IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, DURBAN

CASE NO: 9308/2014

In the matter between:

EDWARD JOHN WILLIAM PEEN N.O	First Applicant
BRETT DENIS BERRIMAN N.O	Second Applicant
ALAN DAVID ERNEST WELLS N.O	Third Applicant
FREDERICK JOHAN RIEKERT N.O	Fourth Applicant

and

THE WESTVILLE COUNTRY CLUB	Respondent

JUDGMENT

CHETTY, J:

[1] The applicants are the Trustees of the Indigo Dawn Trust, which occupies certain premises in terms of a sub-lease with the respondent, the Westville Country Club. The applicants in their capacity as Trustees brought an application for a

declarator that the Trust is not required to pay to the respondent, for the duration of its sub-lease in respect of the premises situated at Remainder of Lot 1700, Westville and more fully depicted on diagram SG 2758/1993, any amount as may be billed by the Ethekwini Municipality to the respondent as a rental for the said premises.

[2] The application was opposed, with the respondent essentially contending that the amount which it invoices the Trust each month is a charge that it is entitled to levy against the Trust in terms of the notarial deed of sub-lease. As will appear from what follows, the decision I reach hinges on the interpretation to be placed on two agreements, one being an agreement of sub-lease with the previous tenant of the premises, and the other described as a 'Permit to sub-lease' entered into between the respondent and the Ethekwini Municipality.

[3] The brief background to the matter is that in 1994 the respondent concluded a 99-year lease with the Town Council of the Borough of Westville, which now forms part of the Ethekwini Municipality. In June 2007 the respondent entered into an agreement of sub-lease with Proproyale Developments CC in terms of which it leased certain premises on the property for a period of 40 years. At the time when Proproyale entered into the lease agreement, the premises were in the process of being constructed. It is not in dispute that Proproyale expended an amount of R1,8 million on the construction of the upstairs portion of the premises in respect of which the sub-lease was concluded. This is the section that is currently occupied by the Trust. The Trust contends that these costs were absorbed by Proproyale in exchange for a beneficial rental agreement. At the conclusion of the 40 year lease

agreement, the respondent will benefit from the constructed premises, without having contributed to its development.

[4] In October 2011, after construction on the premises had been completed, Proproyale concluded an agreement of cession with the Trust in terms of which it ceded and assigned to the latter all its rights and obligations in terms of its sub-lease with the respondent. As a requirement for the agreement of sub-lease with the Trust, the permission of the Municipality had to be obtained. A Permit to sub-lease was concluded between the Municipality and the respondent. In terms of the sub-lease, the Trust is obliged to pay certain amounts on a monthly basis to the respondent. These amounts include rental for the premises as well as certain charges in respect of services supplied by the Municipality, as well as a membership fee, which the Trust is contractually obliged to pay to the respondent.

[5] As from October 2011, the respondent has been invoicing the Trust an amount which it described on the invoices as "rates". In the belief that these amounts were due and payable, the Trust has from inception to date paid such amounts in the *bona fide* belief that these were contractually due. These amounts approximated R2 570 per month. Typically in a month the Trust would be invoiced for insurance, electricity and water, subscription fees in terms of membership of the Country Club, rent, and an amount in respect of "rates". A copy of one such invoice was attached to the founding papers as 'EP4.1'. It is the payment of this latter amount that has resulted in the Trustees bringing this application in which it contends that the respondent has imposed payment of this amount on the Trust,

whereas in terms of the Permit to sub-lease, these amounts are due and payable by the respondent to the Municipality..

[6] Matters came to a head when the Trust received a letter addressed by the Municipality to Proproyale in August 2013. The letter indicated that Proproyale had been in arrears with its rates to the Municipality for the past six years. Mr Peen, a Trustee and the deponent to the founding affidavit, stated that when he came across the letter he considered it to be an error as the Trust had been billed on a monthly basis for rates by the respondent, and that these amounts had been duly paid. The Trust forwarded the letter to the respondent for attention and payment. Subsequently the Trust was advised by the Chairperson of the Country Club that the Trust was liable for payment of rates, and that the Trust should take up the matter directly with the Municipality. The amount claimed was in the region of R24 000 equating to a monthly rates instalment of R422.48. It was at this stage, according to Mr Peen, that the Trust realised that the amounts which were being charged by the Municipality to the respondent as a rental in terms of a Permit to sub-lease was in fact being billed, impermissibly, by the respondent to the Trust. In essence, instead of paying an amount of approximately R422.48 per month, the Trust was being billed amounts of approximately R2255 to R2570 per month under the guise that these were due as "rates". The Trust considered such actions on the part of the respondent to be fraudulent and a misrepresentation of its obligations under the agreement of sub-lease.

