

SOUTH AFRICA / JUDGMENT

Breakers Share Block Ltd v EThekwin Municipality (9378/2013) [2015] ZAKZDHC 58 (27 July 2015)

[2015] ZAKZDHC 58

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Mbatha

CASE / FILE NUMBER

9378/2013

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IN

HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

LOCAL DIVISION, DURBAN

CASE

NO: 9378/2013

DATE:

27 JULY 2015

BREAKERS

SHARE BLOCK

LTD.....PLAINTIFF

And

ETHEKWINI

MUNICIPALITY.....DEFENDANT

JUDGEMENT

Delivered: 27 July 2015

MBATHA J

[1] The parties are engaged in civil litigation, and instead of proceeding to trial, have in terms of Rule 33 (1) agreed upon on

written statement of facts in the form of a special case for adjudication by this Court. In its particulars of claim the

Plaintiff has raised two (2) claims against the Defendant, viz,

- (a) Claim 1, in which the Plaintiff seeks an order declaring that, on a proper interpretation of clause 6(b) of the leases forming the subject matter of the action, the rental payable by it ought to be calculated upon a floor area of 12 079,10 square metres and,
- (b) Claim 2, in which the Plaintiff seeks a monetary judgment against the Defendant based upon an overpayment of rental due in terms of the said leases.

2.1 The stated facts of the case can be summarised as follows:

The Plaintiff and the Defendant had executed and registered a lease agreement with reference number K1541/1975 referred to as Lease 1 in these proceedings.

2.2 Subsequently thereafter the Council and Sycol registered a Notarial Deed of Amendment of Lease, which was registered with reference

number K790/1981. This also led to the amendment of clause 6 of Lease 1. This lease is referred to as the Amended Lease.

2.3 Later on, the Council and Sycol executed a further Notarial Deed of Lease, which was registered under reference number K792/1981.

This lease is referred to as Lease 4. This lease changed clause 6, to a certain extent, but the parties agree that clause 6 of the amended lease and lease 4 are similar in nature.

2.4 On the 21st of May 1985 Sycol ceded and assigned all its rights, title and interest in both Lease 1 and Lease 4 to the Plaintiff, under Deed of Cession of Lease reference number K752/85. This is also common cause between the parties.

2.5 On or about November 2008 negotiations started between the Plaintiff and the Defendant as the Plaintiff offered to purchase the property from the Defendant. Messrs LD Barker and Associates were appointed to determine the detailed measurements of the actual floor area of the buildings constructed upon the property. The floor area of the buildings was calculated to be 12, 079, 10 square metres and the floor area of all parts of the building under roof at each floor level to the external wall was calculated at 15, 594, 34 square metres.

[3] The issue before this Court for determination in terms of Rule 33(4) is the issue pertaining to the proper interpretation of clause 6(b) of each of the Notarial Deed of Leases (Lease 1&4) concluded between the parties on the 21st of August 1975, with reference number K154/1975 and 27th of January 1981, with reference number K792/1981.

The relevant clauses for determination in these proceedings are clauses 6 of both leases, particularly clause 6(b) thereof. Clause 6(b) reads as follows:

“6. Revision of Rental (Lease 4) and Lease 1 as amended.

(a).....

- (b) When the annual rental becomes due for revision same shall be computed at 7% of the valuation (which valuation shall be based on the current market price per square metre of Lot 1066 Umhlanga Rocks Township of an area of foreshore land) which area shall be equivalent to the floor area (calculated in accordance with the provisions of Umhlanga Town Planning Scheme no. 1 as it was at the date of signature hereof) of the buildings on the Lot.”

Clause 6 of Lease 1 before it was amended reads as follows:

“6. Revision of Rental

- (b) The annual rental for each revision period of ten (10) years as aforesaid shall be computed as to seven per centum (7%) of the valuation of an area of foreshore land equivalent to the floor area of the buildings on the Lot, based on ruling market prices per square metre of foreshore land, provided that the rent shall in no case be less than Twenty thousand (R20 000,00) per annum. Floor area shall be defined in the draft Town Planning Scheme as amended from time to time.”
- [4] The Plaintiff contends that on a proper interpretation of the said clauses, read with the provisions of the Umhlanga Rocks Township

Scheme no. 1, the floor area upon which the revision of rental is calculated ought to be determined with reference to the definition of “residential buildings” and the provisions of section 5.1(ii) (b) (iii) a) and b) of Part 5 of the Scheme.

