

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 17887/2021

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: YES
- (3) REVISED. NO

.....
SIGNATURE

DATE: 5 July 2022

**APPLICANT
SECOND APPLICANT
THIRD APPLICANT**

And

**NTHEBE AVHAKHOLWI
TRANSNET SOC LIMITED
BP SOUTHERN AFRICA (PTY) LTD**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT**

JUDGMENT

MANOIM J

- [1] This is an application for declaratory order arising out of a dispute over the interpretation of the remit of an arbitrator's valuation powers.

Background

- [2] The applicants are the trustees of two trusts, respectively, the Iliad Business Development Trust (IDB Trust) and the Commercial Projects Trust (the CPD Trust). I will refer to the applicants from now on as the trusts. The trusts are related because the first applicant is a trustee of both trusts, serving with the second applicant in the IDB Trust and the third applicant in the CPD Trust. For the purpose of this decision the circumstances of the two trusts are identical.
- [3] In December 1993 and March 1994, the trusts entered into long term notarial leases with the second respondent, Transnet. The duration of the leases was for 25 years and 120 days. Each lease contained identical terms allowing the trusts to renew the leases for another 20 years.
- [4] When the leases were first entered into the land had no improvements. The Trusts at their expense developed the land installing the necessary infrastructure so the land could be used for fuel stations. Once the leases terminate these improvements adhere to the land are not recoverable by the trusts.
- [5] The properties have since both been leased to the third respondent BPSA, which runs fuel service stations on the properties, both located on land owned by Transnet in the inner city of Johannesburg. This is why BPSA is the third respondent in the application although it has not elected to participate in the litigation.
- [6] Both leases have since been renewed. It is a peculiar feature of these leases that they can be renewed before the rental for the renewal period has been agreed upon or determined. Because of a dispute between the trusts and Transnet, the trusts have been occupying the properties rent free until the outcome of the dispute over the rental for the renewal period is determined.

Rental Dispute

- [7] Each lease contains an identical term in relation to the calculation of the rental for the renewal period. The relevant clause in the one lease states as follows:

15.1 If the LESSEE decides to exercise its option to this Lease as set out in 4.2 of the agreement the rental amount for the option period shall be determined as follows:

15.1.1 The rental amount shall be the fair market rental for the LAND agreed by the parties, failing agreement, the rental amount shall be determined as follows:¹

- [8] The lease goes on to state how the rental will be determined absent an agreement. The first step is for each party to appoint its own registered valuer and for them to reach agreement jointly. If they are not able to do so, then the applicable market rental is to be determined by an arbitrator who must be a registered valuer. If there was no agreement on who the arbitrator should be, then the President of the Council of Valuers would make the appointment.

- [9] The arbitrator's duties are then provided for in the following manner;

15.1.1.3 After the appointment of the arbitrator, the respective valuers appointed by the parties shall, within twenty one (21) days after being called upon to do so, be entitled to furnish the arbitrator with their written submission explaining the method used and all relevant factors which were taken into account in determining their respective market values.

15.2 The determination of the market value by the arbitrator in terms of sub-clause 15.1.1.2 hereof shall be final and binding on the parties and the finding of the arbitrator shall not be subject to review by a court; ..."

- [10] The parties were not able to agree on what a fair market rental was and nor were their respective experts. The trusts invoked the dispute mechanism provided in the lease agreements, and this led to the President of the Council appointing the second respondent as the arbitrator.

¹ This is the clause in the CPD lease; the equivalent clause in the IDB lease is 14.1.1

- [11] Once the arbitrator had been appointed two issues were agreed upon. Each party's experts would make submissions over the appropriate fair market rental. They also agreed that the procedure outlined in the Arbitration Act would apply.
- [12] A dispute then emerged between the parties over the interpretation of the lease. Essentially the dispute was over whether the expression fair market value raised an issue for legal determination or not. The trusts view was that it did, Transnet disagreed. Since the arbitrator was not a lawyer the trusts unsuccessfully attempted to persuade the arbitrator to refer the interpretation to a legal expert to determine.
- [13] The first respondent was of the view that it was an issue that she as an expert valuer of property could determine.
- [14] The rest of the procedural details of this dispute are not relevant, save to state that having failed to persuade Transnet and the first respondent to refer the matter to a legal expert to determine, the trusts have proceeded with this application for a declaratory order. It is their view that the legal question needs to be determined first because once it has, the fair market rental would be easily resolved by them or an arbitrator. In the meantime, the first respondent has resigned her appointment so if the matter is returned to an arbitrator it will have to be someone else.

