Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No. A605/08

In the matter between:

SHOPRITE CHECKERS LIMITED Appellant

and

HYPROP INVESTMENTS LIMITED First Respondent

ELLERINE BROS (PTY) LIMITED Second Respondent

JUDGMENT DELIVERED ON 9th FEBRUARY 2010

BINNS-WARD J:

[1] The respondents applied successfully in the court *a quo* for a declaratory order to the effect that the appellant was obliged in terms of clause 7.3 of annexure A to the lease agreement

concluded between it and Century City Centre Limited on 9 February 2000 to pay to the respondents (being the current owners of the property) a *pro rata* share, based on the lettable area of the premises occupied by the appellant in the Canal Walk Shopping Centre in proportion to the total lettable area of the Centre, of any increases in municipal rates payable to the City of Cape Town since 1 October 2000 (which was the commencement date of the lease.)

[2] The respondents were also granted judgment against the appellant in the sum of R2 086 766,75, with *mora* interest thereon, being an amount calculated on the basis of the meaning attached to clause 7.3 in the declaratory order as the appellant's liability arising during the period 1 July 2002 to 31 May 2005.

[3] The judgment in the court *a quo* turned entirely on the proper meaning of clause 7.3 - as does the outcome of this appeal, which is brought with the leave of the court of first instance.

[4] Clause 7.3 provides as follows:

> *The Tenant shall be responsible for and promptly pay the Tenant's share, based on lettable area of each tenancy in proportion to total lettable area, of any increases measured from the initial valuation date, in rates, taxes, VAT,*

> *building's operating costs, and/or sewerage charges payable to the competent authority and/or Landlord in respect of the land or improvements thereon imposed after the commencement date of this lease, (sic) The provisions of this clause shall apply mutatis mutandis to any levy or tax not in force on the date of signature of this lease being imposed at any time thereafter against the land and/or improvements thereon by any competent authority. Should the Landlord for any reason increase or decrease the Gross leasable Area of the Building after the date of commencement of this lease then the Tenant's pro rata share shall be adjusted accordingly.*

Counsel for both the appellant and the respondents were in agreement that the clause was inelegantly composed and ambiguous in relevant respects. For example, the linkage of the tenant's pro rata liability for increases in VAT, building operating costs and sewerage charges to an 'initial valuation date' makes no sense whatsoever. The only sensible interrelationship between the liability and the initial valuation date is limited to rates. Also the tenant's liability for a share of the operating costs are in any event comprehensively addressed in clause 6 of annexure A to the agreement and in that context the reference to them in clause 7.3 gives rise to an inconsistency which the parties are most unlikely to have intended. This type of ineptness is not altogether unusual in business agreements; cf. *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* 1964 (1) SA 669 (W) at 670G-H.

[5] The issue essentially in contention is the meaning in clause 7.3 of the expression 'initial valuation date' and, unsurprisingly, it arises in regard to a dispute between the parties as to the nature and extent of the tenant's liability for a share of the increased rates on the property. As the proper construction of a written contract is a matter of law, we are not fettered by the reasoning of the court *a quo* and it is convenient to consider the question afresh with due regard to the protagonists' contesting submissions.

[6] The proper approach to be followed is well established. It is to follow the intention of the contracting parties with reference to the use of the language employed by them in the contract considered as a whole, taking into account any extrinsic evidence that might be admissible under the circumstances. Consideration of the meaning of the language employed in a deed of contract is a sterile exercise unless due regard is had to the context within which it has been used. Context in this respect is not limited only to the immediate context of the words used within the four corners of the contract, but also involves regard being had to the apparent nature and purpose of the contract; all of this to be judged against

the relevant factual matrix in which the contract was concluded.[1] Within the limits of the language used by the parties read in its context in the sense aforementioned it is also necessary to approach the construction of the contract with sensible regard to the business or practical result which the parties apparently sought to achieve thereby.[2] 'Sophisticated semantic analysis' should not be permitted to negate an evident commercial or practical object that was clearly sought to be achieved by the contractual provision which is being construed.[3]

