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**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)**

Not reportable
CASE NO. 660/2018

In the matter between:

**EAST LONDON INDUSTRIAL
DEVELOPMENT ZONE (SOC) LTD**

Plaintiff

and

FELTEX (PTY) LTD

Defendant

JUDGMENT

LAING J

[1] This is an action in terms of which the plaintiff seeks an order for specific performance, directing the defendant to complete the repairs to the premises described as Part 1 of Erf 6[...] East London ('the property'). The plaintiff also seeks payment of R 3 667 699, interest, and costs.

Background

[2] The facts are common cause. The parties concluded a lease agreement on 1 June 2006 for a period of seven years, subject to renewal. Clause 13 stipulated as follows:

- '13.1. The tenant shall be responsible for and shall pay all costs of the maintenance and repair of the whole of the leased premises (excluding structural repairs and roofing, for which the landlord will be responsible), including all running costs of whatever nature as if it were the owner of the leased premises and shall on the termination date deliver the leased premises to the landlord in the same good order and condition as in which received, fair wear and tear only excepted.
- 13.2. Should the tenant fail to comply with any of its obligations in terms of 13.1, the landlord shall be entitled to effect the necessary maintenance and/or repairs and to claim the reasonable cost thereof from the tenant, which shall be payable forthwith on demand.'

[3] Furthermore, clause 23 provided that:

'If during the currency of this agreement the leased premises are damaged or destroyed —

- 23.1. this agreement shall not terminate; and
- 23.2. the tenant shall notwithstanding such damage or destruction, be and remain bound by this agreement and continue to pay all rentals and other amounts payable in terms hereof;
- 23.3. the buildings shall be repaired or rebuilt or replaced by the tenant with all due diligence and as expeditiously as reasonably possible in the circumstances; and
- 23.4. to the extent that the tenant shall have been deprived of the beneficial use and occupation of the leased premises —
- 23.4.1. the tenant shall be entitled to any abatement in rental; and'¹

¹ Sic.

[4] On 3 October 2017, there was an explosion at the premises, causing extensive damage to three buildings in which the defendant housed its production operations. The defendant refused to repair the damage, resulting in the plaintiff's undertaking same at a cost of R 3 667 699.

[5] The defendant pleaded that the lease agreement required the plaintiff to keep the premises insured for not less than its replacement value in the event of loss caused by an explosion. The plaintiff failed to do so and the insurers repudiated its claim for indemnification. Consequently, pleaded the defendant, the plaintiff's breach of its obligation was the cause of the damages suffered.

[6] In the alternative, the defendant pleaded that, either on a proper construction of clause 15 or by virtue of a tacit agreement to that effect, the plaintiff bore the risk of loss. The provisions of clause 15 stipulate as follows:

'15.1. The landlord shall at all times —

15.1.1. keep the leased premises insured for a sum not less than the full replacement value thereof against loss through fire, wind, storm, hail, riot, strike, civil commotion, explosion, earthquake, and any other risks which the landlord may from time to time reasonably require; and

15.1.2. maintain adequate public liability insurance, having regard to the requirements of every law and the relevant risks to which the tenant may be subjected.

15.2. The obligation of the landlord to insure the building, in terms of this clause, shall not impose any obligation upon it to ensure the contents of the building, without limitation, equipment records, stock, loss of profits, or any consequential damage.

15.3. . . .'²

[7] As a further alternative, the defendant pleaded that clause 23.3 incorrectly stipulated that buildings on the premises would be repaired, rebuilt, or replaced by the tenant in the event of damage or destruction.³ This was a mistake resulting from

² Sic. Clause 15.3. dealt with the consequences of any increase in the cost of insurance.

³ The defendant referred to 'clause 22.3'. This was a reference to the incorrectly numbered paragraph in the lease agreement, which ought to have referred to 'clause 23.3'.

a common error because the parties had intended clause 23.3 to refer the landlord. The provisions in question stood to be rectified. Consequently, the defendant denied liability for payment to the plaintiff and denied that it had any obligation to repair the damage.

[8] In a counterclaim,⁴ the defendant pleaded the mistake described above and alleged that the plaintiff had repaired only a part of the buildings; it sought an order for the rectification of clause 23.3. The plaintiff admitted, in that regard, that the premises were not insured at the time of the explosion but denied that clause 15 was for the defendant's benefit, saying that it had to be read with clause 23; the duty to repair the buildings remained with the defendant. The plaintiff also denied that there was any basis for the rectification sought. There had been no mistake.

