THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 443/12

In the matter between Not Reportable

MUNICIPALITY OF MOSSEL BAY **APPELLANT**

and

THE EVANGELICAL LUTHERAN CHURCH **FIRST RESPONDENT**

THE REGISTRAR OF DEEDS **SECOND RESPONDENT**

Neutral citation: *Municipality of Mossel Bay v The Evangelical Lutheran Church* (443/12) [2013] ZASCA 64 (24 May 2013)

Coram: LEWIS, THERON and MAJIEDT JJA and PLASKET and ZONDI AJJA

Heard: **9 MAY 2013**

Delivered: **24 MAY 2013**

Summary: Property Law – interpretation of restrictive conditions embodied in title deeds relating to use of land – on undisputed facts land no longer used for the purposes specified – use of the word 'or' in the restrictive conditions plainly disjunctive – breach clearly proved on undisputed facts, entitling appellant to re-transfer of the land.

ORDER

On appeal from: Western Cape High Court, Cape Town (Baartman J, sitting as court of first instance):

1. The appeal is upheld with costs.
2. The order of the court below is set aside and substituted with the following:

   '(a) Erf 2002, Mossel Bay, held by the first respondent in terms of Deed of Transfer T4823/1941 is to revert to the applicant due to the first respondent's failure to comply with the provisions of clauses (b) B(1) and (2) of the said Deed of Transfer, by not using Erf 2002 for church or educational purposes.

   (b) The first respondent is ordered to take all steps necessary to effect registration of transfer of Erf 2002 into the applicant's name within 30 days of this order.

   (c) In the event of the first respondent failing to comply with paragraph (b) above, the Sheriff of Mossel Bay is authorised to sign all the necessary documents on behalf of the first respondent.

   (d) Erf 2003, Mossel Bay, held by the first respondent in terms of Deed of Transfer 8366/1938, is to revert to the applicant due to the first respondent's failure to comply with the provisions of clause B(a) of the said Deed of Transfer, by not using Erf 2003 for church purposes.

   (e) The first respondent is ordered to take all steps necessary to effect registration of transfer of Erf 2003 into the applicant's name within 30 days of this order.

   (f) In the event of the first respondent failing to comply with paragraph (e) above, the Sheriff of Mossel Bay is authorised to sign all the necessary documents on behalf of the first respondent.

   (g) The applicant is to bear the costs of registration of transfer of Erven 2002 and 2003 into its name.

   (h) The first respondent is to pay the costs of the application.'

JUDGMENT

MAJIEDT JA (LEWIS and THERON JA and PLASKET and ZONDI AJJA concurring):

[1] The appellant, the Mossel Bay Municipality, appeals with the leave of this court against a judgment of Baartman J, sitting as court of first instance in the Western Cape High Court, Cape Town, dismissing with costs the municipality's application for the retransfer to it of certain immovable property in Mossel Bay by the first respondent, the Evangelical Lutheran Church.

[2] The church is the registered owner of Erf 2002, Mossel Bay, held under Title Deed T4823/1941 and Erf 2003, Mossel Bay, held under Title Deed T8366/1938 (the properties). The title deeds contain restrictive conditions in favour of the municipality. These restrictive conditions emanate from the original deeds of grant whereby the properties had been allocated to the municipality's council on 9 October 1917. The salient restrictive conditions in respect of Erf 2002 read as follows:

'(B) (1) The property in question shall be used solely for church or educational purposes, provided that in addition to any church or school buildings erected on the land, a parsonage or a caretaker's house may be erected;

(2) The land shall be used solely for the purposes set out in (1) above. If at any time it ceases to be used for such purpose, or is no longer required for such purpose, it shall revert to the Council without payment of compensation of any improvement effected on or to the land.'

[3] In respect of Erf 2003 the relevant restrictive condition is as follows:

'(a) [I]n the event of the property not being used for Church purposes it shall revert to the Council, save and except that in addition to the Church one dwelling as a parsonage or a caretaker's house may be erected in respect of the property.'

[4] The municipality sought a retransfer of the properties to it on the basis of non-compliance by the church of the conditions contained in clauses B(2), read with B(1) above, in respect of Erf 2002, and clause (a) above in respect of Erf 2003. The nub of the dispute is whether the church has, in contravention of the restrictive conditions, ceased using the property solely for church or educational purposes or no longer requires the land for these purposes, as far as Erf 2002 is concerned and, in the case of Erf 2003, whether the property is not being used for church purposes.

[5] The underlying facts are largely undisputed. It was common cause that the church had erected a school and an outbuilding on Erf 2003 and conducted schooling activities there until December 2005. The adjoining Erf 2002 was used as school grounds until that date. It became common cause further, as will presently appear, that since January 2006 no schooling activities have been taking place and that the buildings have been standing vacant. While the parties were at variance with each other as to the exact state of neglect of the vacant buildings, it is largely undisputed that they are derelict. This is borne out by photographs attached to both the founding and answering affidavits.

