THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 1159/2019

In the matter between:

TRANSNET NATIONAL PORTS AUTHORITY **APPELLANT**

and

REIT INVESTMENTS (PTY) LIMITED **FIRST RESPONDENT**

M C SEOTA NO **SECOND RESPONDENT**

Neutral citation: *Transnet National Ports Authority v Reit Investments (Pty) Limited and Another* (Case no 1159/2019) [2020] ZASCA 129 (13 October 2020)

Coram: PETSE DP, SALDULKER, PLASKET and DLODLO JJA and MATOJANE AJA

Heard: 3 September 2020

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail, publication on the Supreme Court

of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09H45 on 13 October 2020

Summary: Notarial deeds of lease – determination of rental payable by umpire appointed jointly by lessor and lessee – umpire executing mandate in accordance with its terms – no legal basis established for reviewing and setting aside determination.

Contract – interpretation of – s 67 of National Ports Act 12 of 2005 – applicability of.

ORDER

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

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

2 The order of the court below is set aside and in its place is substituted the following:

'The application for review is dismissed with costs, including the costs occasioned by the employment of two counsel.'

JUDGMENT

Petse DP (Saldulker, Plasket and Dlodlo JJA and Matojane AJA concurring)

[1] This appeal raises two interrelated issues. The first issue concerns the circumstances in which the determination made by an expert valuer or umpire jointly appointed by two parties to a contract is susceptible to being reviewed and set aside by a court. In a broader context, the subject of the appeal is the correct basis upon which valuations of immovable property, situated in Maydon Wharf in the port of Durban, should be made for purposes of determining rentals payable in respect of those properties. The second issue raises the question whether the agreements concluded between the parties in 2009 and described as 'Declaration of Rental' had the effect of varying the basis upon which rental would be determined for the remaining period of the long-term leases terminating by effluxion of time on 30 September 2029.

[2] The appellant, Transnet National Ports Authority (Transnet), is one of the trading entities under the auspices of Transnet Limited, which is a public company incorporated in terms of the Legal Succession to the South African Transport Services Act 9 of 1989 as read with the Companies Act 71 of 2008. Transnet operates, amongst other things, the port of Durban. The first respondent is Reit Investments (Pty) Ltd (Reit) which is a private company incorporated in South Africa. Its principal place of business is in Johannesburg. The second respondent is Mr Matsobane Charles Seota, (Mr Seota), who was cited in his official capacity as the registrar of the South African Council for the Property Valuers Profession (SACPVP). Although Mr Seota's valuation took the centre stage in the review proceedings in the High Court, no substantive relief was sought against him personally. Not surprisingly therefore, he took no part in the proceedings in the court below and has not participated in this appeal.

[3] Mr Seota's valuation was impugned on the narrow basis that he 'did not determine the market value of the land when attempting to resolve the deadlock between the appraisers appointed' by Transnet and Reit. It was asserted by Reit that 'instead of determining the market value of the land, to which had to be applied the contractually stipulated fixed percentage to establish the annual rental', Mr Seota 'determined (contrary to the terms of the contract) the market-related rental in respect of the properties'. The reference to 'the contract' is patently a reference to the long-term notarial leases.

[4] The dispute between the parties had its genesis in five long-term notarial agreements of lease concluded between Transnet's

predecessor-in-title called the South African Railways & Harbours, as lessor, and Reit's predecessor-in-title, named B & C Properties South Africa (Pty) Ltd, as lessee during June, August and September 1960. Save for minor differences relating to the percentages that were to be used in determining the rental payable in respect of each agreement of lease, the five notarial leases were otherwise in identical terms.

[5] Reit had initially sought an order reviewing and setting aside Mr Seota's determination coupled with an order directing Transnet to procure, within the period determined by the court, a fresh valuation of the land in accordance with the principles identified in the judgment of the court below. However, it so happened that long after Transnet had delivered its answering affidavit, Reit changed tack some few months before the hearing. It then sought declaratory orders to the effect that Mr Seota was appointed to value the land (excluding improvements thereon) in terms of the agreements of lease but failed to do so. I shall revert to this later.

[6] Despite opposition by Transnet, the High Court (Moshidi J) held that Reit had made out a case for the relief sought. Accordingly, it granted relief substantially in the terms sought by Reit in its amended notice of motion. Although more will be said about the conclusions of the High Court later, it suffices, for now, to briefly set out its principal conclusions. It said (paras 14 and 15):

'At the commencement of argument, it was common cause that the second respondent, when making the rental determination, as he did, was not acting as an arbitrator, but in fact, as an expert valuer. After all is said and done, the historical exposition described above, the crisp issue for determination is therefore the question: whether Mr M C Seota NO ("the second respondent"), in making the rental determination, failed to discharge his mandate

in terms of the notarial deeds of leases, to determine the value of the land, excluding the improvements constructed thereon, and by determining a market- related rental for the premises contrary to the express terms of the notarial leases and if the second respondent was incorrect, as contended by the applicant, whether his determination is susceptible to review and setting aside by the Court.

The first respondent, in also relying on the provisions of section 67 of the National Ports Act 12 of 2005 ("the Ports Act"), advanced the submission in its heads of argument, that the parties amended the notarial leases pursuant to the conclusion of the 2009 Declarations to provide that the valuer would determine a market-related rental for the leased premises, instead of determining the market value of the land, excluding improvements. In the process, the first respondent also invoked the principle of *res judicata* in support of its argument that the applicant is not entitled to challenge the second respondent's valuation. It is to these competing submissions, and related ones, I must now turn, having in mind some legal principles, applicable.'

[7] The Court then continued (paras 33 and 34):

'On the other hand, and on this aspect, the applicant, as observed above, presented entirely different arguments. I have already discredited the second respondent's rental determination.

. . .

It is so, in my view, and as argued by the applicant that, the parties never amended the notarial leases pursuant to the conclusion of the 2009 Declarations to provide that the valuer (the second respondent) would determine a market-related rental for the leased premises instead of determining the market value of the premises, excluding improvements. Neither was there any evidence, in whatever form, to suggest so. I must therefore find that Transnet's assertion that the notarial deeds of leases were amended in the manner suggested, as entirely unsustainable in the circumstances of this case. On a proper construction, the terms of the 2009 Declarations concluded on 17 August 2009, do not show that an amendment to the notarial leases in the terms as alleged by the first respondent. If this was so then the parties would have been obliged to follow the procedure

as set out in the Deeds of Leases. For starters, the Declarations signed by the applicant in 2009, were conditional. . . .'

[8] As already indicated, the High Court proceeded to grant relief to Reit substantially in terms of its amended notice of motion. This appeal is against that order and comes before us with the leave of this Court after the High Court had refused leave. In order to promote a better understanding of the nature and ambit of the issues in this appeal, the facts giving rise thereto, which are largely common cause, require to be canvassed in some detail.

[9] As previously mentioned, the parties concluded five long-term notarial leases in respect of properties located in the Durban Port precinct at what by all accounts were nominal rentals based on an agreed percentage of the market value of the land excluding improvements thereon.[1] As the various leases were to endure for periods in excess of 60 years, the rental payable was to be fixed for five-year periods only at any given time. It bears mentioning that although the five long-term leases were to terminate by effluxion of time at different times, (some in 2025 and others in 2029) Transnet and Reit agreed, four years after signing the 2009 declarations of rental, to vary the termination dates of the leases so that they would all terminate on 30 September 2029.