Issues to be decided

[9] The immediate issue for determination is whether the plaintiff has demonstrated that it is entitled to an order for specific performance. This will depend chiefly on the correct interpretation of clauses 13, 15, and 23, requiring an analysis of the text, context, and purpose of the provisions in question. Against this must be weighed the defence based on causation, as well as various alternatives. If the court is satisfied that the plaintiff is entitled to the order, then it must still determine whether the defendant must pay the cost of repairs claimed. There are, however, complications in this regard, as will be discussed below. A brief overview of the relevant principles follows.

Legal framework

[10] It is unclear, certainly on the face of it, how to reconcile the contents of clauses 15 and 23. Whereas the former places an obligation on the plaintiff to insure

⁴ The counterclaim was conditional upon a finding against the defendant in relation to its main plea (ie the plaintiff's breach was the cause of the damage) and the first alternative plea (ie the plaintiff bore the risk of loss in terms of clause 15).

the premises against loss because of an explosion, the latter places an obligation on the defendant to repair, rebuild, or replace the buildings in the event that the premises are damaged or destroyed. The dilemma attracts the application of the principles of contractual interpretation.

[11] The *locus classicus*, inevitably quoted in circumstances such as these, is *Natal Joint Municipal Pension Fund v Endumeni Municipality*,⁵ where Wallis JA held that:

‘...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.’⁶

[12] In *Comwezi Security Services (Pty) Ltd v Cape Empowerment Trust Ltd*,⁷ Wallis JA acknowledged that regard must be had to all relevant context when attempting to resolve a perceived contractual ambiguity. There was, accordingly, no reason why not to look at the conduct of the parties in their implementation of an agreement. Where it was clear that they had taken the same approach, their conduct provided evidence of how ‘reasonable businesspeople’ would construe the disputed

⁵ 2012 (4) SA 593 (SCA).

⁶ Para 18, footnotes omitted.

⁷ 2012 JDR 1734 (SCA).

provisions.⁸ Shortly afterwards, in *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*,⁹ Wallis JA confirmed that the starting point for contractual interpretation was the words used by the parties, but the process of interpretation did not stop at the perceived literal meaning thereof. The words used had to be considered in the light of relevant and admissible context, including the circumstances under which the contract came into being. Interpretation was ‘essentially one unitary exercise.’¹⁰

[13] The Constitutional Court dealt with the subject in *University of Johannesburg v Auckland Park Theological Seminary and Another*,¹¹ where it remarked as follows, per Khampepe J:

‘The approach in *Endumeni* “updated” the previous position, which was that context could be resorted to if there was ambiguity or lack of clarity in the text. The Supreme Court of Appeal has explicitly pointed out in cases subsequent to *Endumeni* that context and purpose must be taken into account as a matter of course, whether or not the words used in the contract are ambiguous. A court interpreting a contract has to, from the onset, consider the contract’s factual matrix, its purpose, the circumstances leading up to its conclusion, and the knowledge at the time of those who negotiated and produced the contract.’¹²

[14] This meant, said Khampepe J, that parties would invariably have to adduce evidence to establish the context and purpose of the contractual provisions in question. This could include pre-contractual exchanges between the parties, leading up to the conclusion of the contract, as well as evidence of the context at the time.¹³ The learned judge went on to caution, however, that extrinsic evidence was not always admissible, since interpretation was a matter of law and not fact; it was for the court to decide, not witnesses.¹⁴ To the extent that evidence may be admissible to contextualise a document, it had to be used as conservatively as possible.¹⁵

⁸ Para 15.

⁹ 2014 (2) SA 494 (SCA).

¹⁰ Para 12. Wallis JA quoted Lord Clarke SCJ in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, para 21.

¹¹ 2021 (6) SA 1 (CC).

¹² Para 66, footnotes omitted.

¹³ Para 67.

¹⁴ Para 68.

¹⁵ *Ibid.* Khampepe J cited, with approval, the views expressed by the Supreme Court of Appeal in *KPMG Chartered Accountants (SA) v Securefin Limited and Another* 2009 (4) SA 399 (SCA), para 39.