4.2 The relevant provisions of this Scheme, as contended to by the Plaintiff, read as follows:-

“Definition of a Residential Building: a building or portion of a building other than a dwelling house, duplex flat, semi-detached house, terrace house or maisonette used for human habitation together with such outbuildings are ordinarily used therewith and includes an hotel, a block of flats, a boarding house, a residential club or hostel, which building, in the case of a hotel, may include a restaurant or restaurants for the sale and consumption of food and drink.”

4.3 Section 5.1(ii) (b) (iii) (a) and (b) of Part 5 reads as follows:

“(iii) For the purpose of calculating the total permissible floor area in terms of Table D:

- (a) In a residential building, the area of all public access corridors, public stairways and public entrances or hallways whether open or closed shall be excluded, provided that in the case of a block of flats the area of any portion of a public thoroughfare or public waiting space shall be included, and provided that in the case of a hotel the total area of public entrance and hallways shall be included.
- (b) In a residential building, the area of any roofed veranda, balcony or terrace, which is intended for private use of one flat in a block of flats or of one room or one suite of rooms in a hotel, shall be included in the calculation of the total floor area.”

4.4 In essence as summarised by counsel for the Plaintiff, the Plaintiff contends that the floor area, for the purposes of determining the revised rental, ought to be calculated by excluding the area of all public access corridors, public stairways and public entrances or hallways of the buildings.

5.1 The Defendant contends that, on a proper interpretation of clauses 6, read with the provisions of the Umhlanga Rocks Township Scheme no. 1:

- (a) The material provisions of clause 6 of the said leases, provide that the area over which rent will be charged “...shall be equivalent to the floor area (calculated in accordance with the provisions of the Umhlanga Town Planning Scheme no.1 as it was at the date of signature hereof) of the buildings on the Lot;”
- (b) “Floor area” is defined in the Scheme (clause 1.2 of Part
 - 1) to be “...the sum of the roofed area of the buildings at each floor level measured over and including wall thickness,”
- (c) Part 5 of the Scheme refers to “Bulk, Coverage and Height,” and to “permissible floor area” in the context of that part of the scheme rather than to “floor area,”
- (d) Accordingly, the relevant provisions of the Scheme are those contained in the definition in clause 1.2 and are not as contained in part 5 of the Scheme or as alleged by the Plaintiff.

5.2 In essence, as submitted by counsel for the Defendant, Defendant contends that the floor area for the purpose of determining the revised rental, should be the sum of the roofed area of the buildings at each floor level measured over and including wall thickness.

- [6] It is agreed between the parties that if the interpretation contended for by the Plaintiff is correct the rent will be calculated upon a floor area of 12, 079,10 square metres and if the interpretation contended by the Defendant is correct, the rental will be calculated upon the floor area of 15, 594,34 square metres.

7.1 In line with the judgment of *Natal Joint Mutual Pension Fund v Endumeni Municipality*[1], the following should be taken into account in the interpretation of these clauses:

- a) The language used, in light of the ordinary rules of grammar or syntax;
- b) The context in which the word or phrase is found;
- c) The purpose to which the provision is directed;
- d) The knowledge of the parties;
- e) Where more than one meaning is possible it must be considered against the background of the above facts;
- f) Whether the process of interpretation is an objective one; and

- g) A sensible meaning is to be preferred to one that would lead to absurdity.
- [8] The issues before me revolve around the interpretation of clause 6(b) of Notarial Deeds K1541/1945 (the amended lease) and K792/1981 (Lease number 4). Clause 6(b) refers to a calculation in accordance with the provisions of the Umhlanga Town Planning Scheme No.1 as at the date of the signature of the Lease. Plaintiff's submission in summary is that the proper interpretation of clause 6(b) should be found in the provisions of the Umhlanga Rocks Township Scheme 1, which states that the floor area is to be determined with regards to the definition of a "residential building" and the provisions of Section 5.1(ii)(b) (iii) and b) of Part 5 of the Scheme. The Definition of "residential building" includes a hotel, a block of flats, a boarding house, a residential club or hotel.