[10] Clause 5 of the various agreements, which is central to the dispute between the parties, bears special mention. It provides, to the extent relevant for present purposes, that:

[1] Clause 4 of the leases provides:
'In determining the market value of the land for the purposes of clause 3 hereof, account shall not be taken of the value of any buildings or other structures on the said land, but the fact that railway siding facilities have been or can be provided, shall be taken into account.'

‘(a) The Administration may, and if called upon by the Lessee shall, at any time within three (3) months prior to the commencement of any period of five (5) years contemplated in clause 3 hereof, but excluding the initial period referred to in paragraph (a) of that clause, determine the market value of the land and notify the Lessee of the value so determined and of the rent which will consequently be payable in respect of the full period of five (5) years with reference to which such determination was made.

(b) If the Lessee is not prepared to accept the Administration’s determination of the market value, it shall forthwith notify the Administration accordingly, whereupon the value shall be determined by sworn appraisement as hereinafter provided.

(c) Such appraisement shall be undertaken by a sworn appraiser to be selected by the parties jointly. If the parties cannot agree on one sworn appraiser, each party shall appoint one sworn appraiser to undertake the valuation jointly with the one appointed by the other party, and if these two appraisers cannot agree on their valuation, they shall jointly select a third as umpire, whose valuation shall be final and binding on the parties. The cost of all appraisements shall be borne by the parties in equal shares.

(d) If the Administration does not notify the Lessee of any change in its determination of the market value and the Lessee does not request such determination both within the three (3) months aforesaid, it shall be deemed that there has been no change in land values to justify a revision of the rental and in that case the rental for the then current period of five (5) years shall, except where a higher percentage rate on market value becomes applicable in terms of clause (3), be the same as that which was applicable during the immediately preceding period.’

[11] It is also necessary to make reference to clause 18 that provides:

‘It is specifically understood that no amendment or variation of the terms and conditions of this lease in any form or manner whatsoever will be recognised by or be binding upon

the Administration, unless and until such amendment or variation has been embodied in a formal written agreement duly executed by the Administration and by the Lessee.'

[12] It is apposite at this juncture to make reference to the National Ports Act, 12 of 2005 (the NPA) which came into operation on 26 November 2006. The objects of the NPA are set out in s 2 which reads:

'The objects of this Act are to–

(a) promote the development of an effective and productive South African ports industry that is capable of contributing to the economic growth and development of our country;

(b) establish appropriate institutional arrangements to support the governance of 45 ports;

(c) promote and improve efficiency and performance in the management and operation of ports;

(d) enhance transparency in the management of ports;

(e) strengthen the State's capacity to–

(i) separate operations from the landlord function within ports;

(ii) encourage employee participation, in order to motivate management and workers;

(iii) facilitate the development of technology, information systems and managerial expertise through private sector involvement and participation; and

(f) promote the development of an integrated regional production and distribution system in support of government's policies.'

[13] Section 67, which is headed 'Restructuring and reform of ports', provides in subsec (1)*(b)* thereof that:

'If, in any area within a port–

(b) the terms of a long-term lease which existed immediately before this section took effect are substantially prejudicial to the operation of a port, including terms providing for unreasonable low rentals or containing no restrictions on sub-letting or no provision confining the use of the property to a use relating to the relevant

port, the Authority may in writing addressed to the lessee direct that the applicable terms be renegotiated in order to remove the prejudice.'

[14] It is manifest even on a cursory reading of s 67(1)*(b)* that Transnet is empowered, in circumstances where the terms of a long-term lease concluded before this section took effect are thought to be substantially prejudicial to the operation of a port, because they, amongst other things, provide for unreasonably low rentals, to address a letter to the lessee concerned and direct that the applicable terms be renegotiated in order to remove the prejudice. It, therefore, comes as no surprise that on 28 October 2008 Transnet caused a letter to be addressed to Reit in which it pointed out that Reit's leases 'have been identified as falling under review in the port of Durban.'

[15] Transnet's letter just mentioned in the preceding paragraph calls for closer scrutiny. And because of its great import, it is necessary to quote it in full. It was penned by a Ms Linda Nodada who is designated as 'Manager – Real Estate, Transnet National Ports Authority.' It is headed: 'RE – AGREEMENTS OF LEASE BETWEEN EMERGENT INVESTMENTS (PTY) LTD AND THE TRANSNET NATIONAL PORTS AUTHORITY – MAYDON WHARF – PORT OF DURBAN'. It reads:

'We refer to the abovementioned subject, duly authorized.

The Transnet National Ports Authority (TNPA) has embarked on a process of reviewing all our Agreements of Lease, with various tenants – to align the contractual arrangements with our designated functions as provided for in the National Ports Act.

The objectives of the lease review include, inter alia:

- The commercialization of lease terms and conditions to standardize our leases.
- Review of onerous lease terms, terms heavily in favour of the tenant and grossly prejudicial to the TNPA and other tenants on the port.

- Alignment of our leases with normal market practices in the commercial real estate environment.
- Assessing leases that have no direct or no port related use – historically occupying our land.
- Licensing of certain tenants in line with the provisos in the Act.

  Your leases have been identified as falling under this review in the Port of Durban.

  To this end, the TNPA has commissioned a valuation of the property leased to yourselves and the table below outlines the leased areas and the applicable rates:

TENANT	EXTENT	CURRENT RATE/M^2	CURRENT MONTHLY RENTAL	NEW RATE /M^2	NEW MONTHLY RENTAL
EMERGENT INVESTMENTS	4121	1.80	R 7 404.86	R 15.00	R 61 815.00
EMERGENT INVESTMENTS	5216	1.87	R 9 743.25	R 15.00	R 78 240.00
EMERGENT INVESTMENTS	10632	1.03	R 10 901.14	R 15.00	R 159 480.00
EMERGENT INVESTMENTS	6407	2.04	R 13 102.31	R 15.00	R 96 105.00
EMERGENT INVESTMENTS	3966	2.04	R 8 110.47	R 15.00	R 59 490.00

The rentals will escalate annually by 10% for the next five years, whereafter the rentals will be reviewed by both parties to align with the prevailing market rate at the time. The leases will be reviewed every five years thereafter until the date of expiry.

We are adamant that the discrepancy between the existing rental rates currently charged and the prevailing market rate for the leased properties, be addressed.

We invite you for a meeting between the TNPA and your representatives on Thursday, 27 November 2008. Kindly contact Colleen Rampono on (031) 361 8909 to confirm or arrange an alternative date for the meeting.

The new rental rates and all other statutory conditions required for these kinds of leases would be tabled via Declaration of rentals and or Addenda to the existing Agreements of Lease, which would ultimately be signed by both parties through appropriate authorization.

This correspondence is sent to you without prejudice to Transnet National Ports Authority.

We look forward to your positive response.'

As can be observed from the illustration contained in the table showing comparative figures, the increases proposed by Transnet clearly show that there was a substantial difference between the then current rental of approximately R 49 260 per month and the proposed increased rental which would push the rental to an astronomical figure of some R 455 130 per month.

[16] The meeting requested by Transnet in its letter dated 28 October 2008 was held between representatives of Transnet and Reit on 27 November 2008. Following this meeting, Transnet advised Reit that its proposed rental rate was R 15 per square metre per month, exclusive of rates and taxes. Further discussions between the parties ensued and after much to-ing and fro-ing the parties' negotiations ultimately resulted in the conclusion of five 'declaration of rental' agreements which, save for differences in respect of the rental amount payable for each property, were in identical terms.