[7] Having regard to the practical issue in question, namely the tenant's liability for any increase in rates imposed after the commencement of the lease - such increase to be measured from the 'initial valuation date' – it seems to me that the applicable legislative framework pertaining to rating and the valuation of property for rating purposes falls to be taken into account as part of the factual matrix. For this purpose the applicable framework would be that applying at the time of the negotiation and

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[1] See, amongst other pertinent authority, *Joubert v Enslin* 1910 AD 6 at 37-8; *Swart en 'n Ander v Cape Fabrix (Pty) Ltd* at 202; *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A) at 768; *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA) at 464J – 465E; *Plit v Imperial Bank Ltd* 2007 (1) SA 315 (SCA) at para. [10] and *KPMG v Securefin Ltd* 2009 (4) SA 399 (SCA) at para. [39].

[2] See *Picardi Hotels Ltd v Thekwini Properties (Pty) Ltd* 2009 (1) SA 493 (SCA) at para. [5].

[3] Cf. *Lloyds of London Underwriting Syndicates 969, 48, 1183 and 2183 v Skilya Property Investments (Pty) Ltd* [2004] 1 All SA 386 (SCA) at para. [14].

conclusion of the lease agreement. Notwithstanding that the 1993 Property Valuation Ordinance had been in effect since April 1994, there is no indication in the contract or the evidence that the parties contemplated an imminent change in the valuation regime that nevertheless continued to prevail under the preceding 1944 Ordinance. Indeed it was only approximately four years after the signed text of annexure A to the lease was apparently settled that a valuation undertaken under a different framework first came into effect. That change occurred nearly two years after the commencement date of the lease. The delay in the implementation of the 1993 Ordinance was an incidence of the effect of s 37 of the Ordinance which provided a basis for the indefinite continuation of the 1944 Ordinance at the discretion of the local authority. It would not be surprising in the circumstances if the contracting parties had not applied their minds, when they settled the relevant terms of the contract, to an imminent change in the valuation system for rating purposes.

[8] It is apparent that the lease in question had been under negotiation between the contracting parties for some time before its execution on 9 February 2000. The appellant's board had adopted a resolution at the end of 1998 authorising the conclusion

of the lease on essentially identified terms. Furthermore annexure A to the agreement (in which, as mentioned, clause 7.3 resorts) contains indications that the text as signed by the parties was last 'updated' on the draftsman's computer between 5 November 1998 and 31 May 1999.[4]

[9] At the time of the conclusion of the lease agreement, and for some two and a half years thereafter, the rating of the subject property occurred on the basis of the approach to the valuation of the land and improvements applicable in terms of the Valuation Ordinance, 1944 (Ord. 26 of 1944 (Cape). That Ordinance provided for periodic general valuations of all land and any improvements thereon[5] within the area of a local authority to take place for rating purposes. It also provided for interim valuations of individual properties[6] to occur during the intervals between general valuations. One of the evident objects of interim valuations was to provide for the determination of updated bases for the owner's liability for rates, having regard to matters such as the erection or

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[4] The page on which clause 7.3 appears contains the following text in the header to the page: '*C:AR/Checkers Lease Amendment Update 5 November 1998*'

[5] The various aspects or features of property which fell to be valued under Ord. 26 of 1944 were set out in s 45 of the Ordinance. 'All buildings....erected or in the course of erection' were specifically identified as one of the features to be valued.

