THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 315/10

In the matter between:

HYPROP INVESTMENTS LTD **First Appellant**
ELLERINE BROS (PTY) LTD **Second Appellant**

and

SHOPRITE CHECKERS LTD **Respondent**

Neutral citation: *Hyprop Investments v Shoprite Checkers* (315/10) [2011] ZASCA 51 (30 March 2011)

Coram: Nugent, Tshiqi JJA and Plasket AJA

Heard: 4 March 2011

Delivered: 30 March 2011

Summary: Agreement of lease – interpretation – phrase 'the initial valuation date' for purposes of determining tenant's *pro rata* liability for increases in rates to be determined with reference to date of first valuation of completed building.

ORDER

On appeal from: Western Cape High Court, Cape Town (Traverso DJP, Saldanha and Binns-Ward JJ sitting as a court of appeal):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

PLASKET AJA (NUGENT and TSHIQI JJA concurring):

[1] This appeal concerns the proper interpretation of a clause in an agreement of lease. The clause in question, clause 7.3 of the general terms and conditions of the lease, will be set out in due course. The parties agree on one thing: clause 7.3 was drafted extremely poorly and, as a consequence, it displays a degree of ambiguity. The result was that a single judge of the Western Cape High Court, Cape Town (Griesel J) gave it one meaning while, on appeal, a full bench of that court (Binns-Ward J, Traverso AJP and Saldanha J concurring) gave it another. It falls to this court to decide which interpretation is correct.

[2] The facts are common cause. On 9 February 2000, Century City Centre Ltd and the respondent concluded an agreement of lease in terms of which Century City Centre Ltd let premises in the Canal Walk Shopping Centre in Cape Town to the respondent. The shopping centre was still under construction when the agreement of lease was concluded.

[3] The shopping centre was duly completed and it opened for business during October 2000. This meant that the lease commenced on 1 October 2000 because clause 1.3.2 provided that the lease commenced on the first day of the month in which the shopping centre opened.

[4] The appellants purchased the shopping centre during 2003. In May 2005, they launched an application in which they sought a declarator as to the respondent's liability to pay a *pro rata* share of the increase in rates payable on their property. They also sought an order to direct the respondent to pay them an amount of R2 086 766.75, being the *pro rata* share of the rates increase that, on their interpretation of clause 7.3, the respondent was liable to pay.

[5] Whether the appellant is entitled to the declarator and whether the respondent is liable to pay the amount claimed by the appellants depends on the meaning of clause 7.3. It provides:

'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 the lease. 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.'

[6] A number of interim valuations of the property and the incomplete shopping centre had been conducted by the local authority during its construction. They reflected, progressively, the value of the land and a rough estimate of the improvements to the property in its incomplete state. So, for instance, in the Second Interim Valuation 2000/2001, the valuation that was current when the lease commenced, the land was valued at R6 989 000 and the incomplete shopping centre was valued at R60 million on the basis that the building was about 50 per cent completed and the value of the building when completed, would be R120 million. The next valuation, the First Interim Valuation 2001/2002 reduced the value of the land but the value of the improvements remained R60 million. The rates payable on the basis of this valuation were R627 871.

[7] The first valuation of the completed shopping centre was effected in terms of the 2000 General Valuation in October 2002 with an implementation date of 1 July 2002. After a successful appeal by the appellants against the initial valuation, the property and its improvements were valued at R950 million, made up of R860 million in respect of the improvements and R90 million in respect of the land. The rates payable were R13 425 400. This valuation was a great deal higher than previous valuations for two reasons. First, the shopping centre had been completed and secondly a new system of valuation had been introduced that produced universally higher valuations.

[8] The appellants' case was that the term 'the initial valuation date' in clause 7.3 referred to the valuation that was current on the date of the commencement of the lease. If that was so, it followed that the respondent was liable to contribute its *pro rata* share of the increase in rates from R627 871 to R13 425 400. The respondent's case was that 'the initial valuation date' referred to the first valuation after the completion of the building and this was the valuation of October 2002. This, it argued, was the base from which future increases in rates were to be measured.