[17] The material terms of the declarations of rental read thus:

'WHEREAS in terms of NOTARIAL DEED OF LEASE NO 62/1960L dated 4 June 1960 and supplementary documents, the LESSEE hires from the LESSOR Lease 28 on Portion

66 of Erf 10004, Durban, being portion of the LESSOR's land at Maydon Wharf abutting on the Bay of Durban, Province of KwaZulu-Natal.

AND WHEREAS the rental payable by the LESSEE to the LESSOR has been reviewed in terms of the conditions of lease.

AND WHEREAS the rental payable by the LESSEE to the LESSOR has been reviewed in terms of Sec 67.1(b) of the National Ports Act, Act 12 of 2005.

NOW, THEREFORE, THE PARTIES HEREBY DECLARE THAT:

In respect of the period 1 June 2009 to 31 May 2014 the annual rental shall be the amount of Four Hundred and Twenty Five Thousand Nine Hundred and Twenty Rand Only (R45 920,00), (excluding V.A.T) escalating at 10% (ten percent) per annum compounded.'

It bears emphasising that the new increased rentals were intended to take effect from 1 June 2009 to 31 May 2014 subject to a compound 10 per cent annual escalation.

[18] On 1 June 2009 Transnet caused a further letter to be addressed to Reit in which it advised, amongst other things, that other than the terms reviewed and agreed to in terms of the declarations of rental, it had no intention of varying the other terms of the leases. On 24 July 2009 Reit's attorneys advised Transnet that Reit had agreed, on a without prejudice basis, to sign the declarations of rental subject to the following conditions:

'1. Our clients agreement to increase the rental in accordance with the declarations of rental and our client's signature thereof does not constitute an acceptance by our client of Transnet's entitlement to rely of Section 67 of the National Ports Act, No 12 of 2005 to review the rental and/or lease agreements and our client has agreed to the review process on a without prejudice basis and without waiving or novating any of its rights in this regard; and

2. Transnet shall not in future and for the duration of the remainder of the lease periods attempt to again rely on Section 67 of the National Ports Act, No 12 of 2005 to enforce increased rentals or any cancellation of the lease agreements; and

3. The increased rental amounts shall be paid by our client to Transnet quarterly in arrears, in the same cycles as it has prior to the signature of the declarations of rental; and
4. All of the remaining terms and conditions as contained in the various registered lease agreements will remain unchanged, unless otherwise agreed to in writing between the parties.'

I pause here to observe that the contents of paragraph 4 of this letter are revealing. Their implication is that Reit unequivocally accepted that there had been a variation of the various leases in the respects set out in the declarations and that other than the agreed changes '*all of the remaining terms and conditions as contained in the various registered lease agreements will remain unchanged unless otherwise agreed to in writing between the parties*.' (My emphasis.) Reit also contested Transnet's entitlement to invoke s 67(1)*(b)* of the NPA.

[19] Having signed the declarations of rental on 16 July 2009, Reit dutifully paid the increased rental as contemplated therein. Some few weeks before the period covered by the 2009 declarations of rental came to an end, Transnet instructed Mr Humphrey Moyo, a professional valuer, to prepare a fresh valuation of the properties leased by Reit pursuant to clause 5(a)[2] of the notarial leases based, not on a percentage of bare land value, but on the market-related rental with a view to determining the rental which would be payable in respect of the period of five years commencing on 1 June 2014 and ending on 31 May 2019. Pursuant to this valuation, Transnet prepared new

[2] For convenience clause 5(a) is quoted again and reads:
'The Administration may, and if called upon by the Lessee shall, at any time within three (3) months prior to the commencement of any period of five (5) years contemplated in clause 3 hereof, but excluding the initial period referred to in paragraph (a) of that clause, determine the market value of the land and notify the Lessee of the value so determined and of the rent which will consequently be payable in respect of the full period of five (5) years with reference to which such determination was made.'

declarations of rental which it forwarded to Reit for signature in terms of which the new rental would be R 17 per square metre per month.

[20] On 23 July 2014 Reit responded and advised that it objected to the proposed rental and that it would instead appoint its own valuer to prepare its own valuation. To this end, Reit likewise instructed JVR Valuations (Pty) Ltd (JVR) to prepare a valuation on its behalf based on a market-related rental of bare land. In the interim, Transnet confirmed that Reit was at liberty to obtain its own valuation 'if the lease agreement allows you to obtain your own valuation' and also reiterated that Mr Moyo's valuation was based on 'the rental for land, excluding the buildings . . . based on a comparison of rentals achieved for other leases in the Maydon Wharf precinct'.

[21] On 12 August 2014 Transnet wrote to Reit advising the latter that its rental account was in arrears and imploring Reit to pay the invoiced amount in the interim 'until the issue of valuation has been sorted'. On the same day, Reit responded and reiterated that it had not agreed to the latest valuation proposed for the five-year period from 1 June 2014 to 31 May 2019. After noting that it was being invoiced on the basis of the declarations of rental that expired on 31 May 2014, Reit confirmed that, pending the resolution of the dispute, it would continue to pay the invoiced amount 'provided that if [they] have overpaid from 1 June 2014 onwards . . . Transnet [would] refund or credit our account [with the] said overpayment'.

[22] In due course Reit obtained its own valuation from JVR and on 9 September 2014 representatives of the parties met with JVR's representatives with a view to resolving the impasse. Subsequently, Reit offered to pay R 11

per square metre per month (i.e. R 1 more than what JVR had recommended in its valuation). Still, these efforts did not bear fruit. It bears mentioning that the fact that Mr Moyo's valuation and that of JVR were far apart does not necessarily render either of the valuations questionable. Radically divergent views as to the value of a thing are all too common. For as Scott JA said in *Abrams v Allie NO and Others* 2004 (4) SA 534 (SCA) para 25:

'. . . This Court has in the past frequently commented on the nature of the inquiry and hence the approximate nature of its result. In *South African Railways v New Silverton Estate Ltd* 1946 AD 830 at 838 Tindall JA stressed the importance of bearing in mind that a valuation "is to a material extent a matter of conjecture". Ogilvie Thompson JA in *Estate Marks v Pretoria City Council* 1969 (3) SA 227 (A) at 253A described a valuation as "essentially a matter which is in the realm of estimate". Botha JA in *Bestuursraad van Sebokeng v M & K Trust & Finansiële Maatskappy (Edms) Bpk* 1973 (3) SA 376 (A) at 391E similarly described it as "noodwending 'n kwessie van skatting in die lig van al die omstandighede". Nothing, I think, demonstrates this more than the regularity with which good and honest valuers arrive at relatively widely different conclusions.'

[23] As the parties' respective positions became entrenched the negotiations floundered. It came to pass that on 17 October 2014 Reit suggested to Transnet that in view of the impasse it would be best to invoke the dispute-resolution mechanism of the notarial leases. The relevant clause that provides for deadlock-breaking mechanisms in relation to the determination of the rental by Transnet is clause 5(b) and (c). For convenience its provisions are repeated here. It reads:

'If the Lessee is not prepared to accept the Administration's determination of the market value, it shall forthwith notify the Administration accordingly, whereupon the value shall be determined by sworn appraisement as hereinafter provided.

Such appraisement shall be undertaken by a sworn appraiser to be selected by the parties jointly. If the parties cannot agree on the sworn appraiser, each party shall appoint

one sworn appraiser to undertake the valuation jointly with the one appointed by the other party, and if these two appraisers cannot agree on their valuation, they shall jointly select a third as umpire, whose valuation shall be final and binding on the parties. The cost of all appraisements shall be borne by the parties in equal shares. . . .'

