REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

1/03/2018
DATE

SIGNATURE

Appeal No. **A5029/17**

In the matter between:

Edcon Limited Appellant

and

Bay West City (Pty) Ltd Respondent

JUDGMENT

The Court

Introduction

[1] The issue which falls for determination in this appeal against a judgment in motion proceedings, is whether a written lease agreement contains a term obliging

the tenant to *continue trading* from the leased premises or whether the lease agreement entitles the tenant to leave the premises vacant whilst it continues to honour its rental (and ancillary) obligations in respect of the premises.

[2] Edcon Limited ('*Edcon*') (the appellant, and tenant) leased premises from Bay West City (Pty) Ltd ('*Bay West*') (the respondent, and landlord) at its shopping centre ('*Mall*') in terms of a written lease agreement for a period of five years, which lease expires in March 2020 ('*the lease agreement*'). During the second year of the lease agreement, Edcon notified Bay West that it would, after careful evaluation of the store and its perfomance, close the store but that it would comply with its contractual obligations of paying the rental and maintaining the premises until expiry of the lease period. This decision was taken because, amongst other things, it contended it was suffering financial losses and the projected situation looked no better. The decision was purportedly taken in the interests of its shareholders and creditors. Bay West disputed Edcon's right to cease trading and contended that the lease obliged it to continue trading for the duration of the lease. It disputed that the threatened discontinuation of trade, served its interests.

[3] Bay West approached the court on an urgent basis. On 29 July 2016, Mailula J ordered Edcon to continue trading until 31 March 2020 (the end of the lease period) and to pay the costs of the urgent application including costs of senior counsel.

[4] On 7 June 2017, Victor J, by agreement between the parties, granted leave to appeal to the Full Court of this Division. She also recorded an agreement between the parties that the *status quo* at the Bay West Mall is to be maintained pending the outcome of this appeal.

Basis of Bay West's application

[5] Bay West relied on clause 8.1 of the lease agreement, which provides that Edcon:

> '.....shall be entitled to use and occupy the premises for conducting the business of selling any merchandise normally sold, and providing any services normally provided, in a departmental store or general store and subject to the provisions of the following clause hereof, for the sale of any goods whatsoever and for purposes necessary or ancillary thereto or for any purpose whatsoever which does not change the general character of the premises and the Lessee shall not be entitled to use the premises for any other purpose whatsoever without the consent in writing of the Lessor, which consent shall not unreasonably be withheld.'

[6] The court *a quo* found that, by not trading, Edcon was in fact '*using*' the premises for another purpose without Bay West's written consent in breach of clause 8.1 of the lease agreement. The crux of this appeal accordingly concerns an interpretation issue being whether, permitting the premises to be vacant constitutes a '*use*' not authorised by clause 8.1.

Principles applicable to the interpretation of agreements

[7] The current approach to interpretation, which encapsulates the principles applied and refined in the numerous authorities[1] since *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2], is to be found in *Novartis v Maphil* [3], in which Lewis JA held 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).

[2] 2012 (4) SA 593 (SCA)

"[27] I do not understand these judgments[4] to mean that interpretation is a process that takes into account only the objective meaning of the words (if that is ascertainable), and does not have regard to the contract as a whole or the circumstances in which it was entered into. This court has consistently held, for many decades, that the interpretative process is one of ascertaining the intention of the parties – what they meant to achieve. And in doing that, the court must consider all the circumstances surrounding the contract to determine what their intention was in concluding it. *KPMG*, in the passage cited, explains that parol evidence is inadmissible to modify, vary or add to the written terms of the agreement, and that it is the role of the court, and not witnesses, to interpret a document. It adds, importantly, that there is no real distinction between background circumstances, and surrounding circumstances, and that a court should always consider the factual matrix in which the contract is concluded – the context – to determine the parties' intention.

[28] The passage cited from the judgment of Wallis JA in *Endumeni* summarizes the state of the law as it was in 2012. This court did not change the law, and it certainly did not introduce an objective approach in the sense argued by Norvatis, which was to have regard only to the words on the paper. That much was made clear in a subsequent judgment of Wallis JA in *Bothma-Botha Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 (SCA), paras 10 to 12 and in *North East Finance (Pty)Ltd v Standard Bank of South Africa Ltd* [2013]ZASCA 76; 2013 (5) SA 1 (SCA) paras 24 and 25. A court must examine all the facts – the context – in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing.