Section 5.1(ii) (b) (iii) a) and b) of Part 5 of the Scheme states that for purposes of calculating the total permissible floors area in terms of Table D in a residential area.

- a) The area of all public access corridors, public stairways or public entrances or hallways whether open or closed shall be excluded, save for the place of public thoroughfare or public waiting place shall be included more so in the case of a hotel, public entrances and hallways shall be included;
- b) In a residential building, the area of any roofed veranda, balcony or terrace which is intended for private use of one flat in a block of flats shall be included in the calculation of the total floor area.
- [9] The Defendant contends that the relevant Scheme is the one at the date of signature of the document. However, the definition of "floor area" as described in that definition being "the sum total of the roofed area of the buildings at each floor level measured over and including wall thickness" should be accepted; that Part 5 of the Scheme refers to "Bulk Coverage and Height" and not to floor area and that the provisions of Part 5 of the Scheme are not relevant for the determination of the floor area.
- [10] It is common cause that the Plaintiff started off as a Breakers Hotel, but it now operates as a Time Share Resort and the low rise as a permanent residential building. It is not run as a hotel. When the first lease was registered there was no indication as to what buildings were to be built on the leased premises.
- (a) Clause 6(b) of Lease 1 stated that the floor area shall be as defined in the draft Town Planning Scheme as amended from time to time. The amended clause 6(b) and Lease 4 state that it shall be "calculated in accordance with the provisions of the Umhlanga Town Planning Scheme No.1 as it was at the date of signature hereof.

- (b) There is a change in the wording of clause 6(b) in the amended Lease and Lease number 4. Initially in Lease 1 reference was made to the “draft” Town Planning Scheme, now reference is made to a specific Town Planning Scheme. It is my view that at the time of the conclusion of the first lease, the Town Planning Scheme was still being developed, as the words “draft” is used and there was anticipation that it will be amended from time to time.
- (c) For the first time in the amended lease, the word “calculated” was used. The use of the words “as defined” was abandoned. My view is that there has been a change of intention between the parties. The change being brought about by the fact that the Scheme is now in place and no longer in draft. A lot of uncertainty has been cleared.

[11](a) If one looks at Lease 1, it is clear that it was not yet known what type of buildings were to be constructed by the Plaintiff. It is my view that the type of buildings to be erected would determine how the rental would have to be calculated. The definition of floor area of a building as stated in the definition section of the Scheme is too wide for any sustainable interpretation. It does not take into account whether a block of flats, a hotel, or any other type of building would eventually become the object of the intended floor area. It merely says that “Floor Area of a building shall be taken as the sum of the roofed areas of the buildings at each floor level measured over and including wall thickness”. Whereas, when one looks at the use of the word “calculated”, it is clear that reference is not made to the definition, as submitted by the Defendant.

- (b) The Plaintiff contends that it is a residential building, as defined in the scheme. The Definition of Residential Building in the Scheme is given as “a building or portion of a building other than a dwelling house, duplex flat, semi-detached house, terrace house or maisonette used for human habitation together with such outbuildings as they are ordinarily used therewith and includes a hotel, a block of flats, a boarding house, a residential club or hostel, in the case of a hotel, may include a restaurant or restaurants for the sale and consumption of food and drink.” It is clear from this description that the Plaintiff’s construction falls within the description of a residential building.

[12] Section 5.1(ii)(b) (iii) a) and b) of Part 5 of the Scheme starts as follows:

“For the purpose of calculating the total permissible floor area in terms of Table D”.

The words “calculating” and “floor area” as used in part 6(b) of the Lease are used here. They complement the wording in clause 6(b) of the Leases. It is clear to me that the references with regard to the calculation of the floor area were made in the light of the provisions of Section 5,1 of the Scheme.

