

SUMMARY OF THE JUDGMENT

TENANT IN MALL REQUIRED TO ACTUALLY CONDUCT BUSINESS ACTIVITIES?

Edcon Limited v Bay West City (Pty) Ltd (A5029/17) [2018] ZAGPJHC 39 (6 March 2018)

A shopping mall landlord wants to see that all stores are tenanted and attracting feet, for its own sake and also because there are reciprocal advantages for all the other tenants. This matter dealt with such a lease that contained a term obliging the tenant to continue trading from the premises. The tenant, for financial considerations, decided to close its store but continued paying the rental and performing other obligations under the lease. The Court was asked to determine whether this constituted a breach of the lease agreement. Although the judgment is therefore based on interpretation of the wording used in the agreement, it also highlights how important it is that such agreements deal carefully with the consequences of a paying tenant deciding no longer to run a store from its premises.

The Judgment can be viewed [here](#).

FACTS

During 2015, Edcon Limited ('Edcon') leased premises from Bay West City (Pty) Ltd ('Bay West') at its shopping mall for a period of five years in terms of a written lease agreement. The lease was to expire in March 2020.

During 2017, Edcon notified Bay West that it would, after careful evaluation of the store and its performance, close the store but that it would comply with its contractual obligations of paying the rental and maintaining the premises until expiry of the lease period. This decision was taken because, amongst other things, it contended it was suffering financial losses and the projected situation looked no better. Bay West disputed Edcon's right to cease trading and contended that the lease obliged it to continue trading for the duration of the lease. It disputed that the threatened discontinuation of trade served its interests.

Bay West then approached the Court on an urgent basis. It relied on clause 8.1 of the lease agreement, which provided that Edcon:

'... shall be entitled **to use and occupy** the premises for conducting the business of selling any merchandise normally sold, and providing any services normally provided, in a departmental store or general store and subject to the provisions of the following clause hereof, for the sale of any goods whatsoever and for purposes necessary or ancillary thereto or for any purpose whatsoever which does not change the general character of the premises and **the Lessee shall not**

be entitled to use the premises for any other purpose whatsoever without the consent in writing of the Lessor, which consent shall not unreasonably be withheld.' (*Our emphasis*)

The court *a quo* found that, by not trading, Edcon was in fact 'using' the premises for another purpose without Bay West's written consent and was therefore in breach of clause 8.1 of the lease agreement. It ordered Edcon to continue trading until 31 March 2020 (the end of the lease period).

Edcon appealed, arguing that an interpretation of the wording permits the premises to be vacant, i.e. that it constitutes a 'use' authorised by clause 8.1.

HELD:

Principles applicable to the interpretation of agreements

- The current approach to interpretation, which encapsulates the principles applied and refined in numerous authorities, is that "the interpretative process is one of ascertaining the intention of the parties – what they meant to achieve. And in doing that, the court must consider all the circumstances surrounding the contract to determine what their intention was in concluding it."

Principles applied to the facts

- In asking for a specific interpretation to be placed on clause 8.1, Bay West referred to a number of other clauses in the lease agreement which, it contended, supported a finding that the parties had agreed that Edcon would continue trading at all times and that leaving the premises vacant was a purpose precluded by the express provisions of the lease.
- The most important of these was clause 34.1 which casts considerable light on the context in which the lease agreement was concluded with Edcon. It provided:

"The entry of the Lessee into the building is conditional upon the simultaneous entry and continued trading of the tenants listed below, or national tenants of a similar standing, who shall occupy premises of the following minimum sizes, subject to a 5% (five per centum) size variation from the size recorded herein and for the stipulated initial lease periods:-

Woolworths	5000m ²	10 year corporate lease
Game	500m ²	10 year corporate lease
Pick 'n Pay	5000m ²	10 year corporate lease
Checkers group consolidated brands	6000m ²	10 year corporate lease

Foschini group consolidated brands 3600m2 5 year lease
Pepkor group consolidated brands 1200m2 5 year lease
Mr Price group consolidated brands 4000m2 5 year lease
Truworths group consolidated brands 2500m2 5 year lease
and at least 3 (three) of the following banks branches: ABSA, FNB, Nedbank, Standard Bank who shall each occupy premises of not less than 350m2 (three hundred and fifty square metres), and each concluding a fixed 6 (six) year lease period."

- The tenants listed in clause 34 were clearly intended to be so-called 'anchor' tenants. They could, at the election of Bay West, be replaced by 'national tenants of a similar standing'. Whomever they were though, Edcon's entry into the building was conditional upon 'the simultaneous entry and continued trading' of the anchor tenants.
- Clause 34 in fact did not support Bay View's argument, as Edcon pointed out. Rather, the clause provided that the lease with Edcon was conditional upon certain specified tenants continuing to trade for the duration of Edcon's initial lease period. If they did not, Edcon was entitled to a reduction of rental or to cancel the agreement. Those anchor tenants, so it appeared, expressly agreed with Bay View that they would continue trading for a particular period. It is noteworthy, in interpreting the clauses, that no such similar agreement was reached with Edcon. (This was not surprising, the Court noted, if regard is had to the relatively small space Edcon was going to occupy in this shopping centre compared to that occupied by the anchor tenants. Edcon occupied 225 square meters compared with, for example, Woolworths' 5000 square meters and Games' 6500 square meters, as recorded in clause 34.)
- It is so, and Edcon argued accordingly, that ordinarily the parties to a lease contemplate that through self-interest the lessee will use and continue using the leased premises throughout the period of the lease, but generally, it is of no interest to the lessor whether he does so or not, provided he performs his obligations under the lease, such as paying the rent, maintaining the premises, etc. Hence, in order to fix the lessee with an obligation to use and keep using the leased premises, there must be an express or implied provision to that effect in the lease. There was no such express or implied provision in the lease agreement in this matter.
- The lease in the present matter had to be understood in its ordinary and natural meaning. If there was an intention aimed at the far reaching result that Edcon should be under a positive and onerous obligation to carry on business in all

circumstances, even if trading was not profitable, for the inordinate lengthy period of the lease, the parties would have been expected to express a stipulation of such importance in terms.

- The interpretation attached to clause 8.1 of the lease agreement by the *court a quo* was therefore wrong. It ought to have found that Edcon had not breached (and did not intend to breach) clause 8.1 of the lease agreement and it ought to have dismissed the application.

The appeal accordingly succeeded.

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