[15] The decision in *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others*,¹⁶ is important for a proper understanding of the principles of contractual interpretation. Unterhalter AJA (as he was then) explored the impact of *University of Johannesburg* on the parol evidence or integration rule. Where, in this regard, parties have reduced their agreement to writing and assented thereto, extrinsic evidence is inadmissible insofar as it contradicts, adds to, or modifies the contract, save in exceptional circumstances such as fraud or duress.¹⁷ *University of Johannesburg* affirmed, however, an expansive approach in relation to the admissibility of extrinsic evidence, regarding context and purpose, to determine what the parties intended. Unterhalter AJA observed that the Constitutional Court recognized, at the same time, the continued relevance of the parol evidence rule. The learned judge stated that:¹⁸

‘[The Constitutional Court] sought to reconcile the generous admissibility of extrinsic evidence of context and purpose with the strictures of the parol evidence rule in the following way:

“The integration facet of the parol evidence rule relied on by the Supreme Court of Appeal is relevant when a court is concerned with an attempted amendment of a contract. It does not prevent contextual evidence from being adduced. The rule is concerned with cases where the evidence in question seeks to vary, contradict, or add to (as opposed to assist the court to interpret) the terms of the agreement.”¹⁹

Unterhalter AJA continued:

‘The Constitutional Court has rejected the idea of the plain meaning of the text or its primacy, since words without context mean nothing, and context is everything. It has given a wide remit to the admission of extrinsic evidence as to context and purpose so as to interpret the meaning of a contract. Reasonable disagreements as to the relevance of such evidence should favour admitting the evidence and the weight of the evidence may then be considered.’²⁰

¹⁶ 2022 (1) SA 100 (SCA).

¹⁷ Para 38.

¹⁸ Para 41.

¹⁹ *University of Johannesburg*, para 92.

²⁰ *Coral Lagoon*, para 46.

[16] Commenting on the influence of *Endumeni*, saying that it had become ‘a ritualised incantation’ in submissions made to the courts, the learned judge remarked that:

‘[it] simply gives expression to the view that the words and concepts used in a contract and their relationship to the external world are not self-defining. The case and its progeny emphasise that the meaning of a contested term of a contract (or provision in a statute) is properly understood not simply by selecting standard definitions of particular words, often taken from dictionaries, but also by understanding the words and sentences that comprise the contested term as they fit into the larger structure of the agreement, its context and purpose. Meaning is ultimately the most compelling and coherent account the interpreter can provide, making use of these sources of interpretation. It is not a partial selection of interpretational materials directed at a predetermined result.

. . . Most contracts, and particularly commercial contracts, are constructed with a design in mind, and their architects choose words and concepts to give effect to that design. For this reason, interpretation begins with the text and its structure. They have a gravitational pull that is important. The proposition that context is everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text.’²¹

[17] Contractual interpretation is not confined to the literal meaning of the words used. The correct approach, now settled by the courts of appeal, entails a holistic interpretation in which the triad of text, context, and purpose must be considered simultaneously.²² The above principles inform the discussion that follows, but not before summarising the evidence presented by the defendant in support of its interpretation of the relevant clauses of the lease agreement.

Evidence of the witnesses

²¹ Paras 50 and 51.

²² *University of Johannesburg*, paras 63 to 65.

[18] The defendant's manager responsible for contractual matters, Ms Lynette Sithambaran, testified that the defendant was the first tenant at the premises. Mr Des Cobbledick had negotiated the conclusion of the lease agreement on its behalf.

[19] The regional operations manager, Mr Graham Young, explained that the defendant produced and supplied floor carpets, trim, and other material to the local plants of three major original equipment manufacturers (OEMs), viz Isuzu, Mercedes-Benz, and Volkswagen. It was a 'just in time' supplier, holding sufficient stock to provide OEMs with products at extremely short notice, with severe repercussions for the supply chain if it was unable to do so. The witness said that the explosion on 3 October 2017 had caused significant damage to the buildings used by the defendant, blowing off a roof and collapsing factory walls. The plaintiff immediately appointed a contractor to start clearing up and to commence with repairs. The defendant established a so-called 'war room' to keep production and supply operations intact. Referring to various emails that he had exchanged with the plaintiff's manager responsible for maintenance and facilities, Mr Graham Wright, the witness stated that it had been his understanding that the plaintiff's insurer, Lion of Africa, would appoint a principal contractor and engage with various sub-contractors for the repairs required. Work had already started on the fire sprinkler system. At the time, however, the plaintiff had been awaiting the finalization of its insurance claim, alternatively its insurer's confirmation that the repairs could commence. In the interim, Mr Wright had requested Mr Young to identify a liaison person for the formation of a joint team to plan and coordinate the repairs. On 8 November 2013, the insurer declined liability for the claim because of the plaintiff's non-payment of premiums. The plaintiff suspended its involvement in the repairs shortly afterwards.