[24] Relying on this clause, Reit proposed to Transnet that the parties jointly appoint a sworn appraiser to determine the market-related value of the land. In response, Transnet instead counter-proposed that as each party had already independently obtained separate valuations from their respective valuers it would be sensible that they agree to submit the two disparate valuations to the council of the SACPVP to be reviewed by an umpire appointed by the council to determine which one between the valuations of JVR and that of Mr Moyo 'was the most appropriate' and for the costs expended therefor to be shared equally between Transnet and Reit. Reit agreed to Transnet's counter- proposal without any reservations. The council in turn appointed Mr Seota pursuant to the parties' agreement who, after considering the conflicting valuations, concluded that the rental determination contained in Mr Moyo's valuation 'is fair and reasonable'. Notwithstanding the ruling of the umpire, several months passed without Reit signing the declarations of rental for the five-year period under consideration despite undertaking that this was being attended to.

[25] The respective positions taken by the parties had by now become hardened with Transnet contending that unless Reit took Mr Seota's valuation as the umpire on judicial review it was final and binding as provided for in clause 5(c) of the notarial leases. For its part, Reit persisted in its stance that it stood by its earlier tender of R 11 per square metre per month.

[26] When the parties' best endeavours failed to break the logjam, Reit instituted review proceedings in the Gauteng Division of the High Court, Johannesburg on 24 October 2017 for the following relief:

'1. . . .

2. The award of the second respondent . . . dated 4 May 2015 – in which he determined the rental to be paid by the applicant to the first respondent . . . in respect of premises leased by the applicant from the first respondent at the Durban Port known as Maydon Wharf ("the premises") at R17m^2 per month – is reviewed and set aside.

3. The first respondent . . . is hereby ordered to procure, within twenty-one (21) court days of this Court's order, a fresh valuation of the land on which the premises are situated, in accordance with the principles identified in the judgment of this court.

4. . . .'

[27] On 9 May 2018 Reit amended its notice of motion and sought an order in the following terms:

'1. Declaring that the second respondent was appointed to act as an expert valuator (and not an arbitrator) to value the land ("the land") (excluding any improvements constructed thereon) leased by the applicant from the first respondent in terms of –

1.1 Notarial Deed of Lease K47/1960 concluded in 1960, annexed to the founding affidavit marked "FA3";

1.2 Notarial Deed of Lease K62/1960 dated 29 August 1960, annexed to the founding affidavit marked "FA4"; and

1.3 Notarial Deed of Lease K63/1960 also dated 29 August 1960, annexed to the founding affidavit marked "FA5",

(collectively "the notarial leases")

2. Declaring that the second respondent failed to execute his mandate in terms of the notarial leases to value the land, excluding any improvements constructed thereon;

3. Declaring that the second respondent was not entitled in terms of the notarial leases to determine a reasonable commercial rental payable in terms thereof by the applicant;

4. Setting aside the second respondent's valuation report dated 4 May 2015 ("the valuation report") in terms of which the second respondent determined a reasonable rental payable by the applicant in terms of the notarial leases instead of the value of the land;
5. Directing the first respondent to procure, within 21 days of this Court's order, a fresh valuation of the land, in accordance with the principles identified in the judgment of this Court.
6. In the ***alternative*** to prayers 1 to 5 above and should it be found that the second respondent was acting as an arbitrator and not an expert valuator in terms of the notarial leases, the applicant seeks the following relief –

6.1 granting the applicant condonation for the late filing of its review application;

6.2 reviewing and setting aside the valuation report in which the second respondent determined the rental to be paid by the applicant to the first respondent in respect of land;

6.3 directing the first respondent to procure, within 21 days of this Court's order, a fresh valuation of the land on which the premises are situated, in accordance with the principles identified in the judgment of this Court.

7. The first respondent is ordered to pay the applicant's costs.'

[28] The review application came before Moshidi J, who was persuaded that Reit had made out a case for the relief sought. The learned Judge held that (para 14):

'. . .the crisp issue for determination is therefore the question: whether Mr M C Seota NO ("*the second respondent*"), in making the rental determination, failed to discharge his mandate in terms of the notarial deeds of leases, to determine the value of the land, excluding the improvements constructed thereon, and by determining a market-related rental for the premises contrary to the express terms of the notarial leases and if the second respondent was incorrect, as contended by the applicant, whether his determination is susceptible to review and setting aside by the Court.'

[29] He held further that Mr Seota, who it was common cause between the parties, did not act as an arbitrator but as an expert valuer, 'made a manifestly incorrect rental determination; he failed to discharge his mandate in terms of the notarial leases; . . . He, instead, determined a market-related rental for the premises . . . He had no authority and/or mandate to do so, regardless of what was submitted to him'. In the event the learned Judge concluded that Mr Seota's 'determination . . ., was a nullity and of no force and effect'.

[30] Apropos s 67 of the NPA, he held that this section did not avail Transnet for at no stage were the notarial leases amended 'in the terms alleged' by Transnet. Nor could the 2009 declarations of rental assist Transnet because these were subject to the conditions that Reit had stipulated in the letter of 24 July 2009, addressed on its behalf by its attorneys to Transnet. He therefore concluded that this was quite apart from the fact that Transnet had, in any event, not complied with the dictates of s 67 upon which it relied.

[31] Having concluded that the review application ought to succeed, he granted an order that:

'1. . . .

2. The award of the second respondent (M C Seota NO) made on 4 May 2015 in which he determined the rental to be paid by the applicant to the first respondent (Transnet) in respect of premises leased by the applicant from the first respondent at the Durban Port and known as Maydon Warf ("*the premises*") at R17 m^2 per month, is hereby reviewed and set aside.

3. The first respondent (Transnet), is hereby ordered to procure, within twenty-one (21) court days of this order, a fresh valuation of the land on which the premises are situated, and in accordance with the principles identified in this judgment.

4. . . .'

The correctness or otherwise of this order is what confronts us in this appeal.

[32] Before the contentions of the parties are considered, it is appropriate to say something about Mr Seota's role as umpire. It is common cause between the disputants that Mr Seota was an expert valuer and not an arbitrator. The fundamental significance of this distinction lies in this. Our law has for over a century now always drawn a clear distinction between an arbitrator and a valuer. Thus, in *Estate Milne v Donohoe Investments (Pty) Ltd and Others* 1967 (2) SA 359(A) at 373H-374C, Ogilvie Thompson JA said the following:

'This argument assumes something in the nature of an appeal to the arbitrator against the decision of the auditor. That is, however, not the position. In making his valuation, the auditor hears neither party. His is not a *quasi*-judicial function. He reaches his decision independently on his knowledge of the company's affairs. His function is essentially that of a valuer (*arbitrator, aestimator*), as distinct from that of an arbitrator (*arbiter*), properly so called, who acts in a *quasi*-judicial capacity. The distinction between *arbitri* and *arbitratores* was well known to our writers (see e.g. *Voet*, Bk. 4, 8, 2; Wassenaer, *Praktijk Judicieel*, Ch. 26, sec. 17; *Huber*, Bk. 4, chap. 21, secs. 1 and 2, and other authorities listed by *Gane* at p. 93 of vol. 2 of his translation of that work). See also *Sachs v Gillibrand and Others*, 1959 (2) SA 233 (T) at A p. 236, and *Divisional Council of Caledon v Divisional Council of Bredasdorp*, 4 S.C. 445. *Voet*, in the above-mentioned passage, distinguishes between the respective functions of an arbitrator (*arbiter*) and a valuer or referee (*arbitrator*) and, in relation to the latter, uses the phrase *in quibus viri boni arbitrio opus erat*. This phrase is rendered by Sampson (p. 110) as "requiring the arbitrament of an impartial person", but by *Gane* (vol. 1, p. 738) as: "in which there is need of the discretion of a good man". Although the use of the word "discretion" may perhaps be open to criticism, *Gane's* translation appears to me to reflect *Voet's* meaning more correctly. The *arbitrator* or *aestimator* need not necessarily be an entirely impartial person. In discharging his function he is of course required to exercise an honest judgment, the *arbitrium boni viri*; but a measure of personal interest is not necessarily incompatible with the exercise of

such a judgment (see *Dharumpal Transport (Pty.) Ltd., v Dharumpal*, 1956 (1) SA 700 (AD) at p. 707).'

