THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable
Case No: 1177/2015

In the matter between:

URBAN HIP HOTELS (PTY) LTD **APPELLANT**

and

KCARRIM COMMERCIAL PROPERTIES (PTY) LTD **RESPONDENT**

Neutral citation: *Urban Hip Hotels v KCarrim* (1177/2015) [2016] ZASCA 173 (25 November 2016)

Coram: Lewis, Shongwe, Petse, Willis and Van der Merwe JJA

Heard: 9 November 2016

Delivered: 25 November 2016

Summary: Contract ─ interpretation ─ term contended for by the appellant excluded by clear terms of the agreement ─ clear terms cannot be altered by contextual evidence of implementing the contract.

ORDER

On appeal from Gauteng Division of the High Court, Pretoria (Ismail J sitting as court of first instance):

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

JUDGMENT

Van der Merwe JA (Lewis, Shongwe, Petse and Willis JJA concurring):

[1] The issue in this appeal is whether the appellant, Urban Hip Hotels (Pty) Ltd, was entitled to deduct certain operating costs from rental income payable to the respondent, KCarrim Commercial Properties (Pty) Ltd, in terms of an agreement between them. The appellant had in fact made such deductions and when it discovered this, the respondent applied for an order in the Gauteng Division of the High Court, Pretoria that the appellant pay it the sum that had been deducted plus interest. Ismail J in the court a quo ordered the appellant to pay the amount of R2 248 156,29 plus interest and costs to the respondent. It granted leave to the appellant to appeal to this court. The quantum of the respondent's claim is not in issue. The issue is whether, on a proper interpretation of the contract between the parties, the appellant was entitled to make the deductions that it did.

[2] The appellant operates a number of hotels in sectional title complexes. In terms of its standard business model, a rental pool is established in which the owners of sectional title units in the particular complex participate. The units in the rental pool are marketed and administered by the appellant.

[3] A participating owner becomes a member of the particular rental pool and is liable to pay an annual membership fee. The owner is generally

required to enter into the appellant's standard memorandum of agreement (standard agreement). In terms of the standard agreement the participating owners share in the total net rental income of all the units in the pool, in proportion to the percentage of interest that they have in the rental pool, as determined by the surface area of the respective units.

[4] The net rental income is determined by the deduction of expenses specified in the standard agreement from the gross rental income of the units in the pool. These expenses are a monthly rental pool levy per unit, a monthly management fee payable to the appellant calculated at 20 per cent of the gross income derived from the letting of the unit and a proportion of the operating costs of the pool determined by the percentage interest of the unit in the pool. The rental pool levy is intended to cover what the appellant terms fixed costs. The fixed costs include only the costs of provision of DSTV to a unit and a proportionate share of the salaries of the appellant's staff in the particular complex. The amount of the levy would fluctuate in accordance with the costs of the fixed cost items. The operating costs are regarded by the appellant as variable costs and include expenses in respect of cleaning of units, repairs and maintenance, electricity and administration costs. In short, the owner of a participating unit receives a monthly amount consisting of its proportionate share of the total rental pool income, less the rental pool levy, the management fee and a proportionate portion of operating costs.

[5] The appellant managed such a hotel rental pool at the ICON building in Cape Town (ICON). By March 2011 approximately 36 residential units in the ICON formed part of the appellant's rental pool. Its offices were situated on the fourth floor of the building and it had only a reception desk at the entrance to the residential units. The respondent owned 50 residential units and 12 corporate and retail units (for offices and shops) in the ICON. Its residential units were managed by an entity called VIP Living. The respondent had an attractive reception area at the entrance to the residential units in the ICON. As a result there were effectively two competing hotels in the ICON, namely the appellant's operation and the respondent's units managed by VIP Living.

[6] It is common cause that the appellant was keen to obtain the respondent's residential units and superior reception area at the ICON for its rental pool. It accordingly entered into negotiations with the respondent. During the negotiations the appellant was represented by its managing director, Mr Kobus Botha. Mr Zaheed Carrim, the director and chief executive officer of the respondent, acted for the respondent, assisted by its operations manager, Mr Dick Putter. There can be no doubt that during these negotiations the respondent was in a strong bargaining position.

[7] On or about 31 March 2011 the negotiations resulted in the conclusion of a written agreement between the parties entitled Memorandum of Understanding (MOU). The MOU was to serve as an interim arrangement for the period from 1 April 2011 to 31 January 2012, in anticipation of entering into a more comprehensive and lasting agreement.