[20] Under cross-examination, Mr Young admitted that he had not had anything to do with the negotiation of the lease agreement and had been unaware of its terms. The cause of the explosion was still unknown but was possibly linked to the storage of flammable material. The witness confirmed that he and Mr Wright had worked together to ensure that the repairs were carried out to allow for the resumption of production as soon as possible. The plaintiff focused on structural work. It undertook, in that regard, the complete repair of a building that housed the production of tufted carpets, which were critical to the defendant's supply operations. The defendant

removed rubble from the assembly line and generally 'made safe' certain areas. Representatives of the OEMs had also participated. Mr Young said that he had assumed, without regard to the lease agreement, that the plaintiff would do the necessary repairs. The plaintiff's chief executive officer, Mr Simphiwe Kondlo, was aware of the incident and had visited the premises with Mr Wright on the day after the explosion and on at least two other occasions.

[21] Both Ms Sithambaran and Mr Young were credible and reliable witnesses. Their testimonies were not placed in dispute and there is no reason to doubt the probabilities thereof. The plaintiff presented no witnesses of its own. It is necessary at this stage to consider the plaintiff's claims more closely, considering the defences raised.

Specific performance

[22] The plaintiff claimed specific performance from the defendant in terms of clause 23, read with clause 13.1, of the lease agreement. In that regard, clause 13.1 pertains to maintenance and repairs, stipulating that the defendant shall be responsible for the costs of maintenance and repair of 'the whole of the leased premises (*excluding structural repairs and roofing*, for which the landlord will be responsible) . . .'²³ Clause 15 deals with insurance, obliging the plaintiff to keep the premises insured against loss through various specified events, including an explosion; it is not required to insure 'the contents of the building'. Clause 23 deals with damage or destruction. The facts of the matter demonstrate that the premises were damaged by the explosion, but not destroyed.²⁴ In such event, the provisions provide for the following consequences: the lease agreement shall not terminate; the defendant shall remain bound thereby and continue to pay rental and other amounts due; the buildings shall be 'repaired or rebuilt or replaced' by the defendant as

²³ Emphasis added.

²⁴ The term, 'destroy', is not defined in the lease agreement. However, its general meaning, within the present context, is to 'put an end to the existence of (something) by damaging or attacking it.' J Pearsall *The Concise Oxford Dictionary* 10 ed rev (2001) at 389.

expeditiously as possible; and, to the extent that the defendant is deprived of beneficial use and occupation, it shall be entitled to ‘any abatement in rental’.

[23] The lease agreement is not free of interpretive problems. As Unterhalter AJA remarked, nevertheless, in *Coral Lagoon*, context is everything.²⁵ It was common cause that the lease agreement was originally based on a so-called triple net lease agreement, in terms of which the tenant was liable for rental as well as property taxes, insurance, and maintenance costs (the three ‘nets’).²⁶ This much was confirmed in terms of clause 16.1 of earlier drafts,²⁷ where it was recorded that:

‘this is a triple net lease and . . . the tenant shall be responsible for and shall pay all costs and charges relating to the maintenance, use and occupation of the leased premises as if it were the owner thereof, none of which shall be payable by the landlord.’

Furthermore, clause 16.2 provided that:

‘[t]he tenant waives all claims against the landlord relating to the maintenance and repair (including running costs of whatever nature) of the leased premises.’

[24] The defendant bore liability for the bulk of the costs. It also carried most of the risks. The original provisions regarding maintenance and repairs (clause 12 at the time) placed responsibility squarely on the shoulders of the defendant, including the costs of all structural repairs. Similarly, the provisions for insurance (clause 14 at the time) indicated that the defendant, not the plaintiff, was responsible for keeping the premises insured against loss, including loss caused by an explosion. The provisions pertaining to damage and destruction (clause 23 at the time) required the defendant to repair, rebuild, or replace; it was not entitled to any abatement in the rental but would, nevertheless, be entitled to the proceeds of any insurance cover, pending the restoration of beneficial use and occupation of the premises.

²⁵ See n 20 above.

²⁶ The term is commonly used in the United States and is described more fully in Wikipedia. See https://en.wikipedia.org/wiki/Net_lease, accessed on 2 April 2026.

²⁷ The parties agreed, in terms of a pre-trial minute, dated 10 October 2025, that the documents in either party’s trial bundle were what they purported to be, without need for formal proof thereof. This was limited to the extent that the parties could rely only on those documents referred to in evidence or in counsel’s opening address.

[25] Neither party presented witnesses who were directly involved in the negotiation of the lease agreement. The final, signed, version reflects, nevertheless, unmistakeable changes that occurred in the contractual balance between the parties. It is evident from the correspondence exchanged that there was a distinct move away from a triple net lease to an arrangement where liability for costs and risks, in general, was more evenly distributed. This stands to reason. It was undisputed that the defendant was the plaintiff's first tenant. The correspondence reveals a concerted effort to convert a business opportunity into a long-term benefit for both parties, necessitating various trade-offs. The result was an arrangement in terms of which, broadly speaking, the plaintiff would erect the buildings required by the defendant in accordance with agreed specifications, and take ownership. The defendant was responsible for the costs of maintenance and repairs to the premises, but the plaintiff, importantly, assumed responsibility for structural repairs and roofing. The plaintiff also assumed responsibility for the insurance of the premises, not its contents. The parties removed all reference to a triple net lease. In the end, the negotiations produced at least four different drafts. Inevitably, ambiguities and apparent contradictions emerged.