[7] Upon the Trust taking up the issue with the respondent, in which it contended that it had been overcharged for rates and had paid an amount of

approximately R138 000 since inception, no response from the respondent was received until 30 May 2014 when the respondent took the view that such payments were justified in terms of the agreement of sub-lease. In a letter from its attorney dated 30 May 2014 the following averments are made:

> 'At the outset our client denies overcharging your client. Your client at present is indebted to our client in an amount equivalent to the cumulative sum of the unpaid municipal rental invoices to our client which are in accordance with the sublease of which your client has taken cession. Rental charged by the municipality to our client constitutes a charge over municipal land which is in accordance with the sublease agreement passed on your client.
> In terms of clause 10.2 of the sublease it is liable for the municipal rates and charges to the municipality over and above the rental due in of the lease. Rates are not applicable as it is a lease agreement over municipal land. A charge on the land is levied by the municipality which is in accordance with the sublease passed on to your client, which is due and payable by your client to our client. Of relevance is that the invoice which your client now disputes is expressly marked "PRT OF PREMISES SU-LEASED TO PROPROYALE DEV" whether your client was under the impression that it was a rates charge is for purposes of clause 10.2 irrelevant.'

[8] Accordingly the Trust seeks a declaratory order that it is not obliged to pay these monthly rental amounts which the respondent contends is due to it. It further contends that if such relief is so granted, that as a consequence thereof it will not be liable to pay to the respondent these rental amounts, and that any future liability incurred by the Trust in terms of the agreement, be set off from amounts already paid to the Country Club. Put differently, the Trust alleges that it has overpaid the respondent an amount of R138 000 in respect of rates that were not due. If the application is upheld, the Trust contends that its further liability under the sub-lease

(whether in respect of services, rental or membership fees) be set off from the R138 000.

[9] In my assessment, the determination of this application hinges on the interpretation to be accorded to certain provisions of the notarial deed of sub-lease between the respondent and Proproyale, and the Permit to sub-lease entered into between the Municipality and the respondent.

[10] One of the preliminary issues raised by the respondent is whether a dispute of fact exists on the papers, and if so, whether on this ground alone the applicants should be denied the relief they seek. In *Room Hire Co (Pty) Ltd v Jeppe Street Mansions Ltd* 1949 (3) SA 1155 (T), it was decided, as a general rule, that the choice between action and motion procedures depends on whether a *bona fide* material dispute of fact should have been anticipated by the party launching the proceedings. When such a dispute is anticipated, a trial action should be instituted. At 1161 Murray AJP stated:

> '...There are certain types of proceeding (e.g., in connection with insolvency) in which by Statute motion proceedings are specially authorised or directed... There are on the other hand certain classes of case (the instances given...are matrimonial causes and illiquid claims for damages) in which motion proceedings are not permissible at all. But between these two extremes there is an area in which...according to recognised practice a choice between motion proceedings and trial action is given according to whether there is or is not an absence of a real dispute between the parties on any material question of fact'.

[11] Accordingly, a court will be less inclined, when there are genuine disputes of fact on material issues, to decide the matter on motion on a mere balance of

probabilities, as would be ordinarily done in an action. If during an application, a dispute of facts arises, the court must exercise a discretion in terms of Rule 6(g) of the Uniform Rules, to either dismiss the application or refer the dispute to oral evidence or to trial. This discretion must be exercised judiciously.

[12] In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634 Corbett JA stated:

> '...where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.'

In *Room Hire supra* at 1162, the Court held that:

> 'Or the application may even be dismissed with costs, particularly when the applicant should have realised when launching his application that a serious dispute of fact was bound to develop.'