[33] This distinction serves an important purpose in review proceedings because, as Ponnan JA put it in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* [2007] ZASCA 143; 2008 (2) SA 448 (SCA) para 22:

'. . . A finding that Andrews was a valuer would not assist Lufuno and does not require a decision. Unlike an arbitrator, a valuer does not perform a *quasi*-judicial function but reaches his decision based on his own knowledge, independently or supplemented if he thinks fit by material (which need not conform to the rules of evidence) placed before him by either party. Whenever two parties agree to refer a matter to a third for decision, and further agree that his decision is to be final and binding on them, then, so long as he arrives at his decision honestly and in good faith, the two parties are bound by it. . . .'

[34] Accordingly, the power of the courts to interfere with an expert's decision in review proceedings is severely circumscribed. The juridical ambit of this power was described by this Court in *Wright v Wright* [2014] ZASCA 126; 2015 (1) SA 262 (SCA) para 10 as follows:

'The position of a referee under s 19b is, as the high court correctly found, similar to that of an expert valuator who only makes factual findings but dissimilar to that of an arbitrator who fulfils a quasi-judicial function within the parameters of the Arbitration Act 42 of 1965. In this regard, the dictum of Boruchowitz J in *Perdikis v Jamieson* is apposite:

"It was held in *Bekker v RSA Factors* 1983 (4) SA 568 (T) that a valuation can be rectified on equitable grounds where the valuer does not exercise the judgment of a reasonable man, that is, his judgment is exercised unreasonably, irregularly or wrongly so as to lead to a patently inequitable result."

This is also the position in respect of the referee's report – it can only be impugned on these narrow grounds.'[3]

[3] See also: *Civair Helicopters CC v Executive Turbine CC and Another* 2003 (3) SA 475 (W) para 34 and the authorities therein cited.

[35] I revert to the crux of the appeal. The foundation upon which the edifice of the High Court's reasoning rested was, as alluded to above, predicated on at least four principal findings. These were: (i) Mr Seota's mandate derived from the notarial leases as they stood in 1960; (ii) the terms of the mandate given to him by Transnet and Reit jointly which were not consonant with the terms of the leases were irrelevant (I interpose here to remark that the implication of this finding is that Mr Seota should have ignored his mandate and followed the notarial leases of which he was not aware); (iii) because Mr Seota was an expert valuer and not an arbitrator his determination was not final and binding, meaning that Reit was not precluded from impugning it; and (iv) there had been no variation of the 1960 leases for the 2009 declarations of rental were incapable of effecting variations as they were signed by Reit conditionally.

[36] The principal findings of the High Court bring to the fore the two broad issues mentioned in para 1 above, which are what requires determination in this appeal. I pause to observe that the difficulty I have with the reasoning of the High Court relates to its fundamental premise. It mischaracterised the nature of the dispute between the parties. The crux of the dispute, as I see it, was essentially whether Mr Seota had acted in accordance with his mandate from the parties and, if so, whether his determination was otherwise manifestly unjust. On this score, Reit never even came out of the starting blocks. Nowhere in its affidavits did Reit allege, still less establish, that Mr Seota had strayed outside the terms of his mandate. Nor did Reit establish that Mr Seota acted in bad faith, dishonestly or in any other improper manner. Where no case was made out to establish how and where Mr Seota went wrong the High Court should have been slow to interfere. (See in this regard: *S A*

Breweries Ltd v Shoprite Holdings Ltd [2007] ZASCA 103; 2008 (1) SA 203 (SCA) para 41 (*S A Breweries*).

[37] It is necessary to emphasise that in the context of the facts of this appeal, Transnet's case is even stronger than what obtained in *S A Breweries*. Here, Mr Seota's determination was not assailed on any of the recognised grounds. Reit, instead, was content to confine its case to the assertions that the determination was not consonant with clauses 3 and 4 of the notarial leases. In *Telcordia Technologies Inc v Telkom SA Ltd* [2006] ZASCA 112; 2007 (3) SA 266 (SCA) para 51, Harms JA made the following pointed remarks:

'Last, by agreeing to arbitration the parties limit interference by courts to the ground of procedural irregularities set out in s 33(1) of the Act. By necessary implication they waive the right to rely on any further ground of review, "common law" or otherwise. . . .'

Although these remarks were made in the context of a review of an arbitral award, they apply with equal force to the facts of this case. It is as well to remember that Mr Seota was at no stage instructed by the parties to determine rental in terms of clause 3 of the notarial leases. On the contrary, the parties' clear and unambiguous mandate to him was to compare two valuations provided to him by the parties and then determine which one 'was the most appropriate'. Having considered the valuations placed at his disposal by the parties, Mr Seota came to the conclusion that:

'The rental determination as contained in the report by Humphrey Moyo is fair and reasonable.'

[38] Thus, it was not open to him to disregard the parties' explicit instructions and, on a frolic of his own, have regard to the provisions of clause 3 of the lease (of which incidentally he was unaware as neither party had alerted him to them). In reaching its conclusion to the contrary, the High Court

failed to see the wood for the trees and consequently committed a fundamental error. Mr Seota's source of authority was not the notarial leases but the joint mandate of the parties from which he was not at liberty to depart. In a comparable but different situation this Court said the following in *Hos+Med Medical Aid Scheme v Thebe Ya Bophelo Healthcare Marketing & Consulting (Pty) Ltd and Others* [2007] ZASCA 163; 2008 (2) SA 608 (SCA) para 30:

'In my view it is clear that the only source of an arbitrator's power is the arbitration agreement between the parties and an arbitrator cannot stray beyond their submission where the parties have expressly defined and limited the issues, as the parties have done in this case to the matters pleaded. . . .'

[39] It bears emphasising that in agreeing to a slight deviation from the terms of the notarial leases, Reit was obviously aware of the provisions of clause 5(c) because this was the very clause that it must have had in mind when it initially proposed to Transnet that the mechanism contained therein must be applied. But when Transnet proposed a different method, Reit readily agreed. Thus, the mandate given to Mr Seota was consonant with what both Transnet and Reit had ultimately agreed to in the course of their negotiations. It can therefore hardly now lie in Reit's mouth to complain about or question the methodology consensually adopted to break the deadlock between the parties. In truth, at no stage was the dispute between Transnet and Reit ever about the formula that JVR and Mr Moyo had adopted in determining the rental payable for the five-year period between 1 June 2014 and 31 May 2019, namely, the market-related rental based on the value of the land, excluding buildings.