[26] Turning to the purposes of the clauses in dispute, it would be wrong to ignore the context described above. If anything, then clauses 13, 15, and 23 were designed to achieve the compromises and businesslike result already discussed. To make sense of the text by reference to purpose, however, it is necessary to reiterate the relevant common law principles. In *Harlin Properties (Pty) Ltd and Another v Los Angeles Hotel*,²⁸ Beyers JA confirmed that a lessor has a duty to place leased property in a condition reasonably fit for the purpose for which it was let, as well as to maintain it in such condition during the currency of the lease. The duty relates to the condition of the property both externally and internally, and includes the obligation to remedy all defects or flaws that interfere with the use of the property.²⁹ Bradfield summarises the common law position as follows:

'For a lessee to have the use and enjoyment of the leased property, the property has to be in a condition that allows for that use and enjoyment. The lessor is therefore, in the absence of

²⁸ 1962 (3) SA 143 (A).

²⁹ At 150 G–H.

agreement to the contrary, under an obligation to make the leased property available in the condition agreed, or, failing agreement on the condition of the leased property, in the condition in which the property is reasonably fit for the use for which it was let. Furthermore, subject to an agreement to the contrary, the lessor is under a continuing obligation to ensure that the leased property is maintained in such condition for the duration of the lease.’³⁰

The learned writer continues:

‘The lessor’s continuing obligation to maintain the property in the condition in which it is reasonably fit for the purpose for which it was let would involve: general maintenance in the sense of upkeep; and also repairing damage to the premises that was not caused intentionally or negligently by the lessee, or by those for whose actions or conduct the lessee is responsible.’³¹

[27] Interestingly, the Rental Housing Act 50 of 1999, once amended, will codify the common law position. It stipulates that a landowner must provide a tenant with a dwelling that is in a habitable condition, as well as maintain the existing structure of the dwelling.³²

[28] Clause 13 in the present matter was clearly intended to reflect the common law position to the extent that the plaintiff remained responsible for at least the structural repairs and roofing. This could have been expected where, as here, a lessor was to take ownership of the buildings once constructed. The provisions must be interpreted as limiting the defendant’s responsibility to what can only be described as general maintenance and repairs — no further. Clause 15 is in alignment with the common law position. It requires the plaintiff to keep the premises insured for its full replacement value, thereby ensuring sufficient cover to allow the defendant to exercise its right to the continued use of the premises once the plaintiff has carried out the necessary structural repairs and roofing pursuant to any of the events listed, such as an explosion.

³⁰ See G B Bradfield’s title on ‘Lease’, 26 (1) *Lawsa* 3 ed, para 96. Footnotes omitted.

³¹ Ibid. See, inter alia, Van Leeuwen *CF* 1.4.22.10; Voet 19.2.14; Pothier, paras 92–5; and *Syndicate v Moore* 1920 AD 457.

³² Section 4B (11), to be inserted by section 7 of the Rental Housing Amendment Act 35 of 2014, date of commencement to be determined.

[29] Clause 23, lying at the core of the dispute, must be interpreted as a negotiated trade-off in relation to the common law position. The defendant, not the plaintiff, is responsible for the repair, rebuilding, or replacement of the buildings on the premises, but only to the extent that this does not include structural repairs or roofing. The maxim, *generalia specialibus non derogant*,³³ applies. In other words, greater weight must be given to specific rather than general provisions in a contract, on the presumption that the parties did not intend a general provision to apply in a situation that was accommodated by a special provision.³⁴ The continued operation of the principle was confirmed in *Gentiruco AG v Firestone SA (Pty) Ltd*.³⁵ Consequently, to interpret clause 23 as requiring the defendant to be responsible for *all* repairs would conflict with the specific exclusion contained in clause 13. Another reason why this would be incorrect is apparent from the text itself. To that effect, the purpose of clause 23 was not so much to address the allocation of responsibility for maintenance and repairs, which is the focus of clause 13, as to regulate the consequences of damage or destruction. The defendant would remain bound by the lease agreement and would be required to continue to pay rental, subject to any abatement resulting from the deprivation of its beneficial use and occupation of the premises. The obligation to repair was included ostensibly to alleviate the potential losses to both parties while the premises remained unusable. It cannot, however, be afforded the expansive interpretation pleaded by the plaintiff.

