OLD MUTUAL PROPERTY INVESTMENTS
versus
METRO INTERNATIONAL (PRIVATE) LIMITED
and
THOMAS MEIKLES CENTRE (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
PATEL J
HARARE, 8 and 23 June 2005, 9 November 2005 and 11 May 2006

Opposed Application

Adv. Morris & Mr. Gapu, for the applicant
Mr. *Cooke*, for the 1st respondent
Mr. *Biti*, for the 2nd respondent

PATEL J: This is an application for a *declaratur* on the meaning of the word "supermarket" in the context of two lease agreements entered into between the applicant and the two respondents in respect of premises demised within the Westgate Shopping Complex in Harare ("the Complex").

The Facts

The lease agreement with the 1st respondent ("the W Store lease") was concluded on the 19th of November 1995. The lease agreement with the 2nd respondent ("the TM lease") was concluded on the 8th of March 1996. However, it is common cause that the two lease agreements were negotiated at the same time. Both leases are of 10 years duration, commencing on the 1st of April 1997 and terminating on the 31st of March 2007, with options to renew. The W Store lease covers an area of 2264.53 square metres, while the TM lease spans a larger area of 4183.48 square metres.

From the inception of its lease, the 1st respondent traded as the "W" Store in its leased premises. In June 2004, the 1st respondent informed the applicant that it intended to cease trading as the "W" Store and to commence trading as a Spar franchise. In the months that followed, it emerged that there was no agreement between the parties as to what comprised a "supermarket"

for the purposes of the 1000 square metre spatial limitation contained in clause 11.1 of the W Store lease. The 1st respondent contended that the term excluded ancillary facilities, such as storerooms, compressor rooms, butchery, bakery, etc., while the 2nd respondent argued that the term included such ancillary facilities. The applicant found itself in the invidious position of having to take sides and endeavoured to remain neutral. It then instituted this application on the 4th of February 2005.

For the sake of completeness, it is necessary to note that, notwithstanding the lack of consensus between the parties, the 1st respondent commenced trading in its renovated premises as a Spar franchise in May 2005. This development formed the subject matter of a separate urgent application, in Case No. HC 2255/05, wherein the 2nd respondent sought to interdict the 1st respondent from operating a supermarket exceeding 1000 square metres. This application was dismissed by GOWORA J on the 18th of July 2005 for reasons which are not directly relevant to the determination of the present application.

The Arguments

Mr. Cooke, appearing for the 1st respondent, submits that the word "supermarket" in clause 11.1 of the W Store lease pertains to the selling or trading area only and excludes other ancillary areas where no trading takes place. He further submits that both respondents have mutually exclusive contracts and that the provisions of the TM lease cannot be construed to restrict the application of the W Store lease. In this regard, he points out that the exclusivity clause in the TM lease was fixed after the W Store lease had been executed. In support of his submissions, Mr. *Cooke* refers to an Addendum to the W Store lease which was verbally agreed with the applicant and which clearly implies that the ancillary facilities are separate and exclusive from the supermarket area. If there is any ambiguity in the W Store lease, it should, so he argues, be interpreted *contra proferentem* the applicant and in favour of the 1st respondent, particularly inasmuch as the latter has

expended billions of dollars on the refurbishment of its leased premises in pursuance of its new Spar enterprise.

On behalf of the 2nd respondent, Mr. *Biti* submits that the context in which the lease agreements *in casu* were concluded must be taken into account. The 2nd respondent agreed to establishing a huge and costly supermarket located at a distance from the main parking area on the understanding that it would operate the principal supermarket within the Complex. The 2nd respondent's dominant position *qua* supermarket was accepted by all the parties concerned and the exclusivity clause in the TM lease is perfectly reasonable in view of its background. Mr. *Biti* further submits that an inclusive interpretation of the term "supermarket" accords not only with the understanding of the parties *ab initio* but also with common sense and ordinary colloquial usage as to what constitutes a supermarket, *viz*. a large self-service store.