[9] In terms of clause 1.2 of the agreement of lease, the premises were defined as a 'supermarket on the lower level' of the shopping centre some 6 000 square metres in size. The period of the lease was 15 years plus four optional periods of five years each. The commencement date of the lease was defined in clause 1.3.2 as the 'first day of the month in which the Centre opens'. In terms of clause 1.3.4, the obligation to pay rental commenced on that day too. The rental was stipulated in clause 1.4 to be '2.5 per cent of the Tenant's Turnover as defined in Clause 5.1.2 [of the general terms and conditions] for the first 12 months of trading, 2.25 per cent in the second 12 months and 2 per cent thereafter'. The date of beneficial occupation was defined by clause 1.3.6 to be 90 days before the opening of the shopping centre. The premises, according to clause 1.9, could only be used for the purpose of carrying on the business of a supermarket.

[10] Annexure 'A' to the agreement contains its general terms and conditions. Clause 7.3 is one of these terms. Clause 2 states that the premises 'shall have been constructed substantially in accordance with' an attached plan but the parties agreed to the possibility of amendments to the plan, either as a result of municipal requirements, the requirements of any other authority having jurisdiction or in the discretion of the landlord (within the bounds of reasonableness). Clause 3 dealt with beneficial occupation. Clause 3.2 provided that if the 'Landlord is unable to give the Tenant beneficial occupation of the Premises' 90 days before the opening of the shopping centre 'by reason of the building or Premises being incomplete', the tenant would have no claim against the landlord and have no right to cancel for this reason. Clause 6 placed the obligation on the tenant to pay its share of the operating costs, which are, in terms of clause 6.2, 'the total actual cost and expense incurred in operating, administering and managing the Building'.

[11] Clause 7 consists of three sub-clauses. Clause 7.1 required the tenant to pay for electricity, water, gas and other utilities that are used or consumed in the premises as well as the cost of refuse removal from the premises. Clause 7.2 entitles the landlord, in the event of it paying for utilities used or consumed by the tenant, to recover the amounts so paid, with interest and to cancel the lease if the tenant does not pay within 14 days of demand. Clause 7.3 then, as we have seen, deals with the tenant's obligations to pay a *pro rata* share of any increases in rates, taxes, VAT, the building's operating costs and sewerage charges. Finally, clause 20.1 entitles the landlord to 'complete construction of the Building (if it is still in the course of completion at the commencement date of this lease)', to add to 'the improvements on the Land (other than the Premises)' and to effect additions to the building or the premises, and for these purposes to erect scaffolding, hoardings and building equipment and to have access to the premises if needs be.

[12] The process of interpretation of contracts involves a search for the intention of the parties through the words that they used, considered in the context of the agreement as a whole, including the factual background and construed 'in accordance with sound commercial principles and good

business sense so that it receives a fair and sensible application'.[1] In this case, little purpose would be served by attempting to give the words used in clause 7.3 their literal meaning – by applying the so-called golden rule of interpretation – because as Binns-Ward J observed in the full bench judgment, the parties were in agreement that clause 7.3 was 'inelegantly composed and ambiguous in relevant respects'.[2]

[13] Because of the ambiguity of clause 7.3 this is not the type of case in which 'sophisticated semantic analysis' will assist to find the intention of the parties.[3] Despite its drawbacks, a sensible meaning can be attributed to clause 7.3 which accords with good business sense and is equitable, and thus reflects the intention of the parties. That considerations of equity are relevant to the interpretation process is evident from *South African Forestry Co Ltd v York Timbers Ltd*[4] in which Brand JA said that 'the notions of fairness and good faith that underlie the law of contract . . . have a role to play'; that while a court may not superimpose its idea of fairness on 'the clearly expressed intention of the parties', different considerations apply when the contract is ambiguous; and, in that case, 'the principle that all contracts are governed by good faith is applied and the intention of the parties is determined on the basis that they negotiated with each other in good faith'.

[14] In ascribing meaning to the phrase 'the initial valuation date' the first issue that must be addressed is what the increases 'measured' from this date refer to. Do they refer to rates only or do they refer also to 'taxes, VAT, building's operating costs and/or sewerage charges'? In my view, it makes no sense to determine increases in anything but rates from 'the initial valuation date' as none of the other expenses are determined by a valuation of the land on which, and buildings in which, the leased premises are situated. In consequence, it must have been the intention of the parties that only