- [13] Section 5 categorically states what needs to be excluded in the calculation of the residential building. It says the “...area of all public access corridors, public stairways and public entrances or hallways whether open or closed shall be excluded”. Should they have intended that there should be reliance on the definition of “total roof area” as contended for by the Defendant, there would have been no need for such specific clauses, defining how the

calculation should take place. It also states under what circumstances a veranda, balcony or terrace can be included in the calculation of the total floor area. It will only be included if it is for private use only. Section 5 also provides an exception to the general rule in the calculation of the floor area. In the case of a hotel it is a residential building, in calculating the floor area of the hotel, public entrances and hallways to be included.

[14] I do not accept that the definition of the floor area as defined in the Scheme should be accepted as the applicable method of calculating rental in this matter. It is a general definition referring to buildings and not to a specific type of a building. I have perused the leases in this matter and none of them stipulate the type of a building to be built save that for guidance and directions reference is made to the Umhlanga Town Planning Scheme and not only to the definition section thereof. If one looks at this objectively, taking into account the nature of the land leased to the Plaintiff and the purpose by the Plaintiff of leasing these premises, it is clear that the intention of the parties was that if you run a hotel, there are prospects of the that lessee having an income throughout the year, hence, the incorporation of the payment for public spaces, but if it is a residential building with less frequent occupation the intention is not to charge for public places. The word calculated has been used twice, in the amendment as well as in Lease 4 and therefore it could not have been a mistake.

[15] I considered the submissions made on behalf of the Defendant. It is submitted that the definition of the floor area as defined in the Scheme should be considered as the correct measure of rental in this matter. The definition of a floor area in the Scheme states as follows:

“Floor area-of a building shall be taken as the sum of the roofed areas of the building at each floor level measured over and including wall thickness.”

It does not provide this information for purposes of calculating rent. That definition is for other purposes. It is vague and not clear. Common sense would dictate that you establish firstly what residential building you have and then ascertain how rental for that building should be calculated. It could not have been the intention of the parties that whatever building is built on the premises, the rental should be the same.

[16] I do not think that it was the intention of the parties that they should be penalised or pay rental for areas which they have not yet developed. I am persuaded by submissions made on behalf of the Plaintiff that the place is a residential area and that rent had to be calculated in terms of clause 5 of the Scheme. I have taken into account “the language of the provision, read in context and having regard to the purpose and background to the preparation and production of the provision”, as stated in *Natal Joint Municipality v Endumeni Municipality*[2] Judgment..

[16] It is trite that there must be legal certainty when documents such as the Scheme are drafted. It is accepted that when such regulatory documents are drawn that they must not be oppressive. I do not think that it was the intention of the drafters of the Scheme that the rental imposed on residential leases of Municipality properties should be similar to those imposed on hotels. This would lead to an unjust result. Statute law is always presumed not to be unjust inequitable and unreasonable. This presumption is applicable where there is more than one interpretation of the statute. In such a case, the most just and equitable interpretation is to be preferred. See LAWSA Volume 25, Part 1, paragraph 322.

In support of this contention, I am reminded of a dictum in *Howick District Landowners Association v Umngeni Municipality*[3], where the Court stated as follows:

“The question is what meaning can be properly gleaned from the Council’s acts of/on that day. The landowners argument treats the Council’s acts as though they constitute a jumble, each bit of which must be separately passed, even if that leads to incoherence. That criterion of intelligibility, which governs all communications, requires that the Councils’ connected acts be read cohesively to draw fairly from them the meaning sought to be conveyed.”

[17] I have perused the correspondence which forms part of the stated case. There is a lot of discussion about the rental, the suitability

of the area, the offer made by the Defendant to purchase the property etc. There is only one certainty emanating from these discussions and that is that the leased premises were residential in nature and not commercial.

[18] In the letter of the valuer T.B. Richardson dated 16 October 2008, this is said, “I have assessed the ‘Market Value’ of the subject property, as if vacant on 1 July 2008 to be R80 000 000 (eighty million rand) excluding VAT. This equates to a bulk rate of R3 750 per m² excluding VAT”. In his valuation report he came to the conclusion that the current developed FAR is stated by the Municipality as 15, 594 square metres, which equates to 157 rooms. He goes on further to say that there is a potential 60 additional rooms to be allocated to the subject property. The total potential number of rooms is fixed at 214. This is the optimum bulk to allow for the development of 214 rooms. My view is that he assessed the potential value of the property, should it be developed further, but not that the Plaintiff should pay for the area which it has not yet developed.