[8] In terms of the MOU the respondent placed 48 of its residential units in the appellant's rental pool at the ICON and the respondent let its reception area to the appellant. The respondent thus became entitled to a proportionate share of the rental pool income. Clause 3.4 of the MOU provided that the repairs and maintenance in respect of normal wear and tear of the units would be for the account of the appellant. In respect of the financial obligations of the respondent the MOU provided as follows:

'4.3 Expense Contribution

The parties agreed that a levy rate of R1,250.00 per rentable unit will apply for the duration of the agreed initial term of the arrangement based on the number of units made available by KCarrim Commercial Properties and defined in the monthly Residential list to be supplied by Carrim for the month in advance. No other expense or payment would be allowed and any deviation or adjustment hereof must be recorded in writing with a reference to this provision, dated and signed by both parties.

4.4 Management Fee

The parties agreed that the monthly management fee payable to Urban Hip will be calculated on a rate of 14% of the turnover, excluding VAT and will be recorded on a VAT Invoice submitted to Carrim for payment not later at the 25th of each month of operation.'

[9] Clause 4.7 of the MOU read:

'Final Agreement

The parties agreed to honour and respect these recorded terms, business standards and practises until it would be replaced or confirmed by an Agreement of which the final terms would be defined and agreed to not later than 20 January 2012 and that the objective of the arrangement would be to establish a profitable arrangement as the basis thereof. The final implementation date is agreed and set for 1 February 2012.'

Clause 6.2 provided as follows:

'Variation

No variation or consensual cancellation of this MOU shall be of any force or effect unless reduced to writing and agreed by all parties.'

The MOU was amended by two written agreements entered into on 31 May 2011, but it is not necessary to refer to their provisions.

[10] The MOU was thus very different from the standard agreement used by the appellant. A fixed and not variable levy rate and a reduced management fee were agreed upon. Importantly, according to the respondent it was, in terms of clause 4.3 of the MOU, also not liable for operating costs in respect of the rental pool.

[11] The envisaged comprehensive agreement did not materialise. It is common cause that the MOU was terminated on 29 February 2012. The respondent said that during March 2012, Mr Putter ascertained that over the period from 1 April 2011 to 29 February 2012, the appellant had deducted operating costs from income due to the respondent, over and above the expense contributions/levy rate in terms of clause 4.3 and the management fee. As a result the accounts of the appellant were analysed with greater care by the respondent. It determined that the deductions in respect of operating costs for the duration of the MOU amounted to R2 248 156,29 – hence the application against the appellant for payment of this sum, interest thereon from date of demand and costs.

[12] As I have said, the correctness of the amount is not in dispute. The appellant opposed the application essentially on the ground that the standard agreement formed part of the agreement between the parties. Its case was that the relationship between the parties was governed by the standard agreement save as otherwise provided for in the MOU. Therefore, so the appellant averred, the respondent was in fact liable for operating costs and the appellant was entitled to deduct the amount of R2 248 156,29.

[13] The application was referred for the hearing of oral evidence on the following questions:

'1.1 Did the Respondent's standard memorandum of agreement . . . form part of the contract between the parties?

1.2 Did the three MOU's constitute the exclusive memorial of what was agreed between the parties?'

Only Mr Carrim and Mr Botha testified in the court a quo. It found for the respondent in the following terms:

'I am therefore of the view that the MOU was the sole memorial between the parties for the period that it existed, albeit for a short duration of time, and that the respondent's standard pool agreement did not form part of the agreement between the parties.'

It granted the relief claimed in the notice of motion.

[14] Before us, the appellant did not challenge the finding that the standard agreement did not form part of the agreement between the parties. This stance is no doubt correct. Although the standard agreement had been sent to the respondent at the initial stage of the negotiations, it was never referred to again. It is clear from the evidence that Mr Carrim would under no circumstances have bound the respondent to the standard agreement. For this reason the respondent prepared the MOU, which after the signature thereof by Mr Botha, constituted the only document evidencing the contract between the parties.

[15] The argument before us was that on an interpretation of the MOU, the appellant was entitled to deduct operating costs. It was submitted that the

appellant's normal practice in respect of deduction of operating costs applied to the MOU as did its standard practice of allocating rental income. (The respondent has no quarrel with the way in which rental income was determined.) For this argument the appellant relied on an interpretation of clause 4.3 read with clause 4.4, together with clause 4.7 and on the alleged conduct of the respondent subsequent to the MOU.

[16] As I understood it, the argument went along the following lines. Because clause 4.4 dealt with the payment of management fees, the phrase 'no other expense or payment would be allowed' in clause 4.3, could not mean what it says. Clause 4.3 deals only with the rental pool levy for fixed costs. As the MOU therefore contained no mechanism for determination of the net rental income, it must have been intended that the appellant's normal practice in respect of both allocating rental income and deducting operating costs applied. It was submitted that this conclusion was supported by clause 4.7 and evidenced by the subsequent conduct of the respondent.