[6] Ord. 26 of 1944 also made provision for interim general valuations in certain circumstances, but that provision is of no relevance to the issue currently under consideration.

reconstruction of buildings or any other consideration that might have resulted in a material increase or decrease in the value of the rateable property subsequent to the determination of its value in the last preceding general valuation.[7]

[10] It is clear that the lease was concluded well before the building in which the leased premises are housed was completed. There are numerous indications of this in the text of the lease. The 'Lease Commencement Date' is defined[8] as meaning the 'the first day of the month in which the centre opens'. As it happened, the centre opened on 26 October 2000, with the result that commencement date was 1 October 2000, as mentioned earlier.[9] In terms of the 1944 Valuation Ordinance, buildings fell to be valued with reference to the estimated cost of their construction at the time of valuation.[10] The Ordinance provided[11] that 'When a building is valued at an interim valuation the estimated cost of erection of such building shall...be deemed to be the estimated cost of erection of such a building *at the time of the immediately preceding general valuation...*'. The valuation of land for interim

[7] See s 40 of Ord. 26 of 1944.
[8] In clause 1.2.13 of annexure A to the lease agreement.
[9] There was no dispute between the parties that the 'commencement date' or the 'date of commencement' within the meaning of those terms in clause 7.3 was equivalent to the 'Lease Commencement Date' defined in clause 1.2.13 of annexure A to the lease agreement.
[10] See s 44(1) of Ord. 26 of 1944.
[11] In s 44(3).

valuation purposes, on the other hand, was done with reference to the estimated market value of the land at the time of valuation.

[11] At the commencement date of the lease, the property was subject to rating on the basis of an interim valuation. In terms of that valuation the building, in which the rented premises were housed, had been valued while it was in a partial state of completion. The last applicable previous general valuation had been undertaken in 1990. Accordingly the interim valuation of the partially completed building would have occurred with reference to the estimated cost of erection of that part of it which had then been constructed, measured in 1990 values.

[12] It is not in dispute that that the first valuation for rating purposes that included a valuation of the property with the building contemplated by the lease agreement in completed state occurred subsequent to the commencement of the lease and that the resultant valuation became effective for rates purposes on 1 July 2002. Significantly, that valuation was undertaken with reference not to the 1944 Valuation Ordinance, but rather in terms of the quite different requirements of s 14 of the Property Valuation Ordinance, 1993 (Cape). That meant, amongst other things, that

insofar as the valuation of the building was concerned it was done with regard to the market value of the improved land as at the effective date of the general valuation, as distinct from on the basis of the estimated cost of construction of the building improvements.[12] The consequence was that the first valuation of the property which took the completed building into account occurred in a materially different way from any of the valuations applicable prior to the commencement of the 2002/3 municipal financial year, which was statutorily fixed at 1 July 2002. The concatenation of a valuation with reference to 2000 values in place of 1990 values and the effects of a valuation undertaken in terms of the different regime of s 14 of the 1993 Ordinance resulted in a sudden and significant increase in the rates payable on the property with effect from 1 July 2002. It is probable that if the applicable valuations had been undertaken in terms of the valuation criteria in place at the time of the execution of the agreement and the effective commencement of the lease the rates would not have increased to the extent that ultimately occurred.

[13] While on the subject of the applicable statutory framework as part of the factual matrix, it is also relevant to note that in terms of

[12] See s 14 of the Property Valuation Ordinance, 1993.

the Municipal Ordinance 20 of 1974, which was in relevant respects applicable at the material times, a local authority was empowered to levy rates, separately and differentially, on (i) land and (ii) any improvements in, on, over or under land.[13] It is apparent from the evidence that that was indeed the case in respect of the subject property.

[14] The battle line between the appellant and the respondents was drawn on the basis of the respondents' contention that the 'initial valuation date' in clause 7.3 denoted the commencement date of the lease, with the result that the tenant would be proportionately liable for any increase in rates after that date and the appellant's conflicting contention that the 'initial valuation date' denoted the date on which the subject property was first valued for rating purposes taking into account the building in which the let premises were housed in its completed state. On the latter premise the appellant's contention was that it was liable only for a proportionate share of rate increases imposed subsequent to the establishment of a baseline valuation of the property, valued with a completed building, effective from 1 July 2002; in other words for a share of the increase in rates measured from 1 July 2002.

[13] See s 78 of Ord 20 of 1974.