[29] Referring to the earlier approach to interpretation adopted by this court in *Coopers & Lybrand & others v Bryant* [1995] ZASCA 64; 1995 (3) SA 761 (A) at 768A-E, where Joubert JA had drawn a distinction between background and surrounding circumstances, and held that only where there is an ambiguity in the language, should a court look to surrounding circumstances, Wallis JA said (para 12 of *Bothma-Botha*):

> 'That summary is no longer consistent with the approach to interpretation now adopted by South African courts in relation to contracts or other

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[3] [2015] ZASCA 111

[4] Referring to *KPMG Chartered Accountants (SA) v Securefin Ltd & another,* 2009 (4) SA 399 (SCA) para 39 and *Endumeni* (supra) at para 18

documents, such as statutory instruments or patents. While the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is "essentially one unitary exercise" [a reference to a statement of Lord Clarke SCJ in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2012] Lloyd's Rep 34 (SC) para 21].

[30] Lord Clarke in *Rainy Sky* in turn referred to a passage in *Society of Lloyd's v Robinson* [1999] 1 All ER (Comm) at 545, 551 which I consider useful.

'Loyalty to the text of a commercial contract, instrument, or document read in its contextual setting is the paramount principle of interpretation. But in the process of interpreting the meaning of the language of a commercial document the court ought generally to favour a commercially sensible construction. The reason for this approach is that a commercial construction is likely to give effect to the intention of the parties. Words ought therefore to be interpreted in the way in which the reasonable person would construe them. And the reasonable commercial person can safely be assumed to be unimpressed with technical interpretations and undue emphasis on niceties of language.'

[31] This was also the approach of this court in *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* [2009] ZASCA 154; 2010 (2) SA 498 (SCA) para 13. A further principle to be applied in a case such as this is that a commercial document executed by the parties with the intention that it should have commercial operation should not lightly be held unenforceable because the parties have not expressed themselves as clearly as they might have done. In this regard see *Murray & Roberts Constuction Ltd v Finat Properties (Pty) Ltd* [1991] ZASCA 130; 1991 (1) SA 508 (A) at 514B-F, where Hoexter JA repeated the dictum of Lord Wright in *Hillas & Co Ltd v Arcos* Ltd 147 LTR 503 at 514:

'Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe

such documents fairly and broadly, without being too astute or subtle in finding defects.'

Principles applied

[8] In interpreting clause 8.1, Bay West referred to a number of clauses which, it contended, supported a finding that the parties had agreed that Edcon would continue trading and that leaving the premises vacant was a purpose precluded by the express provisions of the lease agreement. Before dealing with the specific clauses referred to, it would be apposite to deal with a feature of the lease agreement which, in our view, casts considerable light on the context in which the lease agreement was concluded. Clause 34.1 provides:

' The entry of the Lessee into the building is conditional upon the simultaneous entry and **continued trading** of the tenants listed below, or national tenants of a similar standing, who shall occupy premises of the following minimum sizes, subject to a 5% (five per centum) size variation from the size recorded herein and for the stipulated initial lease periods:-

Woolworths	5000m^2	10 year corporate lease
Game	6500m^2	10 year corporate lease
Pick 'n Pay	5000m^2	10 year corporate lease
Checkers group consolidated brands	6000m^2	10 year corporate lease
Foschini group consolidated brands	3600m^2	5 year lease
Pepkor group consolidated brands	1200m^2	5 year lease
Mr Price group consolidated brands	4000m^2	5 year lease
Truworths group consolidated brands	2500m^2	5 year lease

and at least 3 (three) of the following banks branches: ABSA, FNB, Nedbank, Standard Bank who shall each occupy premises of not less than 350m^2 (three hundred and fifty square metres), and each concluding a fixed 6 (six) year lease period.' (emphasis provided)

[9] The tenants listed in clause 34 were clearly intended to be so-called '*anchor*' tenants (and will hereinafter collectively be referred to as '*the anchor tenants*'). They could, at the election of Bay West, be replaced by '*national tenants of a similar standing*'. Whomever they were though, Edcon's entry into the building was conditional upon '*the simultaneous entry and continued trading*' of the anchor tenants.