[30] It is necessary to pause at this stage and to revisit, briefly, the evidence of the defendant's regional operations manager, Mr Young. In that regard, the witness described the plaintiff's prompt appointment of a contractor to commence with repairs in the immediate aftermath of the explosion. A 'war room' was established to facilitate the joint coordination of the repairs required, including representatives of the OEMs. The parties appear not to have differentiated explicitly between their respective responsibilities, but it was undisputed that the plaintiff focused on structural repairs, including the wholesale restoration of a building in which tufted carpets were produced; in contrast, the defendant focused on the removal of rubble and 'making

³³ Translated as 'general provisions do not derogate from special.' See R C Claassen *Claassen's Dictionary of Legal Words and Phrases* SI 28 (2025).

³⁴ G B Bradfield *Christie's Law of Contract in South Africa* 8 ed (2022), at 276–7.

³⁵ 1972 (1) SA 589 (A), at 603 A–C.

safe.’ The plaintiff’s work on the fire sprinkler system suggests a degree of overlap between structural and general repairs. If anything, however, this was probably indicative of the haste with which the parties acted to ensure the resumption of production and supply operations, pending the insurer’s appointment of a principal contractor.

[31] In *Coopers & Lybrand and Others v Bryant*,³⁶ Brand JA reiterated the correct approach to the interpretation of a document. The learned judge indicated that extrinsic evidence of the surrounding circumstances may be considered, including the parties’ subsequent conduct.³⁷ Similarly, *Comwezi* is authority for the principle that the parties’ conduct in the implementation of a contract may be considered to resolve a perceived ambiguity.³⁸ This must, however, be done conservatively, as Khampepe J cautioned in *University of Johannesburg*, suggesting, too, that extrinsic evidence was restricted to the circumstances leading up to the conclusion of the contract — and not afterwards.³⁹ Likewise, Unterhalter AJA warned in *Coral Lagoon*:

‘ . . . *University of Johannesburg* recognizes that there are limits to the evidence that may be admitted as relevant to context and purpose. . . *Comwezi* is not to be understood as an invitation to harvest evidence, on an indiscriminate basis, of what the parties did after they concluded their agreement. The case made it plain such evidence must be relevant to an objective determination of the words used in the contract.’⁴⁰

[32] Mr Young’s evidence was, overall, unchallenged. It demonstrated the plaintiff’s understanding at the time that it was responsible, in part, for some of the repairs. The situation changed, however, after the insurer’s repudiation of its claim. Whereas the witness’s evidence did not contradict, add to, or modify the relevant clauses of the lease agreement,⁴¹ the court is reluctant to admit it for the following reasons: firstly, it pertained to conduct that took place more than 11 years after the conclusion of the lease agreement; secondly, neither Ms Sithambaran nor Mr Young was involved in the negotiation thereof; and, thirdly, the seemingly arbitrary division of responsibilities

³⁶ 1995 (3) SA 761 (A).

³⁷ At 768 A–C. See, too, *Grobler v Oosthuizen* 2009 (5) SA 500 (SCA), para 14.

³⁸ *Comwezi*, para 15.

³⁹ *University of Johannesburg*, para 68.

⁴⁰ *Coral Lagoon*, para 48.

⁴¹ *Op cit*, para 38.

immediately after the event, including the plaintiff's work on the fire sprinkler system, invites the question whether the parties had a clear picture of where their respective contractual duties began and ended. The witness's evidence does not undermine the interpretation already discussed, but it also takes the matter no further.

[33] The text of the clauses in dispute is the correct point of departure for the process of contractual interpretation. To this must be added context and purpose, thereby completing the triad mentioned in *University of Johannesburg*.⁴² If an insensible and unbusinesslike result is to be avoided, as discussed in *Endumeni*,⁴³ then the essence of clauses 13, 15, and 23 must be understood to mean the following: the plaintiff was responsible for structural repairs and roofing, and to insure the premises accordingly; the defendant was responsible for all other general repairs. Consequently, the plaintiff's claim for specific performance must be viewed in that light.

Defences

[34] Dealing with the defences raised, the defendant's arguments in relation to causation are unpersuasive. These are centred on the plaintiff's contractual duty to keep the premises insured for not less than its replacement value in the event of loss caused by an explosion. The defendant contended that the plaintiff's failure to do so was the cause of the damages suffered. This ignores, however, the *res inter alios acta* or collateral benefit principle. In *Thomson v Thomson*,⁴⁴ Gautschi AJ confirmed that the benefit derived from insurance cover must be regarded as collateral. It was a situation involving a benefit that arose out of something that was wholly independent of the relations created between the parties by a contract.⁴⁵ The learned judge remarked further that:

'The principle of *res inter alios acta* or collateral benefit has never, as far as I am able to ascertain, been applied in the context of a claim for specific performance. . . . [I]n the case of

⁴² See n 22 above.

