion

[70] Prior to registration of transfer of the property the respondent had, apart from the payment of rates and taxes, a duty to pay the expenses relating to security, gardening, general cleaning, fire protection and maintenance of property.

[71] The weight of decided authorities supports the view that the word “outgoings” is quite wide to cover all expenses incurred in relation to the property. The word “outgoings” was therefore not intended to cover rates and taxes but all other expenditures incurred in relation to the property. Accordingly, it follows that the expression “other outgoings” includes amounts

payable in respect of security, gardening, general cleaning, maintenance and fire protection services provided to the property.

[72] Accordingly, I find it safe to conclude that the appellant is entitled to claim indemnity from the respondent company in respect of such payments.

Order.

[73] In the result, the appeal succeeds. The order of the Court a *quo* is set aside in favour of the one reading as follows:

(a) The respondent is ordered to pay to the appellant the sum of R271 227,66, being the total amount it expended on various services, provided to the property over the period of six months prior to the registration of the transfer, relating to security, gardening, general cleaning, fire protection and maintenance.

(b) The respondent pays the costs of the appeal.

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MURUGASEN J

I agree

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SEEGOBIN J I agree

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MADONDO J It is so ordered.

Date of reserved: 19 November 2010

Date of Judgment: 28 February 2011

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