[6] I interpose at this juncture to comment briefly on the manner in which the answering affidavit was drafted. Paragraphs 1 to 21 of the founding affidavit set out the factual background of the matter, including the transfer of the properties, the restrictive conditions and the present state of disuse of the properties. In its answering affidavit the church elected to lump all these

paragraphs together and to meet all the averments therein with the following terse, non-committal bare denial (loosely translated):

'Save to deny that all facts contained in the founding affidavit of the deponent Prins, under reply, are true and correct, as will more fully appear hereinafter, the rest of the averments are noted.'

In this answer the drafter is remiss in his or her duty to meet any and all material averments in the founding affidavit by either admitting or denying, or confessing and avoiding, unless he or she has no knowledge of any one or more or all of them. A bare or unsubstantiated denial will only pass muster where there is no other option available to a respondent due to, for example, a lack of knowledge, and nothing more can be expected of the respondent (see: *Wightman t/a J W Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) para 13; *National Scrap Metal (Cape Town) (Pty) Ltd v Murray & Roberts Ltd* 2012 (5) SA 300 (SCA) para 17). A bare denial, in circumstances where a disputing party must necessarily be conversant with the facts averred and is in a position to furnish an answer (or countervailing evidence) as to its truth or correctness, does not create a real and genuine dispute of fact (*Wightman,* ibid). A proper answer to material averments under reply requires, at the minimum, a separate and unequivocal traversal of each and every such allegation which the party seeks to contest. The important allegation in para 21 of the founding affidavit – that the properties have fallen into disuse since January 2006 and that no one has been attending to the maintenance of the buildings since then – must therefore, in the face of this bare, unsubstantiated denial, be accepted as correct.

[7] The church did deal *seriatim* with paragraphs 22 and 23 of the founding affidavit, which concerned the derelict state of the buildings, its vandalisation (supported by photographic evidence) and the unacceptability of this state of affairs as far as the municipality is concerned. While disputing the extent of the neglect, the church importantly admitted that the buildings have decayed due to pillaging ('plundering'). For the rest, it embarked on an irrelevant detour which need not burden this judgment.

[8] The church's defence, in essence, amounts to this: it has always used and intends to continue using the properties for church or educational purposes and its temporary cessation of schooling activities there is purely as a consequence of its temporary impecuniosity. It expressed a firm belief that it would, with time, succeed in obtaining adequate financial assistance to overcome its difficulties and to recommence schooling on the properties. In supplementary papers it set out a short and long term vision for the use of the properties, including an ambitious charitable project, named 'Icthus' (the Greek word for fish, a well-known symbol in the Christian faith) and, in the longer term, the establishment of a training centre for ministers on the properties.

[9] Extensive negotiations between the parties failed to resolve the impasse. I must make mention of the fact that, in this regard, the municipality has gone to great lengths to find an amicable solution and to accommodate the church. When all else failed, it launched its application in the court below during February 2010, by which time the properties had been in disuse for over four years already. It was incumbent upon the municipality to act in the interest of its residents, in order to fulfil its constitutional mandate towards them, as set out in s 152 of the Constitution. The municipality can certainly not be faulted for approaching the court as a last resort, when all its compassionate efforts towards attaining an extra-curial solution came to nought.

[10] The issue before us plainly requires an interpretation of the relevant restrictive conditions. In the court below Baartman J held that, in interpreting the conditions, the Constitution's property clauses, namely ss 25(1) and (2), must be given proper recognition and that the church's intention is crucial in determining whether the properties are required for a particular purpose. In applying the well-established approach to disputes of fact in motion proceedings, the learned judge accepted that the school and outbuilding have

been vandalised, but that they are capable of repair and further that the church intended to effect the necessary repairs once it acquired the financial means to do so and to recommence schooling activities. The learned judge concluded that the restrictive conditions in respect of Erf 2002 had not been breached, since the church still required it for church or educational purposes, as evinced by its intention. That intention, held Baartman J, was also relevant in respect of Erf 2003, since the two erven have always been used as a single entity.

[11] The court below misconstrued the restrictive conditions, in particular the words '. . . or is no longer required for such purpose'. It is not proper for a court to excise from a clause containing restrictive conditions one part thereof and to use the excised portion to interpret the entire clause. The conditions had to be viewed holistically by the court a quo in determining their meaning. The words in the relevant restrictive conditions are clear and unambiguous. It is by now well-established that, in interpreting these conditions, the words must be given their ordinary grammatical meaning unless this would lead to absurdity, repugnancy or inconsistency with the rest of the title deeds' conditions (see, inter alia, *Picardi Hotels Ltd v Thekwini Properties (Pty) Ltd* 2009 (1) SA 493 (SCA) para 5*; Du Plessis NO v Goldco Motor & Cycle Supplies (Pty) Ltd* 2009 (6) SA 617 (SCA) para 49*; Phillips v SA Reserve Bank* [2012] 2 All SA 532 (SCA) para 67). There is no difference in principle in the interpretation of statutes, contracts or other documents (*KPMG Chartered Accountants (SA) v Securefin Ltd* 2009 (4) SA 399 (SCA) para 39.)