[10] In its answering affidavit, Edcon's representative highlighted the following:

> '[36] I point out that clause 34.1, read with clause 34.2, provides that the Lease Agreement is conditional upon eight specified tenants **continuing to trade** for the duration of the respondent's initial lease period. If they do not, the respondent is entitled to a reduction of rental or to cancel the agreement. Thus, I assume that those tenants expressly agreed with the applicant that they would continue trading for a particular period.
>
> [37] I reiterate that no such agreement was reached with the respondent. Moreover, the applicant has not alleged or produced any evidence that any of the other tenants' lease agreements are conditional upon the respondent's continued trading. If they are, it was never brought to the attention of the respondent, or, more importantly, agreed to with the respondent.' (emphasis provided)

[11] Not only would the principles enunciated in *Plascon Evans v Van Riebeeck Paints (Pty) Ltd*, [5] dictate the acceptance of this evidence (together with what Bay West says and which Edcon cannot dispute), but quite startlingly too, Bay West elected not to rise to the challenge posed in para [10], of producing other tenants' lease agreements to show that their lease agreements are conditional upon Edcon's continued trading. Indeed, it bears mentioning that Bay West did not, in its replying affidavit, deal with the quoted paragraphs at all. The ineluctable conclusion to be drawn from these surrounding circumstances is that the other tenants' lease agreements do not reflect that their leases are subject to

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[5] 1984 (3) SA 623 (A)

Edcon's continued trading. We do not find this surprising if regard is had to the relatively small space Edcon was going to occupy in this shopping centre compared to that occupied by the anchor tenants. Edcon is to occupy 225 square meters compared with, for example, Woolworths' 5000 square meters and Games' 6500 square meters – all recorded in clause 34.1.[6]

[12] Edcon relied very heavily on the judgment of *Foodtown Incorporated (Pty) Ltd v Florenca and Another*,[7] (*Foodtown*) and in particular the following statements:

> 'Ordinarily, the parties to a lease contemplate that through self-interest the lessee will use and continue using the leased premises throughout the period of the lease, but, generally, it is of no interest to the lessor whether he does so or not, provided he performs his obligations under the lease, such as paying the rent, maintaining the premises, etc. Hence, **in order to fix the lessee with an obligation to use and keep using the leased premises, there must be an express or implied provision to that effect in the lease** (cf. *Bresgi* v. *Lazersohn*, 1939 A.D. 445 at pp. 452 to 455). (emphasis provided).

[13] Bay West sought to distinguish the facts of this case from *Foodtown* by arguing that it is a hallmark of a well-managed and competitive shopping centre to have a quality and diverse tenant mix, which attracts shoppers to the centre. It was contended that if tenants were allowed to simply close their doors whilst paying rent, no customer would visit the centre. It pointed out further that the Bay West Mall was in the process of establishing its presence in a highly competitive market and accordingly required every tenant to trade. In support hereof it relied on, amongst other provisions, clauses 34 and 36. Clause 36 in essence entitled Edcon to cease rental payments or cancel the lease agreement, should at any time during the currency of the lease agreement, more than 30% of the tenants that

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[6] para [8]

[7] [1974] 2 All SA 145 (A) at 147; parallel citation 1974 (1) SA 635 (A) at 639 F - G

traded in the Mall at the commencement of the lease agreement, cease to trade. In our view such clause does not imply an obligation on Edcon to continue to trade. To the contrary, it anticipates other tenants discontinuing trade and governs the position of Edcon following upon such discontinuation. No obligation on Edcon to continue trade is to be inferred from clause 36 alone or read with clause 34.

[14] Anther clause roped in by Bay West to support its contention that it was clearly the intention of the parties that Edcon would continue to trade, was the rental clause (clause 7) which provides that the rental payable by Edcon would be the greater of the basic rental specified in Annexure 'A' to the lease agreement and '*the turnover rental based on the Lessee's nett turnover.*' Because the nett turnover is calculated with reference to the nett selling price of all goods and services, it is argued that it is only logical that nett rent can only be calculated on a trading business. This interpretation ignores the fact that the clause expressly provides that the rental payable shall be the greater of the two options. In our view, if there were no trade, the greater would be the rental as provided for in Annexure 'A'. This clause too, in our view, does not support the interpretation contended for by Bay West.

[15] In support of its contention that Edcon is obliged to continue trading, Bay West relied on the decision in *Edrei Investments 9 Ltd (In Liquidation) v Dis-Chem Pharmacies (Pty) Ltd* [8] *(Edrei). Edrei* is distinguishable from the facts in this case as it was common cause in that case that the contract contained an express provision obliging the tenant to keep the premises open for business and to trade continually during specified times.

[8] 2012 (2) SA 553 (ECP)

[16] We were also referred to a number of unreported judgments[9], all of which are distinguishable from the current set of facts in that they either contained express provisions obliging the tenants to continue trade or a breach had been conceded and the only issue was whether specific performance ought to be ordered.