[15] It does not necessarily follow that if the respondents are wrong, the appellant's version must be correct. For the purpose of deciding this appeal, however, we need only determine the correctness or otherwise of the respondents' contention. If the respondents are wrong they were not entitled to the declaratory relief sought and obtained from the court *a quo*, nor were they entitled to the judgment sounding in money based on the declarator.

[16] In my judgment the contention that the terms 'initial date of valuation' and 'commencement date of this lease' are synonymous is at odds with the distinct and different meanings of the two expressions examined on a strictly semantic basis. It is also not supported by the employment of the terms within the context of the sub-clause itself. Why should the parties have used two different terms with evidently different connotations to denote a single concept, which only one of the terms would ordinarily suggest? In my view the respondent's argument failed to answer this question, thereby highlighting a fundamental flaw in the construction of the sub-clause contended for by it.

[17] The immediate context of the two expressions within the sub-clause indicates that the tenant is to be liable for a proportionate share of any rates increases imposed after the commencement date of the lease, provided that such increases are rates increases imposed with reference to (i.e. 'measured from') the valuation applicable to the property as at the 'initial valuation date'. On that approach it is readily conceivable (both conceptually and pragmatically) that there might be rates increases imposed after the commencement date but before the initial valuation date. Such rates increases would necessarily be predicated on a different valuation to that which would apply in consequence to that ascribed in the valuation rendered effective on the initial valuation date. And on the plain language of the provision the tenant would *not* be liable to pay a proportionate share of such increases. (It needs mentioning at this point that there is no practical sense in construing the term 'valuation date' to refer to the date on which a valuation was undertaken by the valuer. In the context of determining liability for rates, the only date on which a valuation becomes relevant is the date on which the value determined by the valuer becomes effective for rating purposes. The valuation date is thus a date determined by the rating authority.)

[18] The result of such an analysis is not as anomalous as might at first blush appear if it is remembered that the subject property was in a state of incomplete development when the lease was concluded and that the effective commencement of the lease was intended to be coterminous with the completion of the shopping centre building on the property in which the leased premises were to resort. A valuation of the property with reference to the shopping centre building in completed state would therefore, to the knowledge of the contracting parties when they concluded their agreement, in all probability have been undertaken only at some date after the commencement of the lease.

[19] There is nothing unbusinesslike in construing the sub-clause in this way. The tenant is not liable in terms of the lease to pay a proportionate share of the rates on the subject property; it is only liable for a share of any increase in the rates measured with reference to the initial valuation date, which sensibly means any increases in the rates predicated on the valuation determined at the initial valuation date. There was an interim valuation undertaken after the conclusion of the lease agreement but before the completion of the building and the coterminous commencement of the lease. That valuation however was not the

first valuation of the property and could not qualify properly under the character of an initial valuation. It was also a valuation undertaken before the effective commencement of the lease and in that sense also not an initial valuation within the context of the contracting parties' contractual relationship as landlord and tenant. The was no valuation of the property with regard to its improvement by a completed shopping centre building before that which became effective on 1 July 2002.

[20] I agree with the submission of the appellant's counsel that it makes no business sense to construe the word 'initial' to connote the date of the first valuation of the property undertaken for rating purposes after the signature of the lease agreement even if the that valuation occurred before the effective commencement of the lease and also before the property had been improved by the completion of the building which had to be completely erected for the lease to come into effect. It would make no commercial sense for the appellant to have undertaken to pay a *pro rata* share of any increases in the landlord's rates which flowed principally from the incremental progress in the completion of a building which the landlord had to finish to put itself in a position to enable the lease to come into effect. Increases of rates in respect of the property

with regard to the value it enjoyed when the lease commenced could only be effected after the commencement of the lease and measured from a date determined with reference to a valuation of the property with a completed building.