⁴³ See n 5 and n 6, above.

⁴⁴ 2002 (5) SA 541 (W).

⁴⁵ At 547 A–C.

specific performance, the defendant has bound himself by contract to perform an obligation, and he cannot avoid that performance because the plaintiff has received something similar or identical elsewhere.⁴⁶

[35] This court respectfully agrees. In the present matter, the plaintiff's failure to have kept the premises insured had no impact on the defendant's contractual duties. As the plaintiff pointed out, this is not a claim for damages. The plaintiff simply seeks to enforce its right under clause 13.2 of the lease agreement to claim the reasonable cost of repairs because of the defendant's alleged failure to have complied with its obligations in terms of clause 13.1. The question of causation does not arise.

[36] Turning to the alternative defences, it cannot be said, on a proper interpretation of clause 15, that the plaintiff's assumption of risk affected the defendant's contractual duties. The relevant provisions must be read in harmony with clauses 13 and 23. Save for structural repairs and roofing, the defendant was obligated to carry out general repairs, notwithstanding the fact that the damage had been caused by an explosion. There is, furthermore, no basis upon which the defendant can assert that there was a tacit agreement that the plaintiff bore the risk of all loss. For the reasons already explained, a proper interpretation of the lease agreement does not support such an assertion; there was, moreover, no evidence to that effect. In any event, the plaintiff was not obligated to apply the proceeds of any insurance cover to the repairs needed. The relevant principle was stated in *Achterberg v Walters*,⁴⁷ where the full bench, per Millin J, held as follows:

'Where the lessee is under obligation, as here, to repair and replace all furniture and furnishings damaged or destroyed and at the end of the lease to restore possession of all furniture and fittings let, it is obvious that the lessor has a direct interest to compel him to insure, at any rate, against destruction or damage by fire. It is usual to require the lessee to insure in the lessor's name or in the names of the lessor and lessee jointly, in which case the lessor has the right, as being the insured, to apply the proceeds to the reinstatement of the insured property. If he does not insist on this, but only requires the lessee to insure the property, the lessee performs his obligation by insuring in his own name and the lessor has

⁴⁶ At 547 D–F.

⁴⁷ 1950 (3) SA 734 (T).

no means of compelling him to apply the proceeds of the policy to reinstatement. The utility of such a covenant is no more than to promote the solvency of the lessee and put at his disposal funds with which to discharge his covenant to repair and replace; but to that extent it is of value to the lessor.⁴⁸

[37] It is submitted, with respect, that the principle operates equally in relation to a situation where the lessor, not the lessee, is under a contractual duty to insure a property. Even if the defendant was able to demonstrate the existence of a tacit agreement, then it would have been of no advantage. The defendant's obligation to carry out general repairs remained intact.

[38] Regarding the defendant's remaining defence of rectification, which also underpinned its counterclaim, reference was made to *Tesven CC and Another v South African Bank of Athens*.⁴⁹ Farlam AJA observed that allowing the words that the parties actually used in a document to override their prior agreement or the common intention that they intended to record was to enforce what was not agreed. It would overthrow the basis upon which contracts rested in South African law.⁵⁰ The defendant's arguments in this regard are, however, unconvincing. In *Propfokus 49 (Pty) Ltd v Wenhandel 4 (Pty) Ltd*,⁵¹ Van Heerden JA stated the following:

'In order to succeed with its claim for rectification, Wenhandel had to allege and prove the following:

- (a) that an agreement had been concluded between the parties and reduced to writing;
- (b) that the written document does not reflect the true intention of the parties — this requires that the common continuing intention of the parties, as it existed at the time when the agreement was reduced to writing, be established;
- (c) an intention by both parties to reduce the agreement to writing — in the present case, the agreement was for the sale of land and, therefore, had to be in writing in order to be valid and binding;
- (d) a mistake in drafting the document, which mistake could have been the result of an intentional act of the other party or a bona fide common error; and

⁴⁸ At 740G–741A.

⁴⁹ 2000 (1) SA 268 (SCA).

⁵⁰ Para 16.

⁵¹ 2007 JDR 0165 (SCA).