See too *Lombaard v Droprop CC & others* 2010 (5) SA 1 (SCA) and *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA). In *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 26, Harms DP said:

> 'Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise in the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or

> so clearly untenable that the court is justified in rejecting them merely on the papers'.

[13] In my view, having considered the papers and the submissions of the respective counsel, I am satisfied there is no dispute of fact which arises in this matter which requires this Court to refer the matter to oral evidence or to trial.

[14] A further issue arose when the respondent's attorneys, in refuting the contention that the respondent was liable to refund the rental charges for which it had been invoicing the Trust, suggested that in light of the dispute as to the interpretation of clause 10.2 of the sub-lease, that the Trust approaches the court to rectify the agreement. In their letter of 30 May 2014 the respondent's attorney noted that:

> 'Should your client wish to rectify the agreement your client will need to bring a rectification action, and in doing so persuade the court that it was the common intention of the parties that your client receive the benefit of the premises at a rental of approximately R750,00 (R3500,00 as per clause 4.1, less the amount disputed by your client) to the Westville country club. This was clearly not the understanding of the initial sublease whose rights and obligations were ceded to your client as each and every payment was timeously made. Pending the rectification of the agreement your client stands liable for payment in terms of the lease agreement.'

The position adopted by the Trust in these proceedings is that there is no need for rectification as the agreement is abundantly clear that the obligation to pay rental for the premises falls on the respondent. Conversely, the respondent in its opposing papers seeks a rectification of the agreement entered into between the parties to have it conform with their common intention. In light of the conclusion I reach, rectification is not necessary.

[15] In *Coopers & Lybrand & others v Bryant* 1995 (3) SA 761 (A) at 768, Joubert JA held that in interpreting contracts, one must have regard to various factors such as the context in which the word or phrase is used; the background circumstances to explain the purpose of the contract and extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intention. This distinction between context, background and extrinsic evidence has been rejected by the Supreme Court of Appeal in *KPMG Chartered Accountants (SA) v Securefin Ltd & another* 2009 (4) SA 399 (SCA) para 39, where Harms DP held that:

> 'First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning . . . . Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses . . . . Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent . . . . Fourth, to the extent that evidence may be admissible to contextualise the document (since 'context is everything') to establish its factual matrix or purpose or for purposes of identification, 'one must use it as conservatively as possible' . . . . The time has arrived for us to accept that there is no merit in trying to distinguish between 'background circumstances' and 'surrounding circumstances'. The distinction is artificial and, in addition, both terms are vague and confusing. Consequently, everything tends to be admitted.'

[16] In so far as context is concerned, the respondent contends that the interpretation sought to be placed by the Trust on the amount to be paid by it in respect of the rental, in terms of the notarial deed of sub-lease read together with the Permit to sub-lease, leads to a conclusion which does not make business

sense. In this regard the respondent alludes to the example of another tenant, namely the Olive & Oil restaurant, which currently pays a rental of approximately R180 per square metre. On the other hand, if the applicants' version is to prevail, the rental to be paid by the Trust would equate to approximately R22 per square metre. Mr *Hoar*, who appeared for the applicants, submitted that this comparison is misplaced, and that the interpretation contended for by the applicants must be seen in the context of the Trust having paid Proproyale R1,8 million in consideration for the constructed premises which it moved into. On the other hand, the Olive and Oil restaurant have not contributed in any way to the development of the infrastructure, which forms part of the overall premises of the Country Club and from which the Club will benefit after the lease has run its course.

[17] In deciding whether the relief sought by the applicants may be granted, regard must be had to the relevant provisions of the notarial deed of lease between the respondent and Proproyale, and the Permit to sub-lease between the respondent and the Municipality. Clause 4 of the sub-lease dealing with rental states that:

> '1. The rental payable by the subleasee to the lessee in consideration for the hire of the premises for the first year shall be the sum of three thousand five hundred rand (R3500,00) plus VAT, per month payable in advance on the first day of each and every month commencing on the effective date. The rental for the first month shall be adjusted pro rata should the effective date not be on the first of a month. All and any payments shall be made to the lessee at 1 Link Road, Westville.
>
> 2. The rental shall be subject to an annual minimum increment of 8% which interest rate shall, in addition also increase from time to time in line with the CPI increase above the foregoing 8%... ....
>
> 3. The cost of all building additions / alterations / improvements / upgrading as set out in the plan marked "A" annexed shall be borne by the sub lessee.'