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[1] *Picardi Hotels Ltd v Thekwini Properties (Pty) Ltd* 2009 (1) SA 493 (SCA) para 5. See too *KPMG Chartered Accountants (SA) v Securefin Ltd & another* 2009 (4) SA 399 (SCA) para 39; *Coopers & Lybrand & others v Bryant* 1995 (3) SA 761 (A) at 767E-768E.
[2] Para 4.
[3] *Lloyds of London Underwriting Syndicates 969, 48, 1183 and 2183 v Skilya Property Investments (Pty) Ltd* [2004] 1 All SA 386 (SCA) para 14.
[4] *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) para 32.

increases in rates were to be determined from the initial valuation date. In other words, what was intended was that the respondent would be responsible for its share of any increases in rates, 'measured from the initial valuation date', and increases in taxes, VAT, the building's operating costs and sewerage charges. Increases in the expenses mentioned other than rates would be payable by the respondent on a *pro rata* basis when the increases occurred.

[15] There are important indications in the agreement that the parties intended the lease to become operative only when the building was completed. First, the opening of the shopping centre, as the trigger for the lease commencing, appears to me to contemplate a building that is complete. Secondly, clause 2 of the general terms and conditions speaks of the premises having 'been constructed' in accordance with an attached plan. Thirdly, clause 1.3.6 of the lease agreement and clause 3 of the general terms and conditions, dealing with beneficial occupation, contemplate that the building and the premises would be completed 90 days before the opening of the shopping centre. Finally, clause 6 of the general terms and conditions, dealing with the tenant's obligations to pay its share of the operating costs of the building, contemplates a completed building – one that is operated, administered and maintained.

[16] The tenant's rental was determined on the basis of a percentage of its turnover, presumably on the basis of projected figures determined by experience and expertise in this type of development. The operating costs of the building, whatever they may be, were for the tenant's account, as were consumables such as electricity and water, these being based on the amount of use. Finally, in accordance with the common law position, the landlord bore responsibility initially for rates. In terms of this scheme, there were few imponderables for the landlord: with the exception of the rental, other costs were to be borne by the tenant and those that were borne by the landlord were, if not known in precise terms, capable of easy and accurate estimation. All that was left was future increases. Clause 7.3 is a mechanism – albeit a poorly crafted mechanism – for the landlord to make provision for the tenant

to contribute, not to rates *per se*, but to increases in rates as and when they arise.

[17] It is within the context that I have outlined that the meaning of the term 'the initial valuation date' must be determined. It must first be stated that, for what it is worth, the word 'date' is out of place; the liability to pay a *pro rata* share of any increase in rates arises from 'the initial valuation' or, I suppose, the date on which the initial valuation came into effect.

[18] As stated above, the two possibilities contended for by the parties are first that the initial valuation date refers to the valuation that was operative when the lease commenced and the second is that it refers to the first valuation of the completed building. The first possibility has, in my view, at least three problems. They are, first, that it conflates the phrase 'the commencement date of the lease' with the phrase 'the initial valuation date', rendering the latter term meaningless and superfluous. I cannot imagine that both phrases would have been used in clause 7.3 if the parties intended them to mean the same thing. Secondly, I can see no reason why the parties would have intended that the base from which increases in rates were to be determined would be a valuation of an incomplete building. As the tenant would only be able to utilise the building when it was complete, as contemplated in the agreement, it would be illogical, as well as making no business sense for it to have agreed to such a scheme. Thirdly, on that construction, the base date would be arbitrarily set. The parties could not have intended that the base date would be set by the state of completion in which the building happened to be at the time the valuation was made.

[19] In my view, it would have been logical, equitable and would have made business sense for the parties to have agreed that the respondent would only be liable for increases in rates on the basis of an increased valuation of the completed building. In other words, the base from which increases are to be determined is a valuation of the completed building. This fits into the scheme of the lease that the tenant leases part of a completed building and contributes to increases in rates levied on a completed building. It follows that,

'the initial valuation date' in clause 7.3 refers to I July 2002, the implementation date of the General Valuation of October 2002. That being so, the appeal must fail.

[20] The following order is made:

The appeal is dismissed with costs, including the costs of two counsel.

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C PLASKET

ACTING JUDGE OF APPEAL

APPEARANCES

APPELLANT	:	S Burger SC and E Fagan SC Instructed by Bernhardt, Vukic, Potash and Getz, Cape Town; Lovius-Block Attorneys, Bloemfontein
RESPONDENT	:	J A Newdigate SC and J H Roux SC Instructed by Werksmans Attorneys, Cape Town Naudes, Bloemfontein