SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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***KwaDukuza Municipality v Lahaf (Pty) Ltd* (940/18) [2020] ZASCA 09 (18 March 2020)**

Today the Supreme Court of Appeal (SCA) upheld an appeal, from the KwaZulu-Natal Division of the High Court, Pietermaritzburg (high court), with costs. The appeal concerned the interpretation of the words 'the total Gross Lettable Area (GLA) of the Property', in a single zone in a town planning scheme which applies exclusively to the Lifestyle Centre (Centre) in Ballito, KwaZulu Natal.

A brief background of the matter is that, the respondent, Lahaf (Pty) Ltd, and two of its tenants submitted to the appellant, KwaDukuza Municipality, building plans for approval. The appellant did not consider the plans. The appellant's stance was that what the respondent had built and proposes building at the Lifestyle Centre contravenes the limitations imposed on the property in terms of its zoning controls. The parties were in dispute as to which built areas in the centre constitute GLA and which areas do not. The respondent, thereafter, sought an order in the high court directing the appellant to consider the three sets of building plans submitted by the respondent in light of the declared definition of the GLA within 60 days of the order. The high court accepted the respondent's contention and held that the interpretation of GLA contended for by the respondent had to be preferred to that of the appellant as it would avoid absurdity and unconstitutionality. The appellant was directed to consider the relevant building plans submitted to it by the respondent or its tenants in accordance with the declared definition of 'GLA'.

In the Supreme Court of Appeal (SCA), the appellant submitted that the 'GLA' comprises all areas notionally capable of being let including storage areas and receiving yards. It drew no distinction between shop and non-shop areas. The respondent contended that the word 'GLA' must be interpreted to mean only the area of 'shops' as defined in the scheme clauses, that is to say, the areas let out by the respondent to be used as shops and all areas used exclusively by a shop tenant.

In the SCA, per Mbatha JA (Leach JA concurring) (the majority judgment), considered how the term GLA should be defined. In considering how GLA should be defined the nature of the Lifestyle Centre, as the term GLA is not defined in the scheme, should be taken into account. A Lifestyle Centre is not a conventional shopping complex. In considering which meaning should be accepted, a businesslike meaning needs to be adopted rather than an unbusinesslike meaning, which undermines the purpose of a Lifestyle Centre. The SCA, per Mbatha JA, held that it was inconceivable that the meaning of GLA was intended to apply to shops only to the exclusion of other lettable areas, as this would go against the nature and purpose of the Lifestyle Centre. GLA applies to all lettable areas, this is further evident by how ‘Gross shop area’ is defined in the scheme. The purpose of leasing property is to generate income from all lettable areas hence GLA should apply not only to shops, but also to exclusive use areas and the nursery.

The majority judgment went on and held that the appellant should not be ordered to consider the plans submitted by the respondent unless if compliant with the appellant’s interpretation of GLA. The respondent knew very well that it had to obtain approval before building. The interpretation of GLA as contended for by the respondent was to try to regularize the illegal building without the approved plans.

In a concurring judgment penned by Plasket JA (in which Leach JA concurred), Plasket JA concurred with the order of majority judgment albeit for different reasons. Plasket JA disagreed with the conclusion reached by Zondi JA, he held that based on history of the use and density controls what emerges over a period of time, is that the appellant, in successive amendments, moved steadily away from the original linkage between shops and GLA as the means to achieve the unique features of the lifestyle centre. Plasket JA went on to hold that the meaning of the use and density controls, within their historical context, cannot be trumped by reliance on the purpose of the scheme.

In a dissenting judgment written by Zondi JA, Zondi JA (in which Petse DP concurred) held that based on the history of the Lifestyle Centre, the whole purpose of its design was to create a mix of uses and it was to include lifestyle features such as restaurants, a nursery, large open walkways and water features and service providers such as the Post Office and banks. The Lifestyle Centre was to be different from a conventional shopping centre dominated by

retail outlets. The purpose of creating the Lifestyle Centre would be defeated if GLA was not confined to shops, because all lifestyle features such as restaurants, nurseries, animal farms, a gymnasium, open air tea gardens and an open air theatre would fall within the definition of GLA, as a result of the notion that they are capable of being leased out. For such reasons the words 'the total GLA of the property' have to be interpreted to comprise areas leased out by the respondent to be used as 'shop' and all the areas used exclusively by the shop tenant.

In the result, Zondi JA would have dismissed the appeal with costs including the costs of two counsel and the appellant would have been ordered to consider the building plans submitted to it by the respondent.

The appeal was upheld with costs.