[12] The court below completely ignored the first part of the condition in B (2), set out in para 2 above, namely '(i)f at any time it [the land] ceases to be used for such purpose [ie church or educational purposes] . . .' and chose to restrict its enquiry to the latter part of the condition, namely '. . . or is no longer required for such purpose'. As stated, the court below held that the church's stated intent (which the court accepted) was that it planned to recommence schooling once its finances permitted it to do so and the church consequently

still required the land for such (educational) purpose. Apart from the problem with the impermissible excision, pointed out above, the court below also misconstrued the use of the word 'or' in the condition. That word is plainly used as a disjunctive, ie signifying a substitution or an alternative. It is trite that 'or' is to be construed as a conjunctive, ie reading it as 'and', in only the most exceptional of cases where the context demands it. See inter alia *Preddy v Health Professions Council of South Africa* 2008 (4) SA 434 (SCA) paras 10 – 12, and the cases cited there. It is also trite that, in the process of determining what the plain, ordinary grammatical meaning of words are, regard must be had to the context in which the words have been used. In the leading case on this aspect Schreiner JA expressed it as follows in *Jaga v Dönges, NO* 1950 (4) SA 653 (A) at 662G:

'Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context'.

This dictum has been followed in a long line of cases, the most recent of which in this court are *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) and *South African Property Owners Association v Council of the City of Johannesburg Metropolitan Municipality* 2013 (1) SA 420 (SCA).

[13] When the restrictive conditions are holistically interpreted by giving the words therein their ordinary grammatical meaning, in their contextual setting, the church is plainly in contravention of the restrictions, it being common cause (for the reasons expounded above) that the properties are no longer used for educational or church purposes. Whatever the stated intent of the church as to its future usage may be, this cannot and does not salvage its breach. The court below erred in finding to the contrary and the appeal ought therefore to succeed.

[14] I think it necessary to say something briefly about two further aspects of the judgment of the court below. It held, on alternative grounds, that there

was a critical shortage of premises suitable for educational purposes and that the municipality had failed to demonstrate its willingness to make the properties available to any other institution for this purpose. Consequently, so the learned judge held, the municipality had failed to show that it required the properties for public purposes or in the public interest. Secondly, the court below found that the municipality had the option of demolishing the buildings if they were in as bad a state as the municipality alleged. This option emanates from the provisions contained in s 12 of the National Building Regulations and Building Standards Act 103 of 1977. The municipality's failure to resort to this option, said the judge, is at odds with the case it sought to make out in its founding papers. These two aspects are self-evidently irrelevant considerations. The dispute between the parties simply required a legal interpretation of the restrictive conditions, applied to the factual background (which, as stated, was largely or became common cause) in order to determine whether reversion of the properties to the municipality was warranted. The court below erred in veering off-course in respect of these two aspects and its conclusions do not provide a legally tenable alternative basis for its dismissal of the application.

[15] The following order is made:

1. The appeal is upheld with costs.
2. The order of the court below is set aside and substituted with the following:

   '(a) Erf 2002, Mossel Bay, held by the first respondent in terms of Deed of Transfer T4823/1941 is to revert to the applicant due to the first respondent's failure to comply with the provisions of clauses (b) B(1) and (2) of the said Deed of Transfer, by not using Erf 2002 for church or educational purposes.

   (b) The first respondent is ordered to take all steps necessary to effect registration of transfer of Erf 2002 into the applicant's name within 30 days of this order.

(c) In the event of the first respondent failing to comply with paragraph (b) above, the Sheriff of Mossel Bay is authorised to sign all the necessary documents on behalf of the first respondent.

(d) Erf 2003, Mossel Bay, held by the first respondent in terms of Deed of Transfer 8366/1938, is to revert to the applicant due to the first respondent's failure to comply with the provisions of clause B(a) of the said Deed of Transfer, by not using Erf 2003 for church purposes.

(e) The first respondent is ordered to take all steps necessary to effect registration of transfer of Erf 2003 into the applicant's name within 30 days of this order.

(f) In the event of the first respondent failing to comply with paragraph (e) above, the Sheriff of Mossel Bay is authorised to sign all the necessary documents on behalf of the first respondent.

(g) The applicant is to bear the costs of registration of transfer of Erven 2002 and 2003 into its name.

(h) The first respondent is to pay the costs of the application.'

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JUDGE OF APPEAL

APPEARANCES

For Appellant:	Adv. R S van Riet SC Instructed by: Krige Zietsman Attorneys c/o Werksmans Attorneys, Cape Town Lovius Block Attorneys, Bloemfontein
For Respondent:	Adv. J de Vries Instructed by: Liesel Scholtz Inc c/o Nawaal Cloete Attorneys, Cape Town Van Pletzen Lambrechts Attorneys, Bloemfontein