[18] Clause 10 of the sub-lease states the following:

> '1. The sub lessee shall, during the continuance of this lease, punctually pay all charges levied by any competent authority for electric current, water and all other municipal services for the premises. The sub-lessee shall at its costs install separate metres for these purposes.
> 2. The sub lessee shall be responsible for the payment of all municipal rates and charges payable to the local authority in respect of the premises over and above the rental due in terms of this lease agreement. Should the rates or charges due in respect of the premises not be identified separately by the local authority, the sub-lessee shall pay a proportionate share of such rates on a pro rata basis in the same proportion that the area of the premises bears in the total area of the main clubhouse situated on the property from time to time equal monthly instalments.'
> (My underlining)

[19] At the time when Proproyale entered into the above-mentioned sub-lease, annexed to that was the Permit to sub-lease, entered into between the respondent and the Municipality, being the owner of the property on which the Club is situated. The preamble to the Permit to sub-lease is worded in a manner that describes the respondent as the 'lessee', which seeks to lease a portion of land, approximately 350 m² to the Trust for the purposes of a health and wellness centre. The consent of the Municipality was made subject to certain conditions, the following of which, listed as 5, states as follows:

> 'The *lessee* shall pay as consideration to the municipality in respect of the sublease, a ground rental of two thousand and eighty eighty rands (R2088,00) per month with effect from 25 January 2011 until 31 October 2011, escalating thereafter by 8% per annum for the ensuing two years of the sublease period, which rental shall be payable in advance on or before the seventh day of each and every month at the offices of the Deputy city manager (Treasury) or at such other place he may nominate. For clarification purposes, it is recorded that

> reference to "ground rental' in this permit to sublease means the rental payable in respect of vacant land only and that no direct or indirect rental shall be due and payable for any buildings, structures and/or other improvements elected on the sublease area.'

[20] As set out earlier, the Trust contends that the respondent has since 2011 been billing it for rentals which the respondent is liable, in terms of clause 5 of the Permit to sub-lease, to pay to the Municipality. This billing, it is common cause, has taken place under the heading of "*rates*", which the Trust contends was misleading and created the impression that such amounts were legitimately due and payable to the respondent. Accordingly the Trust contends that in terms of the Permit to sub-lease, it is clear that the obligation to pay rental, falls on the "lessee". The preamble to the agreement defines the "lessee" as the Westville Country Club. In addition, the Permit to sub-lease states that the "ground rental" payable by the respondent to the Municipality is with reference to "vacant land" upon which the building stands. The Trust occupies the upper floor of the building while the lower or ground floor has been let out to tenants, from whom the respondent also draws a monthly rental.

[21] Counsel for the applicants submitted that the Trust does not dispute or deny that it is liable for rental in the amount of R3500 per month together with charges for services as provided for by the local authority, together with monthly fees in respect of subscriptions for membership to the Westville Country Club. Beyond that, it submits there are no further obligations in respect of payment to the respondent which emerge from the contract of sub-lease.

[22] Counsel for the respondent, Ms *Konigkramer*, submitted that the rental obligation referred to in clause 5 of the Permit to sub-lease must be interpreted as a "*charge*" contemplated in terms of clause 10 of the notarial deed of sub-lease. As such, the obligation in the notarial deed in clause 10.1 to pay "*all charges*" must be interpreted to include rental which the respondent is obliged to pay in terms of clause 5 of the Permit to sub-lease. Counsel further contended that this interpretation is fortified by the distinction drawn in the wording of clause 10.2 of the sub-lease between "*municipal rates*" on the one hand, and the reference to "*charges*" payable to the local authority over and above rental due in terms of the agreement.