[40] On the authorities discussed above, it is now well established that an expert's bona fide determination or award will not be lightly interfered with by the courts. For as observed by Ponnan JA in *Lufuno*:[4]

'. . . Whenever two parties agree to refer a matter to a third for decision, and further agree that his decision is to be final and binding on them, then, so long as he arrives at his decision honestly and in good faith, the two parties are bound by it. . . .'

As already mentioned, in early May 2014 Mr Moyo was instructed by Transnet to prepare a fresh valuation based on a market-related rental in respect of the five-year period commencing from 1 June 2014 to 31 May 2019. And it was on this basis that the parties negotiated the issue of rental related to this period. Indeed, Reit itself instructed JVR to prepare a valuation on the same basis. All of this is not disputed by Reit. On the contrary it is accepted, if not explicitly, at the very least tacitly.

[41] But in pursuit of its review application, Reit contended that all of this was irrelevant simply because what Mr Seota did was at variance with the express provisions of the leases. No thought was given to how it came about that Mr Seota came into the picture as explained above. It therefore did not pertinently engage Transnet's case which was that the basis for determining rental had changed once s 67 of the NPA was invoked by Transnet, culminating in the 2009 declarations of rental. In response to a question from a member of the Bench, counsel for Reit was constrained to accept that in 2009 a change occurred. He nevertheless argued that this admitted change was limited to the 2009 – 2014 five-year period. Beyond that, argued counsel for Reit, the parties would revert to the initial formula provided for in the notarial leases in terms of which it is the percentage of the value of bare land that

[4] *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* [2007] ZASCA 143; 2008 (2) SA 448 (SCA) para 22.

mattered. I do not agree. Were this to be the case, this would have the effect of putting the rental revision exercise that Transnet embarked upon in October 2008 to nought, meaning that s 67 of the NPA would, as a result, be rendered nugatory. I can think of no possible reason why parties would engage in such an irrational and unbusinesslike exercise.

[42] The aforegoing conclusion would, in the normal course of events, have been the end of the matter as it is dispositive of the appeal. But taking one's cue from the decision of the Constitutional Court in *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici-Curiae) 2002 (6) SA 642 (CC)*,[5] it is necessary to consider the second leg of the argument advanced by Transnet. It is this. Transnet contended that the various notarial leases were validly amended to provide for the determination of rental on a market-related basis, albeit still limited to the market value of the bare land.

[43] From Reit's perspective, as its counsel urged upon us at the outset of his address, the crux of the dispute between the parties concerns the question whether the notarial leases had at any stage been varied. Accordingly, counsel for Reit implored us to determine this issue for failure to do so would, as he put it, result in endless disputes between the protagonists. It is to that aspect that I now turn.

[44] As already indicated, in setting aside the umpire's determination the High Court held that a determination of the rental payable under the notarial

[5] See para 21. Although in *Jordan* the Constitutional Court was dealing with a constitutional challenge on a number of grounds where the High Court upheld one ground and held that it was unnecessary to deal with the remaining grounds, the principle remains the same for all cases.

leases could only be properly done on the basis of the notarial leases themselves, which provide that the rental is calculated on the basis of a set percentage of the market value of the bare land, rather than simply a market-related rental. Reit embraced this finding as its springboard to argue that absent a finding that the notarial leases were validly amended to provide for a market-related rental the reasoning of the High Court is unassailable. This contention therefore entails that the question whether the notarial leases concerned were validly amended must be confronted head-on.

[45] The amendment or variation of the notarial leases at issue here is governed by clause 18 thereof. This clause is not couched in the language of a typical non-variation clause. It says that 'no amendment or variation of the terms and conditions of this lease in any form or manner whatsoever *will be recognised by or be binding upon the Administration*[6] unless it has been embodied in a formal written agreement duly executed by the Administration and by the Lessee'. (My emphasis.)

[46] It is now well established that a stipulation or condition in a written contract that provides that any variation or amendment of its terms by the parties shall have no force or effect unless it is reduced to writing is binding on the parties and cannot be altered verbally. (See in this regard: *S A Sentrale Ko-Op Graanmaatskappy Bpk v Shifren and Another* 1964 (4) SA 760 (A) at 766D-H.)[7] Nevertheless, our law recognises that as a non-variation clause curtails the common law freedom to contract it must be restrictively

[6] A reference to Transnet.
[7] *Shifren* has been consistently followed in a series of judgments of this Court such as *Brisley v Drotsky* 2002 (4) SA 1 (SCA) and *Tsaperas and Others v Boland Bank Ltd* 1996 (1) SA 719 (A) at 725 B-C.

interpreted. (See: *Randcoal Services Ltd and Others v Randgold and Exploration Co Ltd* 1998 (4) SA 825 (A) at 841E-842D.)

[47] It is necessary to say something about the words 'will be recognised by or be binding upon the Administration' contained in clause 18 of the leases already quoted in para 11 above. As a general rule, clause 18, being a non-variation clause, must be construed restrictively. This is, however, not to say that if its language is clear effect must not be given to it or that it must be interpreted otherwise than sensibly.[8]

[48] In its heads of argument, Transnet submitted that the requirements of clause 18 were complied with when the 2009 declarations of rental were signed by the parties. It further argued that in any event clause 18, particularly the words put in inverted commas in para 47 above are indicative of the fact that clause 18 was inserted for the benefit of Transnet and not Reit. Thus, so proceeded the argument, 'There can be no issue at all if Transnet chooses not to assert its rights in terms of the clause'.

[49] I do not agree. To my mind the object of the clause is clear. It offers Transnet an election to wave its rights flowing from the notarial leases if it chooses to do so. But it does not follow that where the variation, as contended for by Transnet in this case, which imposes what, by all accounts, is an onerous financial obligation on Reit is asserted clause 18 should not be accorded its full effect. Here the variation upon which Transnet relies has far-reaching implications for Reit in that it has the effect of increasing the

[8] See for example: *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) paras 18 and 23.

rental payable by a substantial amount. A clause such as this, for example, would only assist Transnet in circumstances where a lessee asserts that it has been released from its obligations under the leases. If the release relied upon by the lessee is not in writing and signed by the parties, Transnet would not be bound but would be at liberty to recognise the claimed release if it so chooses. There can be no doubt that the object of a clause such as this is to protect Transnet and enable it to determine its rights vis-à-vis its several lessees by reference to documents in its possession. It seeks to protect Transnet against spurious defences by lessees who might want to assert that they were released from one or some of the obligations undertaken in terms of the lease. (Compare: *Tsaperas and Others v Boland Bank Ltd* 1996 (1) SA 719 (A) at 724D-E.) This is all the more so considering that Transnet is a large entity comprising different divisions with a large number of employees.

[50] Did the 2009 declarations of rental about which there is no dispute between the parties have the effect of varying the basis for determining rental? More particularly, is their effect that Transnet is now entitled to determine rental with reference to a market-related rental, as opposed to a percentage of the market value of the leased land, at the date of commencement of each succeeding five-year period? Unsurprisingly, the protagonists answer this question differently. Transnet says Yes, whilst Reit says No. The High Court agreed with Reit and went on to hold that s 67 of the NPA found no application to the dispute.