(e) the actual wording of the true agreement.⁵²

[39] The defendant contended that the word, 'tenant', in clause 23.3 should read 'landlord.' By reference to what it described as various internal contradictions and *lacunae*, as well as the indication of a clear transition away from a triple net lease to a different business model, the defendant argued that the provisions in question were a mistake resulting from a common error. The court does not agree; there was simply no evidence to that effect. In *Bardopoulos and Macrides v Miltiadous*,⁵³ Clayden J held that a party seeking rectification must show, 'in the clearest and most satisfactory manner', the facts entitling him or her to the relief claimed.⁵⁴ Neither of the defendant's witnesses was involved in the negotiation of the lease agreement. The correspondence exchanged between the parties, moreover, does not support the defendant's contention. To the extent that it could be said that there was indeed a mistake, this would still not assist the defendant. Clause 23.3 must be read in harmony with clause 13.1. The defendant would remain responsible for carrying out general repairs.

[40] Mention must be made, too, of the defendant's reference to subsequent lease agreements that the plaintiff concluded with third parties. In that regard, it was argued that the relevant clauses required the plaintiff to keep the premises insured against, inter alia, an explosion *and* to repair the buildings pursuant to any damage or destruction inflicted. This avoided the apparent contradiction contained in clauses 15 and 23 of the present lease agreement and yielded a sensible and businesslike result. The concerns raised in *Coral Lagoon*, however, cannot be ignored.⁵⁵ Extrinsic evidence that tends to contradict, add to, or vary the terms of a contract is inadmissible. The reference to third party lease agreements has such an effect; it falls foul of the parol evidence or integration rule and does not assist the court in the proper analysis of the text, context, and purpose of the clauses in question.

⁵² Para 13.

⁵³ 1947 (4) SA 860 (W).

⁵⁴ At 863. The court cited *Bushby v Guardian Assurance Co* (1915, WLD 65, at 71). See, too, *Soil Fumigation Services Lowveld CC v Chemfit Technical Products (Pty) Ltd* 2004 (6) SA 29 (SCA), para 21.

⁵⁵ See n 17 above.

Cost of repairs, relief, and order

[41] The plaintiff claimed the reasonable cost of the repairs that it previously carried out, as envisaged under clause 13.2. This amounted to the sum of R 3 667 699, which was not in dispute.⁵⁶ The difficulty with this, however, is that the plaintiff presented no evidence regarding how the sum was composed. This was consistent with its all-or-nothing approach to the liability of the defendant in relation to the repairs, without distinction between structural repairs and roofing, on the one hand, and general repairs, on the other. On the face of it, with reference to the plaintiff's particulars of claim, the cost of the general repairs for which the defendant would be liable must be calculated in relation to the following: fire sprinklers, hydrants, and 'FHRs';⁵⁷ plumbing, hose reel, and hydrant pipes; electrical components; cladding; gutters and drainage system; roller shutter doors; aluminium doors; glass viewing panels; and general clearing of the fire damage. The only item that appears to fall within the meaning of structural repairs and roofing is the cost of repairs to steel rails and purlins, for which the plaintiff would be liable. In the absence of any evidence (or argument) in that regard, the court cannot make a definitive finding.

[42] Ultimately, the court is satisfied that the plaintiff is entitled to its claim for specific performance, but limited to general repairs. These exclude structural repairs and roofing, for which the plaintiff retains responsibility. There is no merit to the defendant's counterclaim. Regarding costs, the plaintiff has been substantially successful in its claim as well as its defence of the counterclaim; the general rule must apply. By reason of the nature and complexity of the matter, scale C is appropriate. It would seem fair, however, to order that interest on the cost of general repairs must run from the date of service of summons until date of payment, rather than the date upon which the plaintiff made payment to the various contractors, as alleged and claimed.

⁵⁶ The parties' pre-trial minute (n 27 above) merely recorded that the defendant agreed to the amount claimed.

⁵⁷ The term is understood to be an acronym for fire hose reels.

[43] In the circumstances, the following order is made:

- (a) the defendant is ordered to:
 - (i) complete the general repairs to the premises, excluding structural repairs and roofing;
 - (ii) pay to the plaintiff such amount as represents the reasonable cost of the general repairs that the plaintiff previously carried out;
 - (iii) pay interest thereon at the legal rate from the date of service of summons until the date of payment;
- (b) the defendant's counterclaim is dismissed; and
- (c) the defendant is ordered to pay the plaintiff's taxed costs on a party-and-party basis, at scale C, together with interest thereon at the legal rate from the date of *allocatur* until the date of payment.

JGA LAING
JUDGE OF THE HIGH COURT

Appearances

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Dates heard:	13 – 14 October and 5 November 2025.
Date delivered:	14 April 2026.