[17] Clause 8.1 of the lease agreement does not contain an express provision dealing with an obligation on Edcon to continue to trade. There was some atttempt to argue for the existence of a tacit term to this effect, but this was not strenuously pursued as such a finding would have to draw on parol evidence which evidence is inadmissable as it would vary the written terms of the lease agreement. This prohibition was, in any event, expressly agreed upon by the parties when they incorporated a so-called '*whole agreement*' clause as part of the express terms in the lease agreement.

[18] In our view, a crucial and fundamental flaw which was made by the court *a quo* in interpreting the lease agreement was to interpret clause 8 in isolation. Had regard been had to the whole agreement and in particular clause 34, it would have been immediately apparent that the interpretation attached to clause 8.1 by the court *a quo* is unsustainable and we respectfully differ therefrom.

[19] It seems to us that the learned judge, who decided a difficult question of interpretation in urgent court, was in law bound by the decisions of *Bresgi v Lazersohn*[10] and *Foodtown* and ought to have applied the principle in those decisions, which would have driven the learned judge to conclude that, in the

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[9] *Thornhill Shopping Centre v Africa Automotive Solutions (Pty) Ltd t/a Midas*, 30 August 2017, case number 5331/17, Limpopo Division, Polokwane. Leave to appeal against the decision was granted on 13 November 2017; *Mthatha Mall (Pty) Ltd v Model Extensions t/a Ideals*, 21 April 2017, casw number 857/17, Eastern Cape Division, Grahamstown; *Billion Property Developments (Pty) Ltd v Presidential Group CC*, 14 February 2017, case number 16251/16, Western Cape Division, Cape Town.

[10] 1939 AD 445

absence of a term in the lease, Edcon was under no obligation to continue trading. The agreement of lease does not provide for such an obligation. The reasoning of the court *a quo* is that Edcon, by electing not to use the premises for any of the identified purposes was effectively using the premises for an unauthorised purpose and therefore in breach of the lease agreement. Such a construction does violence to the language used in clause 8.1 and the lease agreement as a whole. Edcon does not intend using the premises for an unauthorized purpose. It intends vacating. It will not be using the premises at all. Unlike the anchor tenants whose continued trading was a prerequisite for the continuation of Edcon's lease, Edcon's continued trading was not a matter upon which any other tenant's lease depended. The landlord did not include in its bargain with the tenant that the tenant had to keep trading and we find that in the absence of such a term it could not insist that the tenant continue trading where the tenant continued to honour the lease.

[20] We can do no better than to echo the sentiments expressed by the Supreme Court of Appeal in *Foodtown* where Van Blerk, JA held[11]:

> 'The lease has to be understood in its ordinary and natural meaning. If the peremptory form in which the first portion of clause 3 is couched is to be understood to convey an intention aimed at the far reaching result that the appellant should be under a positive and onerous obligation to carry on business in all circumstances, even if trading is not profitable, for the inordinate lengthy period of the lease **the parties would have been expected to express a stipulation of such importance in terms.'** (own emphasis)

[21] We cannot but conclude, that the interpretation attached to clause 8.1 of the lease agreement by the court *a quo* is wrong and that the court *a quo* ought to have found that Edcon had not breached (and did not intend to breach) clause 8.1 of the lease agreement and it ought to have dismissed the application.

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[11] p640 F - G

Order

[22] We accordingly grant the following order:

22.1. The appeal is upheld with costs including the costs of two counsel where employed which costs include the costs of the application for leave to appeal.

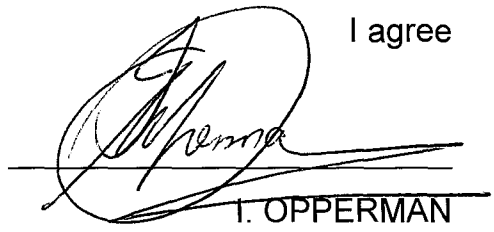
22.2. The order of the court *a quo* is set aside and the following order is made: '*The application is dismissed with costs including costs of two counsel where employed*'.

M.TSOKA
Judge of the High Court
Gauteng Local Division, Johannesburg

I agree

M. TWALA
Judge of the High Court
Gauteng Local Division, Johannesburg

I agree



I. OPPERMAN
Judge of the High Court
Gauteng Local Division, Johannesburg

Heard: 7 February 2018

Judgment delivered: 6 March 2018

Appearances:

For Appellant: Adv Panayiotis Stais SC and Adv GD Wickins

Instructed by: Werksmans Attorneys

For Respondent: Adv H van Eeden SC and Adv DH Wijnbeeck

Instructed by: Ben Groot Attorneys Inc.