[51] Whether the High Court was correct in taking this view of the matter is the second leg of what confronts us in this appeal. As I see it, the answer to this question depends, first and foremost: (i) on the interpretation to be

ascribed to the section; (ii) the evaluation of the factual narrative recounted above; and (iii) the interpretation of the 2009 declarations of rental, of course, subject to the conditions stipulated on Reit's behalf. Section 67 opens with subsec (1)*(a)* which deals with change of use of the leased property found necessary in order to improve the safety, security, efficiency and effectiveness of the operations of the port. It is not relevant for present purposes. It has no bearing on the issue at hand whatsoever.

[52] Subsection 1*(b)* which is central to the appeal has already been quoted above. Its object is clear from the text. It seeks to remove prejudice to Transnet associated with the terms of a long-term lease concluded before it came into operation – as has happened in this case – providing for, crucially in the context of this appeal, unreasonably low rentals. It goes on to state that the Ports Authority (ie Transnet) may in writing direct the lessee to renegotiate the rental in order to remove the prejudice. The subsection employs permissive language by using the word 'may'. But the reason for doing so is not far to seek because its invocation is dependent upon it being found, firstly that the rental payable is 'unreasonable low' and, secondly, that such unreasonable low rental is prejudicial to Transnet. Both factors entail a factual inquiry and determination. Subsections 1*(c)*; (2); (3) and (4) also find no application in this appeal. Although subsec (2) is not germane to this case, the High Court appears to have given Transnet's argument based on s 67 short shrift because, in its view, Transnet had not followed its requirements to the letter before invoking them and was therefore precluded from relying on them until it had fully complied with its prescripts. In this regard the High Court erred. So far as subsec (3) is concerned, it too finds no application because here, when Transnet invoked subsec 1*(b)* on 28 October 2008 and the parties

commenced negotiations, they were able to reach an agreement. Hence the 2009 declarations of rental about which there is no dispute.

[53] However, what is in serious contention between the parties is the question whether these declarations had the effect of changing the rental- determination basis for each of the successive five-year periods beyond 31 May 2014. On this score, diametrically opposed contentions have been advanced by the parties. In the view I take of the matter this aspect of the case lies in a narrow compass.

[54] The logical starting point in this exercise is the 2009 declarations of rental and the proper construction to be ascribed to them, read together with the letter of 24 July 2009 from Reit's attorneys. The contents of the 2009 declarations of rental have already been quoted in para 17 above and will not be repeated here. The relevant part of the letter of 24 July 2009 reads:

'Having regard to our latest e-mail of the 30th of June 2009, and in order to bring this matter to a head, our client has instructed us to advise you that it will sign the declarations of rental in respect of the above leases in the format presented by yourselves, however, the signature thereof are strictly subject to and conditional upon the following:-

1. Our clients agreement to increase the rental in accordance with the declarations of rental and our client's signature thereof does not constitute an acceptance by our client of Transnet's entitlement to rely on Section 67 of the National Ports Act, No 12 of 2005 to review the rental and/or lease agreements and our client has agreed to the review process on a without prejudice basis and without waiving or novating any of its rights in this regard; and
2. Transnet shall not in future and for the duration of the remainder of the lease periods attempt to again rely on Section 67 of the National Ports Act, No 12 of 2005 to enforce increased rentals or any cancellation of the lease agreements; and

3. The increased rental amounts shall be paid by our client to Transnet quarterly in arrears, in the same cycles as it has prior to the signature of the declarations of rental; and
4. All of the remaining terms and conditions a-; contained in the various registered lease agreements will remain unchanged, unless otherwise agreed to in writing between the parties.

Subject to the aforesaid conditions, we attach hereto the signed declarations of rental in respect of the various lease agreements.'

[55] As already indicated, the declarations of rental were a culmination of protracted negotiations between the parties over several months which were triggered by the letter of 28 October 2008 addressed to Reit by Transnet. It bears repeating that in its letter of 28 October 2008, Transnet made plain that it had embarked on a process of reviewing all of its agreements of lease with various lessees with a view to aligning 'the contractual arrangements' with the NPA. In particular, it spelt out the current rental that Reit was hitherto paying in respect of its leases and the rental that Transnet proposed to charge with effect from 1 June 2009 which was a substantial increase. There is no dispute between the parties about all of this and the fact that, properly construed, the 2009 declarations of rental had the effect of changing the basis upon which rentals payable under the notarial leases from market value of bare land to a market-related rental basis. Nevertheless, the parties part ways on the question of whether the admitted change was limited to the five-year period between 1 June 2009 and 31 May 2009.

[56] The rivalling contentions of the parties require that something, by way of prelude, be said about the proper approach to the interpretation of

documents, be it contracts, statutes or any other kind of document.[9] The approach to the interpretation of documents is well settled. It was admirably explained by this Court in *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18 thus:

'. . . The present state of the law can be expressed as follows. 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.'

[57] Nearly two and a half years earlier, Lewis JA had occasion to restate the principles of interpretation in *Ekurhuleni Municipality v Germiston Municipal Retirement Fund* [2009] ZASCA 154; 2010 (2) SA 498 (SCA) *(Ekurhuleni Municipality)* as follows (para 13):

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[9] See for example: *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School* [2008] ZASCA 70; 2008 (5) SA 1 (SCA).

'The principle that a provision in a contract must be interpreted not only in the context of the contract as a whole, but also to give it a commercially sensible meaning, is now clear. . . The principle requires a court to construe a contract in context – within the factual matrix in which the parties operated. . . .'

[58] In conclusion on this topic, reference may be made to yet another decision of this Court in *Bothma-Batho Transport (Edms) Bpk v S Bothma and Seun Transport (Edms) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 (SCA) where the following was stated (para 12):

'. . . Whilst the starting point remains the words of the document . . . the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of the relevant and admissible context, including the circumstances in which the document came into being. . . Interpretation is no longer a process that occurs in stages but is "essentially one unitary exercise" . . . .'

[59] The contentions advanced on behalf of Reit on this aspect of the appeal rest, in essence, on two pillars. First, it was contended that the various notarial leases were never varied in line with the requirements of clause 18 thereof. Secondly, it was further submitted that absent a valid variation of the leases, Reit is not obliged to pay the amount required of it by Transnet because its obligation to pay rental arises, not from the determination, nor the instructions given to Mr Seota but, from the terms of the notarial leases. Relying on the reasoning in the judgment of the High Court, counsel for Reit argued that s 67 of the NPA only contemplates that there must be a renegotiation of the terms of leases concluded before it came into operation and that if renegotiations fail, a declaration of invalidity. Without a successful renegotiation of the terms of the various leases or failing that a declaration of invalidity, so went the argument, the terms of pre-existing leases remain unaffected.

[60] In counter, counsel for Transnet contended that one need only look at the language, context and purpose of the 2009 declarations of rental to determine the purport of the declarations having regard to the factual matrix in which the parties operated since October 2008. And that if this is done, the absurdity of the interpretation for which Reit contends will be revealed. As to the factual matrix in which the parties operated, it is necessary to briefly deal with the preliminary objection raised by Reit in relation to the parties' renegotiations preceding the conclusion of their agreement as recorded in the 2009 declarations. It was argued that the content of the exchanges between the parties is inadmissible because they relate to negotiations that were conducted on a without prejudice basis. This issue can easily be disposed of.

