REPORTABLE ZLR (68)

Judgment No. SC 83/06
Civil Appeal No.134/04

METRO INTERNATIONAL (PVT) LTD v (1) OLD MUTUAL PROPERTY INVESTMENT CORPORATION (PVT) LTD (2) THOMAS MEIKLE CENTRE (PVT) LTD

SUPREME COURT OF ZIMBABWE
SANDURA JA, CHEDA JA & MALABA JA
HARARE, NOVEMBER 21, 2006 & JUNE 26, 2007

E W W Morris, for the appellant

G Gapu, for the first respondent

T Biti, for the second respondent

MALABA JA: This is an appeal from a declaratory judgment of the High Court dated 11 May 2006 as to the meaning of the word "supermarket" used in two lease agreements entered into between the first respondent ("Old Mutual") and the appellant ("Metro") on the one hand and Old Mutual and the second respondent ("TM") on the other. The declaratory order given was to the effect that:

> "1. The word supermarket in the context of the lease agreement entered into by the applicant with the first respondent on the 19th of November 1995 and with the second 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."

Old Mutual was the applicant in the court *a quo* whilst Metro and TM were the first and second respondents respectively. Old Mutual is the owner of shops in the shopping complex known as Westgate Shopping Centre. It lets out the business premises to different tenants, including Metro and TM.

At the time Westgate Shopping Centre was under construction, TM expressed interest in taking up tenancy of one of the shops to carry on the business of a supermarket. It had wanted the supermarket to be located in the front part of the shopping centre near the car park. Old Mutual was, however, desirous to have the TM Supermarket located inside the shopping centre to draw more customers for the benefit of other lessees. By way of a compromise TM agreed to have the supermarket located inside the shopping centre on condition Old Mutual undertook to guarantee its position as the biggest and dominant supermarket in the shopping centre. As a result Old Mutual undertook not to lease to any other trader premises within the shopping centre in excess of 1 000 square metres for the purpose of carrying on the business of a supermarket.

Old Mutual and TM entered into a lease agreement on 6 March 1996, in terms of Clause 2 of which the former let to the latter for a period of ten years commencing on 1 April 1997 premises in extent of 4183,48 square metres to be used as a supermarket. The premises were not to be used for any other purpose whatsoever without the landlord's prior written consent.

Under Clause 40 headed "Exclusivity" Old Mutual undertook in favour of TM:

> "… not to lease any other premises over 1 000m² in the Building as a supermarket during the first ten years of this lease without the written consent of the Tenant."

Old Mutual entered into a lease agreement with Metro on 14 November 1995. The lease was also to commence on 1 April 1997 and run for a period of ten years. In terms of Clause 2 of the lease agreement the premises let to Metro measured 2039

square metres in extent. It comprised a single storey shop, main Plaza, plus a walled service yard approximately 130 square metres.

Under Clause 11.1 of the lease agreement the parties agreed that:

> "11.1. The Tenant shall be entitled to use the premises for a clothing store, plus a supermarket which may not exceed 1 000m² and for no other purpose whatsoever without the landlord's prior written consent."

By an addendum No. 1 dated 19 November 1997 the parties agreed that the area occupied by Metro be extended to 2264.53 square metres.

From the date of commencement of the lease to June 2004 Metro operated the business of selling imported clothes under the name "W-Store". It also ran a supermarket over an area which did not exceed 1 000 square metres. When the clothing business fell on hard times because of the ban on importation of finished clothing material Metro ceased operating the clothing business and closed W-Store.

On 16 June 2004 Metro advised Old Mutual of its intention to use the area of the premises previously occupied by W-Store to trade under a Spar franchise. It argued that the lease agreement entitled it to do so provided the "supermarket, within the store as a whole does not exceed 1 000m²".

Metro envisaged the conversion of the whole area of the leased premises into a large store with a trading area which it defined as a supermarket covering 1 000 square metres.

This is clear from the letter dated 22 October 2004 written by Metro's Managing Director to Old Mutual. In the letter Metro asserted its right to "run a large store with all its ancillary facilities (offices, freezer rooms, kitchens/canteens, toilets, goods receiving and pricing areas, storerooms, compressor rooms etc), plus a supermarket not exceeding – 1 000 square metres". According to Metro the floor space

of the premises under ancillary facilities such as the bakery, butchery, cold rooms and storeroom was not a "supermarket". The contention was that the word "supermarket", as used in the lease agreement, referred to the trading floor area with shelves and refrigerators containing goods to which the public had access.