Adv. *Morris* and Mr. *Gapu*, for the applicant, argue that the applicant has never fully acceded to the enlarged concept of a supermarket. In this respect, the addendum to the W Store lease has not as yet been signed and therefore cannot be regarded as binding on the parties until it has been signed. Moreover, the applicant has always sought to protect the 2nd respondent's exclusivity rights. The 1st respondent has been fully aware of that fact and in the past, *qua* the "W" Store, has adhered to the 1000 square metre restriction as applying to a supermarket area inclusive of ancillary facilities. They also point out that both of the lease agreements under review were negotiated by the parties at the same time. Thus, the fact that the W Store lease was signed before the TM lease is irrelevant in light of the overall context.

Sketch Plans

In November 2005, the parties were directed to produce sketch plans of the leased premises so as to enable the Court to formulate a clearer picture of the layout and areas under review. These sketch plans were duly produced

and submitted in December 2005. In essence, although there is some dispute as to the precise dimensions involved, the plans depict the following:-

(i) Apart from small areas set aside for office space and staff facilities totalling less than 700 square metres, the bulk of the premises under the TM lease is devoted to a supermarket trading area and ancillary facilities, approximating *circa* 3500 square metres.

(ii) Under the W Store lease, the total trading area, inclusive of the clothing and textiles area, exceeded 1000 square metres. However, the area assigned to the supermarket and its ancillary facilities comprised less than 1000 square metres.

(iii) In the new Spar establishment, the total trading area has been reduced by approximately 150 square metres. The supermarket trading floor *per se* consists of 960 square metres. This area, combined with the coffee shop, take-aways, refrigerators and bulkheads, all of which are open to public access, comprises a total of 1215 square metres. The remainder of the leased premises, which is not accessible to the public, constitutes 1135 square metres assigned to storage and service facilities ancillary to the Spar supermarket.

The Lease Agreements

Clause 11.1 of the W Store lease entitles the 1st respondent "to use the premises for a clothing store, plus a supermarket which may not exceed 1000 square metres and for no other purpose whatsoever" without the applicant's prior written consent. In terms of clause 37, no variation of the lease agreement is binding on the parties unless it is "reduced to a written agreement signed by or on behalf of the parties".

Correspondingly, clause 11.1 of the TM lease entitles the 2nd respondent "to use the premises for a supermarket and for no other purpose whatsoever" without the applicant's prior written consent. Additionally, clause 40 of the

agreement constitutes an exclusivity clause whereby the applicant "undertakes not to lease any other premises over 1000 square metres in the Building as a supermarket during the first ten years of this lease" without the written consent of the 2nd respondent.

As regards the Addendum relied upon by the 1st respondent, I am unable to see how this can assist to advance its position. Although it may well reflect the negotiated stance of the parties as to the proposed conversion and refurbishment of the W Store premises, it is common cause that it was never signed by the applicant *qua* landlord. In the event, in the absence of such signature, it falls foul of clause 37 of the W Store lease and cannot be held to be binding on the parties. In my view, it is of no legal force or effect and does not take the present matter any further.

Turning to clause 40 of the TM lease, the clarity of this clause is not entirely satisfactory in its reference to "any other premises over 1000 square metres in the Building as a supermarket". It obviously could and should have been better drafted to reflect the agreed intention of the parties.

As for the crucial word "supermarket", the term is not defined in either of the lease agreements. Clauses 1 and 2 of both lease agreements, which respectively define the terms used therein and identify the premises leased thereunder, do not provide any assistance in this regard. More critically, the restriction contained in clause 11.1 of the W Store lease and the exclusivity conferred by clause 40 of the TM lease simply refer to the word "supermarket" without articulating the intended parameters of that term.

In the final analysis, it is clear that the lease agreements under consideration, whether taken individually or together, fail to provide any meaningful answer to the central question posited in this matter, viz. what is a "supermarket" for the purposes of the restriction imposed upon the 1st respondent.