[17] There is no merit in this argument. It is trite that the MOU must be read as a whole. The subject of clause 4.3 is contribution to expenses and that of clause 4.4 is the management fee. The wording of clause 4.3 makes it abundantly clear that, apart from the levy rate of R1 250 per unit, the respondent would not be liable for any other expense or payment unless otherwise agreed in writing and signed by both parties. Seen thus, the MOU indeed contained a method of determination of the net amount payable to the respondent, ie its proportionate gross rental income less the expense contribution and the management fee.

[18] In the final analysis the appellant relies on nothing other than a tacit term of the MOU to the effect that the appellant's normal practice in respect to operating costs would apply. Reliance on such a tacit term is unfounded for a variety of reasons. It was not pleaded nor raised in the court a quo. As I have pointed out, the MOU is complete and efficacious. The parties applied their minds to the subject of operating costs. They excluded liability for operating costs on the part of the respondent by the express provisions of clause 4.3

and the deliberate exclusion of the standard agreement from their agreement. In these circumstances there is no room for this tacit term. See *Robin v Guarantee Life Assurance Co Ltd* 1984 (4) SA 558 (A) at 567B-F. In any event, on the evidence it can be stated with confidence that had the officious bystander during the negotiations raised the question as to whether the respondent would be liable for operating costs, Mr Carrim would have firmly answered in the negative.

[19] On a proper interpretation of clause 4.7, the words 'terms, business standards and practices' are all qualified by the words 'these recorded'. Clause 4.2 for instance provides as follows:

'Service Delivery Standard

The parties agreed that the operational co-operation standard to be applied would be similar to those standards that make up the total business of Urban as exercised in all its rental pool premises.'

The submission that clause 4.7 refers to extraneous business standards and practices can therefore not be accepted. The appellant's interpretation in any event takes its case no further. The alleged extraneous business standards and practices are unidentified, but can certainly not refer to the standard agreement.

[20] It remains to deal with the appellant's submission in respect of the alleged subsequent conduct of the respondent. The appellant relied upon the evidence that for the duration of the MOU, the appellant furnished the respondent with monthly accounts that reflected deductions of operating costs. It is undisputed that despite discussions of these accounts by Mr Putter with the appellant, the respondent did not, during the contract period, object to the accounts on the ground that the deduction of operating costs was impermissible.

[21] It is now well established that the meaning of a contract must be ascertained by consideration of the words used, the contract as a whole and the context or factual matrix in which the contract was concluded, irrespective of whether there is an ambiguity in the meaning thereof. See *Novartis SA*

(Pty) Ltd v Maphil Trading (Pty) Ltd [2015] ZASCA 111; 2016 1 SA 518 (SCA) para 28. I accept that in an appropriate case the manner in which the parties to a contract carried out their agreement, may be considered as part of the contextual setting in which the terms of the contract are to be determined. See *Unica Iron and Steel (Pty) Ltd & another v Mirchandani* [2015] ZASCA 150; 2016 (2) SA 307 (SCA) para 21 and G B Bradfield *Christie's Law of Contract in South Africa*, 7 ed, at 254. The use of such evidence is, however, subject to three provisos. First, the evidence must be indicative of a common understanding of the terms and meaning of the contract. Second, as pointed out by Bradfield, (supra) at 254, the evidence may be used as an aid to interpretation and not to alter the words used by the parties. See also *Comwezi Security Services (Pty) Ltd & another v Cape Empowerment Trust Ltd* (759/2011) [2012] ZASCA 126 (21 September 2012). Third, as Harms JA cautioned in *KPMG Chartered Accountants (SA) v Securefin Ltd & another* [2009] ZASCA 7; 2009 (4) SA 399 (SCA) para 39, the evidence must be used 'as conservatively as possible'.

[22] In this matter the evidence by no means established that the conduct of the respondent is consistent only with acceptance of liability for operating costs in terms of the MOU. The failure of both Mr Putter and the accounts department of the respondent to raise the question of operating costs before March 2012, may simply be ascribed to a mistake or misunderstanding. This appears to be supported by the fact that the impermissible deduction by the appellant of operating costs in respect of repairs and maintenance, was also not picked up. It is clear that Mr Carrim was the directing mind of the respondent. His evidence that he was not furnished with the appellant's accounts and that he was therefore unaware of the deduction of operating costs before March 2012, cannot be rejected, to say the least. In any event, as I have said, the clear meaning of clause 4.3 of the MOU cannot in the circumstances be varied by evidence of conduct subsequent to the entering into of the MOU.

[23] Accordingly, as the court a quo found, the appellant was not entitled to deduct the operating expenses that it did and the respondent is entitled to payment of the sum underpaid.

[24] The appeal is dismissed with costs including the costs of two counsel.

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C H G van der Merwe
Judge of Appeal

APPEARANCES:

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