[61] It is true that some of the letters which were exchanged between the parties from the time when Transnet asserted its statutory rights under s 67(1)*(a)* of the NPA and the general tenor of the discussions at various meetings – some of which were confirmed in subsequent correspondence between the parties – were written and the discussions conducted on a without prejudice basis. Thus, 'as a general rule negotiations between parties that are undertaken with a view to settling a dispute between them are protected from disclosure'. (See: *Absa Bank Ltd v Hammerle Group* [2015] ZASCA 43; 2015 (5) SA 215 (SCA) para 13.) The rationale for this rule is rooted in public policy. Parties to disputes are encouraged to avoid litigation by resolving their differences amicably through full and frank discussions in the knowledge that, should the negotiations fail to bear fruit, any admissions made by them during their negotiations will be protected from disclosure in the event of litigation ensuing. (See in this regard: *Naidoo v Marine and Trade Insurance Co Ltd*

1978 (3) SA 666 (A) at 677B-D; *KLD Residential CC v Empire Earth Investments 17* [2017] ZASCA 98; 2017 (6) SA 55 (SCA) para 20.)

[62] However, it bears emphasising that the rule is contingent upon the failure of the negotiations. Where the settlement negotiations succeeded and ultimately culminated in the conclusion of an agreement – as has happened in this case – the content of the settlement negotiations can be disclosed in court and admitted as evidence. This is premised on the fact that the basis for non- disclosure has fallen away. (See, for example, *Gcabashe v Nene* 1975 (3) SA 912 (D) at 914; *Adkins and Hunter v M J Crosbie and F W Crosbie and M M Crosbie's Executors* 1916 EDL 357 at 361.) In this case the parties' settlement negotiations, as already indicated, culminated in an agreement that led to the production and signing of the 2009 rental declarations. Consequently, Reit's reliance on the privilege relating to the parties' negotiations preceding the production of the 2009 rental declarations is misplaced.

[63] I now revert to the crux of the matter. As in *Ekurhuleni Municipality*, the considerations discussed above raise the question as to what, then, was the commercially sensible, businesslike and reasonable interpretation of the 2009 declarations read with the letter of 24 July 2009, regard also being had to their underlying purpose and the relevant background factual matrix? It is a fact that brooks no argument to the contrary that the various long-term notarial leases were concluded in 1960. And that they will terminate by effluxion of time only in 2029. Thus, if they run their full course they will have endured for almost 70 years. The inference is therefore irresistible that this was one of the considerations that led to the enactment of the provisions of s 67(1)*(b)* that

took effect on 26 November 2006. Pursuant thereto, Transnet addressed a letter to Reit proposing that the terms of the five notarial leases be renegotiated in relation to the rental payable which was considered to be unreasonably low. The basis of Transnet's proposed increase in the rental was, to Reit's knowledge, a market-related rental. It is common cause that the renegotiations succeeded in bearing fruit. Hence the signed 2009 declarations of rental coupled with the letter of 24 July 2009 from Reit's attorneys.

[64] The High Court moved from the premise that s 67 of the NPA found no application because Transnet had not complied with its prescripts. It then proceeded to hold that any oral amendment of the notarial leases would be ineffective as the leases 'contain express non-variation clauses'. For this conclusion, it relied on *Shifren* stating that 'the principles thereof are still good law'. Finally, it held that the 2009 declarations of rental did not avail Transnet because they do not constitute amendments of the leases. I cannot agree.

[65] A careful reading of the 2009 declarations read in conjunction with the relevant letter leaves no room for any doubt as to their purpose. After the description of the parties, the preambles of the five declarations all made reference to the notarial leases. They proceeded to proclaim that the rental payable by the lessee to the lessor (these being references to Reit and Transnet respectively) has been reviewed in terms of s 67(1)*(b)* of the NPA and the conditions (presumably terms) of the leases. They then concluded by stipulating the annual rental payable in respect of the period 1 June 2009 to 31 May 2014, subject to a ten per centum annual escalation.

[66] Reit seized upon the fact that the annual rental stipulated in the declarations relates only to the five-year period from 1 June 2009 to 31 May 2014 to contend that the rental revision in terms of s 67(1)*(b)* was specifically for that period and no other. That cannot be for several reasons. First, to sustain Reit's contention would entail disregarding the background facts that gave rise to the production of the rental declarations and the purpose to which they were directed. Second, Reit's construction would undermine the legislative purpose of s 67(1)*(b)* of the NPA. Third, one would have to entirely ignore the material known to those responsible for the production of the rental declarations such as s 67(1)*(b)* itself; the mischief it sought to address which would, as a result, be perpetuated and the like. The fact that Transnet would be precluded from invoking s 67(1)*(b)* again,[10] meaning that from 1 June 2014 until 2029 it would only be entitled to about a third of the annual rental that it had enjoyed during the five-year period immediately preceding 1 June 2014. And, lastly, the fact that Reit's preferred interpretation would not be reasonable, sensible or businesslike.

[67] Indeed, condition 4 of the conditions stipulated by Reit's attorneys in their letter of 24 July 2009 is telling and bears repeating. It reads:

'All of the remaining terms and conditions as contained in the various registered lease agreements will remain unchanged, unless otherwise agreed to in writing between the parties.'

On a reasonable, sensible and businesslike reading of the wording of this particular condition, it becomes manifest that Reit itself had accepted that the basis of calculating the annual rental provided for in clause 3(b) was

[10] This was expressly agreed to between the parties in the correspondence exchanged between them because Transnet was understandably of the opinion that it could invoke s 67(1)*(b)* to regulate the remaining period of the notarial leases only once.

consensually varied in writing to a market-related rental whilst the unaffected terms of the leases would remain unchanged ‘unless otherwise agreed to in writing between the parties’. Any other interpretation of the rental declarations coupled with the letter, as Reit would have it, would not be commercially sensible.

[68] In sum, that the 2009 rental declarations in their operative clause expressly provided that the rental amount stated therein (subject to a ten per centum escalation) was in respect of the period from 1 June 2009 to 31 May 2014 can easily be explained. Clause 3 of the long-term leases provides that rental is to be determined periodically for a five-year period, hence the five-year period in this instance was from 1 June 2009 to 31 May 2014. However, by no means does this detract from the overarching objective of the parties initiated by Transnet in October 2008 that the unreasonably low rentals hitherto payable in terms of the 1960 leases needed to be renegotiated. Renegotiations then ensued and a resolution was found. And the fact that in early May 2014 Transnet, in keeping with the terms of the leases which it understood to have been varied in respect of the rental-determination basis in 2009 already, proposed a revised rate of R 17 per square metre per month for the succeeding five-year period from 1 June 2014 to 31 May 2019 reinforces this point.

[69] Moreover, to interpret the 2009 declarations of rental in the way for which Reit contended, would not be sensible or businesslike. It would, in addition, not make economic and commercial sense which is how contracts ought to be construed. The absurdity of Reit’s interpretation becomes stark when regard is had to the fact that the rental payable would, in the result, be

drastically reduced from some R 450 000 per month to a measly R 45 000 per month.

[70] Accordingly, I am satisfied that the appeal must succeed with costs, including the costs occasioned by the employment of two counsel.

[71] In the result the following order is made:

1 The appeal is upheld with costs, including the costs of two counsel.
2 The order of the court below is set aside and in its place is substituted the following:
'The application for review is dismissed with costs, including the costs occasioned by the employment of two counsel.'

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X M PETSE
DEPUTY PRESIDENT

Appearances

For appellant:	A M Annandale SC (with her J Thobela-Mkhulisi)
Instructed by:	Hughes-Madondo Inc., Durban
	McIntyre van der Post, Bloemfontein
For Respondent:	J J Brett SC (with him D Mahon)
Instructed by:	Vining Camerer Inc., Sandton
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