[23] I am not persuaded that the reference in the Permit to sub-lease of a "*ground rental*" can be interpreted as being a "service" or a "charge" within the wording of clause 10 of the sub-lease. The respondent was unable to provide any explanation as to why the invoicing to the Trust reflected rental under the heading of "*rates*". Counsel for the respondent submitted that it did not matter under what category the amount was invoiced. Mr *Hoar* however contended that any obligation to pay rates can never be construed as a charge, as by definition, it is a tax levied by the local authority. It was further submitted that the obligation of the Trust to pay rates was an amount of approximately R422.00 per month. It is clear that the respondent was not billing the Trust for rates, as the amount charged on a monthly basis significantly exceeded the average amount of the rates payable for the premises. It must follow therefore that the amount invoiced to the Trust could only be the rentals referred to in clause 5 of the Permit to sub-lease.

[24] The respondent attempted to build a case against the interpretation contended for by the Trust by alluding to the alleged financial distress of the Trust, and their desperation in wanting to lease the premises to a church. This proposal was rejected by the respondent, on the basis that such use would be inconsistent with the terms and conditions of the main lease agreement entered into between the respondent and the Municipality. The Trusts' submission is firstly that these allegations are based on hearsay evidence, and further that there is no truth to the allegation that the Trust is in financial crisis. This argument emanates from the contention of the respondent that the Trust has since 2013 been paying the rentals, for which it was billed on a monthly basis, and has only recently sought to dispute this obligation. The respondent contends that this resistance to paying the rental emanates from the worsening financial predicament of the Trust. The respondent further pointed out that Proproyale also paid these rental amounts, without any demure.

[25] I am not persuaded that it is necessary for me to make any findings or to consider the allegations of financial distress made by the respondent. Whether the premises can be let to a church or not is outside the scope of this application. Interpretation of contractual provisions is a matter of law. In my view, it is clear from the wording of the agreements that the obligation to pay rental in clause 5 of the Permit to sub-lease is one which clearly falls on the "lessee", being the respondent. I can find no basis to infuse that obligation into the obligations on the Trust in terms of clause 10 of the agreement of sub-lease.

[26] It was argued that I should interpret the agreements in accordance with the ratio laid down in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18:

> 'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

[27] After considering the above dictum, I reach the view that the rental obligation contemplated in clause 5 of the Permit to sub-lease is an obligation that falls on the respondent alone. There is no basis, contractual or otherwise, which allows the respondent to pass on this obligation to the Trust. I am unable to find any basis for clauses 4 and 10 of the notarial deed of sub-lease to be interpreted in a manner that allows the rental obligation in terms of clause 5 of the permit to sub-lease to be read as a "*charge*" for services. I am furthermore unable to find that the interpretation sought for by the Trust would lead to an insensible or unbusinesslike

approach as referred to in *Natal Joint Municipal Pension Fund v Endumeni Municipality*,(supra), or that such an interpretation would undermine the purpose of the agreement to sub-lease.

[28] As set out earlier, in interpreting agreements one must also have regard to context. An important factor in arriving at the conclusion that the respondent is not permitted to pass on payment of the rental obligation to the Trust is the investment of R1,8 million which the Trust paid to Proproyale at the time when it entered into the cession of the sub-lease. In exchange for the investment, which would ultimately benefit the respondent, the Trust could not have been expected to pay its rental of R3500 plus rates, services such as electricity and water, membership fees to the Club as well as the amounts billed to it as "rates". If the result is that the Trust is charged a significantly lesser amount for its lease of the premises in comparison to other tenants, this must be seen in the context of its payment to Proproyale. Otherwise, the Trust would have simply sought to occupy one of the other premises without outlaying any amounts.

[29] In the result I make the following order:

1. It is declared that the Indigo Dawn Trust is not required to pay to the respondent, for the duration of the sub-lease with the latter in respect of the premises situated at Remainder of Lot 1700, Westville and depicted on the Surveyor General's diagram No. 2758/1993, any such amount as may be billed by the Ethekwini Municipality to the respondent as a rental for the said premises.

2. The respondent is directed to pay the costs of the application.

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M R CHETTY

Judge of the High Court

Appearances:

For the Applicant: Adv S Hoar

Instructed by Lister & Company

For the Respondent: Adv M A Konigkramer

Instructed by Andrew & Associate, Durban

Date of hearing: 18 March 2015

Date of judgment: 30 July 2015