Old Mutual was of the view that the large store which Metro intended to operate over the entire area of the leased premises would be a "supermarket" in excess of 1 000 square metres in size. The Chief Property Manager wrote to the Managing Director of Metro on 27 October 2004, pointing out that the word supermarket as used in the lease agreement between the parties referred to the trading area and ancillary facilities of a large store. He said:

> "Whilst we take note of your intention to separate the Supermarket trading area from its ancillary facilities and defend that position, we wish to advise that such a position is potentially not defensible. You should appreciate that the current proposal materially changes the previous use hence the whole question of compliance."

TM was also of the view that the word "supermarket" was used in both lease agreements to include the trading floor area and all ancillary facilities. In paragraph 20.8 of the opposing affidavit TM's Director said:

> "… I submit that commonsense dictates that a supermarket cannot consist solely of the area under shelving. Supermarkets by their very definition are self-service stores and the goods sold therein cannot be made available without the infrastructure of coldrooms, a bakery, butchery, a delicatessen, preparation areas, offices and other facilities. The basic sales floor area must be supported by ancillary facilities."

On 4 February 2005 Old Mutual made an application to the High Court seeking a declaration as to the meaning of the word "supermarket" in the context of the two lease agreements it entered into with Metro and TM respectively in light of its obligation to TM under clause 40.

The court *a quo* held that the word supermarket as used in the context of the two lease agreements included the trading floor area and all ancillary facilities in the store such as the bakery, butchery and storeroom. The learned judge said:

> "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 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 intergral 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.

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 first 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"."

Metro appealed against the judgment. The grounds of appeal are that:

"1. The court *a quo* erred in finding that the ordinary meaning of the word 'supermarket' is applicable in the context of the lease entered into between the appellant and the first respondent.

2. The court *a quo* erred in interpreting the word 'supermarket' in isolation, without having regard to the fact that the lease refers to 'a clothing store, plus a supermarket which may not exceed 1 000 square metres' and therefore, the reference to 'supermarket' is to the trading floor area only, since the ancillary facilities such as reception and pricing area, storerooms, toilets and other facilities would also necessary for or ancillary to the business and the clothing store.

3. The court *a quo* erred in interpreting the word 'supermarket' without having regard to the intention of the parties.

4. The court *a quo* erred in finding that the lease agreement between the second respondent and third respondent affected the interpretation of the lease agreement between the appellant and the first respondent.

5. The court *a quo* erred in finding that the *contra proferentem* rule was not applicable and that the first respondent was not the dominant party, even though it was the owner of the property being leased."

The allegations constituting the fourth and fifth grounds of appeal can be disposed of right away. Clause 11.1 of the lease agreement between Old Mutual and Metro particularly the limitation on the area size of the supermarket to 1 000 square metres, was inserted in light of the obligation Old Mutual undertook in favour of TM under clause 40 of their lease agreement. The interpretation of the terms of clause 11.1 had to take into account the meaning of clause 40 of their lease agreement.

Counsel are agreed that in establishing what the parties to the two lease agreements meant when they used the word "supermarket" there was no need for the Court to call in aid the *contra proferentem* rule of interpretation.

The question for determination is whether the court *a quo* was correct in holding that the word "supermarket" was used by the parties to the two lease agreements

in its ordinary and grammatical sense as referring to a large commercial establishment, occupying a floor space with facilities for the sale of a wide variety of foods and household goods to members of the public.

In *Coopers & Lybrand v Bryant* 1995(3) SA 761(A) JOUBERT JA at 767E-768E said:

> "According to the 'golden rule' of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity or some repugnancy or inconsistency with the rest of the instrument … The mode of construction should never be to interpret the particular word or phrase in isolation (*in vacuo*) by itself… The correct approach to the application of the 'golden rule' of interpretation after having ascertained the literal meaning of the word or phrase in question is broadly speaking, to have regard:
>
> (1) to the context in which the word or phrase is used with its inter-relation to the contract as a whole, including the nature and purpose of the contract …
>
> (2) to the background circumstances which explain the genesis and purpose of the contract, i.e. to matters probably present to the minds of the parties when they contracted.
>
> (3) To apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence, of their own intentions."

The parties did not define the word "supermarket" when they used it. They must be presumed to have used the word in its ordinary and grammatical sense. In applying the "golden rule" of interpretation to identify the ordinary and grammatical meaning in which the word "supermarket" was used in the two lease agreements, the learned Judge referred to the definition of the term given in a Standard English dictionary.