The *Contra Proferentem* Rule

As a rule, where there is some ambiguity in the use of a word or choice of expression which leaves the court unable to decide which of two meanings is correct, the word or expression ought to be construed against the party who was responsible for drafting the document in question. See *Cairns (Pty) Ltd v Playdon & Co Ltd* 1948 (3) SA 99 (AD), at 123; *Commercial Union Fire, Marine & General Insurance Co Ltd v Fawcett Security Organisation Bulawayo (Pvt) Ltd* 1985 (2) ZLR 31 (SC); *Presbyterian Church of Southern Africa v Shield of Zimbabwe Insurance Co Ltd* 1991 (2) ZLR 261 (HC).

It is to be cautioned, however, that the rule is one of last resort and is only to be applied where it is not possible to ascertain the proper meaning of the contractual provision in question, after having exhausted all the ordinary rules of interpretation. See in this respect the *Cairns* case, *supra*, cited in *Jonnes v Anglo-African Shipping Co. Ltd* 1972 (2) SA 827(A). As explained by Faber : *Rat 2.14.39* (Wessels translation):

> "But the interpretation against the seller or the lessor must clearly not be applied in the first instance, but only if nothing better can be determined: That is to say, if it can neither be proved what was the intention of the parties nor an interpretation given in accordance with the probabilities."

As I understand it, the rule is generally applicable where the party that drafted the document under dispute is the dominant party, allowing for minimal or purely perfunctory input from the other party, as invariably occurs in the case of contracts of insurance. The rule ought not to be applied where the parties are relatively equal in their respective bargaining positions.

In the present case, it is not in dispute that both lease agreements were negotiated at the same time and only concluded by the parties after lengthy and detailed negotiations. Therefore, it cannot be said that the applicant or either of the respondents was the dominant player in the course of negotiating and concluding the lease agreements.

More significantly, I do not think that this is an instance where it is impossible to ascertain the true or probable intention of the parties either from the lease agreements themselves or from their surrounding circumstances. Accordingly, while I accept that the restriction and exclusivity clauses under review might have been more lucidly formulated, I am unable to accept that the failure to define the word "supermarket" in the lease agreements should be held against the applicant by invoking the *contra proferentem* rule.

Meaning of Supermarket

According to Anderson & Labley: *Success in Commerce*, at p. 25, a supermarket is a large self-service store buying in bulk. This definition accords with the dictionary definition of the term. In the New Collins Concise Dictionary (1982), the word "supermarket" is defined as "a large self-service store retailing food and household supplies", while "store" is defined as "an establishment for the retail sale of goods and services".

What emerges from these definitions is that a supermarket is a large commercial establishment where goods are stored in bulk and where goods, and possibly services, are retailed to members of the public. Obviously, the space where goods are displayed and paid for, viz. the trading area, is unquestionably an essential part of a supermarket. Moreover, the definitions cited above indicate that the storage facilities of a supermarket, as well as the areas where services are provided, form as much an integral part of the supermarket as its trading area. Taking this conception further, it seems to me difficult to separate the other amenities and facilities that are usually attached to a supermarket from its trading area *per se*. In other words, a supermarket in its totality must be viewed as comprising not only its trading area but also its ancillary warehousing, refrigeration and ablution facilities. In my view, the latter constitute intrinsic facets of the notion of a supermarket.

I am confident that the view that I have taken is consonant with ordinary colloquial usage and the popular perception of a supermarket. A

comparison of other commercial enterprises is also illustrative and instructive in this regard. Thus, a restaurant, bakery, bottle-store, pharmacy and butchery would ordinarily contain facilities and areas to which the public are denied access. These would include, *inter alia*, kitchens, storerooms, dispensaries, cold-rooms and cutting-rooms. It would, I think, be absurd to suggest that these facilities should be divorced from the trading areas to which they are necessarily and intimately attached in determining what constitutes the relevant commercial enterprise under consideration. Each such enterprise must surely be regarded as being inclusive of all the amenities that are necessary for conducting the particular business of that enterprise.