[21] That the evident common intention of the parties was that the appellant would bear a proportionate share of any increases in the rates payable on the property of which the leased premises formed part - that is of the property valued with reference to the completed shopping centre - is borne out by the content of a letter, dated 28 August 2003, by the respondents' predecessor in title (i.e. the originally contracting landlord) to appellant, in which the then landlord contends for a construction that would have rendered the appellant liable for an increase in rates predicated on a notional valuation of the property on 1990 values with the shopping centre building in a completed state.[14] Had the intention been otherwise I can divine no reason for the decision by the parties to qualify the basis of the tenant's liability for a proportionate share in the rates increases on the property in the way in which they did. It makes no sense for the contracting parties to have defined the liability by

[14] Annexure DGM 5 to the answering affidavit of D.G. Moller; see especially paragraphs 10-12 thereof.

reference to increases measured from an initial valuation date if they had intended that the tenant would be liable on an unqualified basis for a share of any increase in rates imposed after the commencement of the lease.

[22] Construing the sub-clause in the manner just described does not require a reading in the words 'of the property in its completed state' after 'the initial valuation date', as thought by the learned judge *a quo*. On the contrary, the conclusion that the effective date of the first valuation of the property after the completion of the building is the valuation to which the term 'initial valuation date' in clause 7.3 relates is one reached on a proper construction of the express wording of the sub-clause read in context in the sense described at the outset of this judgment.

[23] The conclusion reached means that the respondent should not have obtained a declaratory order in the terms sought in paragraph 1 of its notice of motion.

[24] The result of a proper construction of the express provisions does not lead to an equitable commercial result. This is a consequence of decisions by the relevant administrative

authorities. It is not necessary or appropriate to consider whether the imputation of a tacit term or a rectification of the agreement might have effectively addressed the displeasing result. The court *a quo* was not called upon to decide a case advanced on that basis and it is therefore certainly not for us to try to do so on appeal.

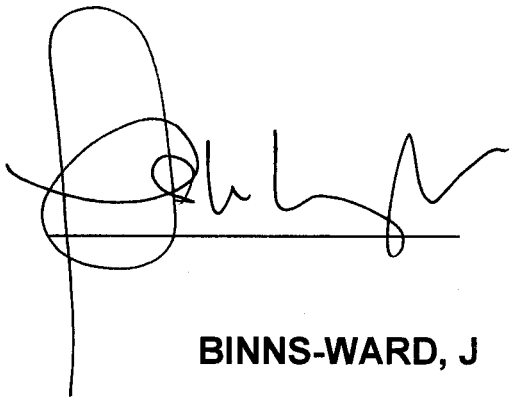
[25] The relief sounding in money sought by the respondents in terms of paragraph 2 of the notice of motion was predicated on the basis of their construction of the express provisions of clause 7.3 of annexure A to the lease. In the context of a finding that that construction was unfounded, the monetary award cannot stand.

[26] In the result the following orders shall issue:

(i) The appeal is upheld with costs, including the costs of two counsel;

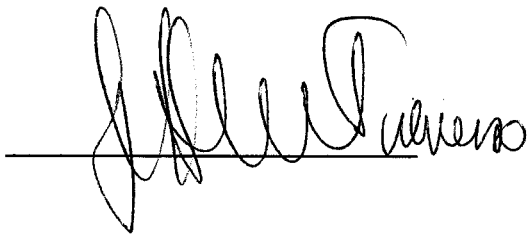
(ii) The order of the court *a quo* is set aside and replaced by an order dismissing the application with

costs, including the costs of two counsel.



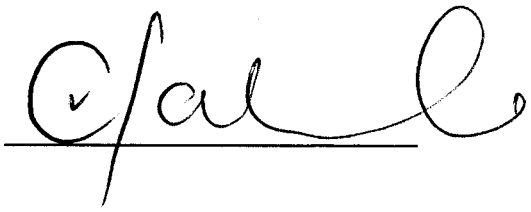
BINNS-WARD, J

I concur. It is so ordered.



TRAVERSO, AJP

I concur.



SALDANHA, J