One may add the definition of "supermarket" in *Wikipedia Free Encyclopedia* – where it is stated that:

> "A supermarket is a departmentalized self-service store offering a wide variety of food and household merchandise. It is larger in size and h as a wider selection than a traditional grocery store.
>
> The supermarket typically comprises meat produce, dairy and baked goods departments along with shelf space reserved for canned and packaged goods as well as for various non-food items such as household cleaners, pharmacy products and pet supplies. Most supermarkets also sell a variety of other household products that are consumed regularly such as alcohol (where permitted) household cleaning products, medicine, clothes and some sell a much wider range of non-food products.
>
> The traditional supermarket occupies a large floor space on a single level and is situated near a residential area in order to be convenient to consumers. Its basic appeal is the availability of a broad selection of goods under a single roof at relatively low prices."

The concept of a supermarket as a large self-service store occupying a large floor space and retailing a wide variety of food and household goods is the essence of the definitions given. The learned Judge found that the area size of a supermarket was demarcated by the floor space it occupied. It incorporated the floor space under shelves and refrigerators with the merchandise displayed for the public to take to the tills for payment. This is what is referred to as the trading floor space. That leaves that part of the floor space occupied by ancillary facilities such as butchery, bakery, storeroom, kitchen and goods receiving area. The definition of supermarket in the Wikipedia & Free Encyclopedia clearly includes ancillary facilities and those on the trading floor space.

Mr *Morris* argued on behalf of Metro that the word "supermarket" refers to the trading floor space only. He said that is the place where money is made and to which the public has access. It appears to me that the meaning given to the word "supermarket" by the appellant is contrary to the ordinary and grammatical meaning of the word. If the parties intended to give the word the limited or special meaning advocated for by Metro they would have defined it.

In each lease agreement the word supermarket was used in the context of the rights to use floor spaces of the leased premises. TM was given the right to use the whole floor space of the leased premises as a supermarket. Metro, on the other hand, was given the right to use the floor space of the leased premises as a clothing store plus a supermarket which may not exceed 1 000 square metres. Each party was under an obligation not to use the floor space for any other purpose whatsoever without Old Mutual's prior written consent.

There was a clear restriction on the maximum area size of a supermarket Metro could legally operate over the floor space of the leased premises. As it had no right at all to use the floor space under the clothing store for anything other than the business of a clothing store it had to have all the facilities, the use of which was connected to the business of a supermarket, within the 1 000 square metres of the floor space of the leased premises. Metro could not locate a butchery or bakery providing back up service to the trading area of the supermarket on the floor space reserved for the clothing store.

In the context in which the word "supermarket" was used in clause 11.1 of the lease agreement between Old Mutual and Metro, it is clear that it was meant to refer to all the facilities which occupied the floor space measuring 1 000 square metres and constituting the business of a supermarket. That would include the floor space under the shelves and refrigerators with goods displayed for the public to take to the tills for payment and the floor space under ancillary facilities such as the butchery, bakery, offices and storerooms.

When the clothing store was operational, Metro accepted that the word supermarket bore the ordinary and grammatical meaning given to it by the court *a quo*. At p 114 of the record there is a diagram depicting the layout of the clothing store and supermarket. The diagram shows that the trading floor space of the supermarket was 251 square metres. The rest of the floor space was under ancillary facilities such as the

storeroom, produce/meat preparation, compressor, goods receiving and food handling facilities. The trading floor space and the ancillary facilities floor space did not exceed 1 000 square metres. The diagram formed part of the contract of lease and expressed the common intention of the parties as to what a supermarket entailed in the context of the lease.

It is also clear from the diagram that the clothing store had its own trading floor space which was 846 square metres in extent. It was only after the demise of the clothing store business that Metro became desirous to establish a large store with all its ancillary facilities (offices, freezer rooms, kitchens, canteen, toilets, goods receiving and pricing areas, storerooms and compressor). It was then that a suggestion was made that the floor space of 1 000 square metres was a trading floor to which the word "supermarket" in clause 11.1 of the lease agreement referred.

There is a diagram at p 113 of the record which shows that Metro had now converted the whole floor space of the leased premises into a large self-service area of 865 square metres. The rest of the floor space was to be under ancillary facilities such as storerooms, bakery, delicatessen, office, butchery, kitchen, canteen and goods receiving. It retailed a wide variety of foods and household goods. In short Metro had converted the whole floor space of the leased premises into a large supermarket without prior written consent of the landlord. The attempt to give the word "supermarket" as used in clause 11.1 of the lease agreement, an exceptional meaning referring to the trading floor space only was correctly rejected by the court *a quo*.

The appeal is accordingly dismissed with costs.

SANDURA JA: I agree

CHEDA JA: I agree

Atherstone & Cook, appellant's legal practitioners
Scanlen & Holderness, first respondent's legal practitioners
Honey & Blackenberg, second respondent's legal practitioners