In the result, I am of the considered opinion that the word "supermarket", regarded in both its grammatical and colloquial sense, means the entire enterprise comprising the business of a large self-service store, inclusive of its trading area as well as its ancillary storage, refrigeration, cooking and ablution facilities. In the present context, it follows that the Spar supermarket presently operated by the 1st respondent includes not only its trading area which is open to the public but also the ancillary facilities and amenities to which the public are ordinarily denied access, viz. the entire area devoted to the business of the supermarket.

Context and Surrounding Circumstances

It is trite law that the courts are at liberty to have regard to extrinsic evidence pertaining to the circumstances surrounding a written agreement in order to resolve any ambiguity in the interpretation of the agreement. See *Richter v Bloemfontein Town Council* 1922 AD 57, at 59; *Delmas Milling Co. Ltd v du Plessis* 1955 (3) SA 447, at 454; *Botha v Venter* 1999 (4) SA 1277. See also Kerr: *The Principles of the Law of Contract* (3rd ed. 1982) at pp. 217-220 and 226; Christie: *The Law of Contract in South Africa* (3rd ed.) at p. 227 ff.

In the instant case, the 2nd respondent agreed to establish a large supermarket at huge expense on the understanding that it would operate the

principal supermarket within the Complex. This position was accepted by all the parties concerned and the restriction clause in the W Store lease as well as the exclusivity clause in the TM lease were negotiated and inserted within that context. The applicant has thereafter acted to protect the 2nd respondent's exclusivity rights, while the 1st respondent has in the past adhered to the 1000 square metre restriction in accordance with the wider and more inclusive concept of what constitutes a supermarket.

Moreover, as I have already indicated, both of the lease agreements under review were negotiated by the parties at the same time. Thus, it cannot be accepted that they are mutually exclusive and that each lease agreement must be interpreted without recourse to the other. Again, the fact that the W Store lease was signed before the TM lease cannot operate to vitiate the exclusivity rights conferred by the latter in view of the contemporaneous negotiation of both lease agreements and the circumstances surrounding their conclusion.

Accordingly, even if the word "supermarket" were open to doubt and ambiguity as to its correct meaning, which it is not, I am satisfied that the intention of the parties, as gleaned from the context in which the leases were negotiated and the conduct of the parties after the leases were concluded, was to ascribe the wider and more inclusive connotation to that word as it is used in the lease agreements.

Costs

In this application each of the three parties seeks costs against the other two parties, the one paying the other to be absolved. The outcome of this case is that the 1st respondent has not succeeded in persuading the Court to accept its interpretation of the lease agreements under review. However, to some extent this interpretation was influenced by the applicant's involvement in the formulation of the inchoate Addendum relied upon by the 1st respondent.

The relief sought in this matter is a *declaratur* interpreting the word "supermarket" as used in the lease agreements. The proper scope and meaning of that word was obviously not self-evident *ex facie* the provisions of the lease agreements. In the absence of any acceptable consensus, recourse to this Court for a declaratory order was perfectly proper and unavoidable. Indeed, none of the parties *in casu* has taken issue with the propriety and necessity of this application.

Having regard to the foregoing factors, I am satisfied that this is a case where the Court's discretion should be exercised against making any order as to costs in favour of or against any of the parties.

Order

In the result, it is ordered that:

1. The word "supermarket" in the context of the two lease agreements entered into by the applicant with the 1st respondent on the 19th of November 1995 and with the 2nd respondent on the 6th of March 1996, in respect of premises situate at the Westgate Shopping Complex, includes the trading floor area and ancillary facilities, viz. reception and pricing areas, kitchens, storerooms, cold-rooms, toilets and such other facilities as are necessary for or ancillary to the business of a supermarket.

2. Each party shall bear its own costs.

Scanlen & Holderness, applicant's legal practitioners
Atherstone & Cooke, 1st respondent's legal practitioners
Honey & Blanckenberg, 2nd respondent's legal practitioners