The nature of the dispute

- [15] According to the trusts the dispute is a legal one because of the way certain terms are defined in the lease agreements.
- [16] In clause 15.1.1, quoted earlier, the rental for the renewal period is to be determined on the "... *fair market value of the LAND*". The term land is in capitals because it is a defined term in the lease. According to the lease, 'LAND' means "*the area of land indicated on the plans*". There is a separate definition for 'IMPROVEMENTS' which means: "*all buildings and structures erected on or any*

other development of the LAND by the LESSEE and any existing structures not demolished;"

- [17] Finally, there is a definition for 'PREMISES' which is defined as "... *the LAND and IMPROVEMENTS*".
- [18] The trusts contend that the fair market value of the land means valuing the land without its improvements. This is what it says their expert has done. The Transnet expert has done two valuations. First, a valuation of the land and then a second valuation of the land plus the improvements. The two experts valuations of the land are not far apart. Where the dispute lies is that if the improvements are taken into account the fair market value almost doubles in respect of the one property and is substantially higher in respect of the other.
- [19] The trusts argue that this interpretation is simple and straightforward. The term land does not include improvements because the lease has a separate definition for improvements. If the agreement contemplated fair market value to be the land plus the improvements, then the parties would have used the term 'premises' which is the defined term in the lease which includes both. But instead, they used the term land which means that the value of improvements was to be excluded in the determination of a fair market value.
- [20] The trusts also offer a purposive interpretation in addition to this textual one. Because the trusts had paid for the improvements during the first rental period it made sense that during the second this value they had created was excluded from the future rental valuation.
- [21] This interpretation is unassailable. So why is there a dispute? Initially Transnet's opposition was based on prematurity because the first respondent had not yet made any decision. However, a change of counsel by the time of the hearing, led Transnet to abandon reliance on this point. Instead, Transnet's main point is that this is not a legal dispute over the interpretation of the lease. This is because Transnet contends that the valuation of fair market value is an economic or commercial one for which the arbitrator who is to be an expert valuer is best

placed to determine. Thus, in approaching the question of whether fair market value of land should include improvements the expert would have regard to valuation methodology and not to the interpretation of the language used.

[22] The real question is in what capacity the arbitrator is intended to act in terms of the lease. It seems clear to me that by choosing to give the task of determining fair market value to a person with valuation expertise as opposed to a lawyer, the parties had intended for the person to act as an expert not as an arbitrator. This means that the person was not expected to decide questions of a legal nature. This notwithstanding that the term arbitrator was used in the lease and the reference the parties had to the processes of the Arbitration Act when they had a meeting with the first respondent to decide on process.

[23] This distinction in function is explained in the case of *Perdikis v Jamieson* 2002 (6) SA 356 (W) at paragraph 5:

“Our law recognises that the function of an expert who acts as a valuer is distinct from that of an arbitrator. The valuer's duty is not to hear and determine a dispute but to decide the questions submitted to him by the exercise of his judgment and skill without a judicial inquiry. He does not exercise a quasi-judicial function.”

[24] Because of this distinction, a question of law which undoubtedly this is, can appropriately be referred to the court to decide by way of a declaratory order. It would be highly artificial and subvert the meaning of the lease to suggest that the careful definitions provided were capable of anything other than a legal interpretation. Once the legal question has been determined the question of determining land value, as defined in the agreement, which mean without consideration of improvements, becomes a question of expert valuation and hence methodology. Transnet's further argument that 'land' is sometimes defined as including improvements in other areas of law may be correct. But in this lease the parties chose their preferred definition, and this is the one that must apply.

[25] Transnet also argued that in terms of the well-known *Telcordia* decision, the leading case on the question of the review of arbitration proceedings the

arbitrator could decide a point of law.² But that case involved an arbitrator who was a barrister, whose mandate included deciding the application of law.³ This is not the case with the present agreement where the arbitrator is an industry expert and not a lawyer mandated to decide legal questions.

[26] It has long been held that a declaratory order is competent when the following prerequisites are met.

- a. The applicant has an interest in an existing, future, or contingent right or obligation; and if that requirement has been proved;
- b. It then has a discretion considering all the relevant facts, to decide whether to grant or refuse the declaratory order sought.⁴

[27] In this case I am satisfied on both legs. There is a “real and pertinent dispute” between the parties. Resolving it would obviate further protracted litigation and may lead to a speedy resolution of this dispute which is in the interests of both parties.

² *Telcordia Technologies Inc v Telkom SA Ltd* 2007(3) SA 266 (SCA).

³ See *Telcordia* supra paragraph 84

⁴ See *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 SA (6) 205 SCA at 213 E to G and *Competition Commission v Hosken Consolidated Investments Ltd and Another* 2019 (3) SA 1 (CC) at paragraph 88

ORDER

- [1] It is declared that a dispute exists between the Applicants and the Second Respondent as to the proper interpretation of clause 14.1.1 of the IDB Lease (as defined in the Applicants' founding Affidavit) and clause 15.1.1 of the CPD Lease (as defined in the Applicants' founding Affidavit) ("the dispute") ("the lease agreements"), read with clause 2.1 of the lease agreements.
- [2] It is declared that the lease agreements mean that the arbitrator, appointed in terms of clause 15.1.1.2 of the CPD lease and 14.1.1.2 of the IDB lease, is required to determine the rental for the renewal period by determining the fair market rental for the "LAND", as defined in each lease agreement, in its unimproved state, without regard for the improvements effected to the land.
- [3] The Second Respondent is ordered to pay the costs of the application.

N. MANOIM

JUDGE OF THE HIGH COURT

GAUTENG DIVISION

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 4 July 2022.

Date of Hearing: 30 May 2022

Date of Judgment: 5 July 2022

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