[19] I am alive to the decision in *Port Elizabeth Municipality Council v Part Elizabeth Electric Trainway Co. LTD*[4] to which the Defendant has referred us to. I still hold the view that the use of the words “calculated” in the leases and in the Scheme indicates a change of the intention of the parties.

The correspondence between the parties subsequent to the amendment of the lease, indicate a reference to the floor area ratio or bulk. The scheme has a heading Bulk Coverage and Height at para 5.1. This merely indicates how the floor area that you are entitled to build on is calculated. Had the parties relied on the definition as submitted by the Defendant there would have been no

reference to the use of the terms FAR and Bulk in their correspondence. These factors have all been taken into account in ascertaining the intention of the parties. Nowhere in that correspondence is the reference made to the definition in terms of the Scheme .

[20](a) I cannot accept the submission by the Defendant that the nature of the building that was built is irrelevant to the determination of the rental. Defendant refers to the potential of what can be built on the property which is an abstract concept. A property in other cases is rateable in terms of its value. A vacant land cannot attract the same rates as land with buildings. Common sense dictates that the same rule should apply in leased municipal properties.

(b) “Equivalent to the floor area of the buildings on the lot” did not change in the amended lease. The Defendant submits that it meant that rental would be determined on the actual floor area of the buildings on the property. I do not agree as paragraph 5.1 sets out what is payable in respect of each property depending upon what it is used for. The exclusions set out in paragraph 5 are not indulgences, but are prescribed in terms of the Scheme.

[21] I have been referred to *Manyasha v Minister of Law and Order*[5] by the Defendant regarding the change in a statutory provision, that it signifies a change of intention. That much will depend on the nature, extent and significance of the change. Basically, what the Defendant submits is that it concedes that there has been a change in the wording of the statute, but there is no change as far as the actual portion of the building which is to be taken into account in the determination of rental. I am of the view that the change in the wording of clause 6 of both leases indicated the change in the intention of the parties.

[22] I therefore make the following order:

a) Declaring that, on a proper interpretation of clause 6(b) of the Notarial Deed of Lease concluded on the 21st of August 1975 with reference number K1541/1975, as amended, and the Notarial Deed of Lease concluded on the 27th of January 1981 with reference number K792/1981, the floor area of the buildings constructed upon the leased property ought to be calculated by determining the total floor area of such buildings excluding the area of all public access corridors, public stairways

and public entrances or hallways of the said buildings.

b) Declaring that the floor area, for the purposes of calculating any revision of the rental payable in respect of clauses 6(b) of the aforesaid leases, is 120, 079,10 square metres; and

c) Directing the Defendant:

(i) To forthwith recalculate the rental currently payable by the Plaintiff pursuant to the provisions of the aforementioned leases upon a floor area of 12, 079, 10 square metres;

(ii) To levy a current rental based upon such recalculation; and for so long as the current use of the buildings constructed upon the leased property remains the same, to calculate and levy all future rentals, or any revision thereof as may occur from time to time, upon a determination of the total floor area of such buildings excluding the area of all public access corridors, public stairways and public entrances or hallways.

- d) Directing the Defendant to pay the Plaintiff's costs of suit to date, including the costs of senior counsel where employed.
- e) The issue of wasted costs occasioned by the adjournment of the hearing of the matter on the 18th of March 2015 is reserved for determination when this matter is finalised.

Date of hearing : 11 May 2015

Date delivered : 27 July 2015

Appearances:

For the Applicant : Adv. I.L. Topping

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For the Respondents : Adv. V.I. Gajoo SC & Adv. G.D. Goddart

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[1] 2012

(4) SA 593 (SCA).

[2] 2012

(4) SA 593 (SCA).

[3] 2007

(1) SA 206 (SCA) para 15.

[4] 1947

(2) SA 1269 (A) page 1279.

[5] 1999 (2)SA 179 (SCA) para 186.

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