THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
CASE NO: 477/2003

In the matter between

BAY CENTRE INVESTMENTS (PTY) LIMITED **APPELLANT**

and

THE TOWN COUNCIL OF THE BOROUGH OF RICHARDS BAY **RESPONDENT**

CORAM: **HOWIE P, NAVSA, MTHIYANE, BRAND JJA et MAYA AJA**

HEARD: **15 FEBRUARY 2005**
DELIVERED: **23 MARCH 2005**

Summary: **Interpretation of an agreement – meaning and effect of the phrase 'from the date of completion' and of the words 'maintenance' and 'full liability' – whether obligation assumed by a Town Council towards a developer entailed maintenance in perpetuity and whether it related to the specific parking bays constructed by the developer on Town Council land in terms of the agreement.**

JUDGMENT

MTHIYANE JA:

MTHIYANE JA:

[1] This is an appeal from the judgment of the Natal Provincial Division (Combrink J, with Mclaren and Hurt JJ concurring) upholding an appeal by the respondent (the Town Council) against the decision of Levinsohn J, sitting in the Durban High Court. Levinsohn J had granted certain orders (to which I shall return later) in favour of the appellant company (Bay Centre), a developer, *inter alia* interdicting the Town Council from destroying certain parking bays constructed by Bay Centre on Town Council land in terms of an agreement concluded between them (the agreement). The appeal is with special leave granted by this Court and turns on the meaning and effect of a certain clause in the agreement.

[2] On 15 August 1982 the Town Council sold four plots of land (collectively referred to as 'the property') to Bay Centre for the sum of R542 000. The property is situated in the core of the central business district of Richards Bay (the CBD) and formed part of the designated block in the CBD which had been set aside to be sold to developers. The property was subject to the conditions of establishment of the township as laid down by the Administrator and Bay Centre undertook to accept and abide by them. In terms of the town planning scheme (the scheme) in the course of preparation at the time, the property was zoned for

commercial development and could only be utilised for general commercial purposes.

[3] Under clause 10.1.1 of the agreement (about which more later), the Town Council was entitled to instruct Bay Centre, and the latter was obliged, to make provision for the parking of motor vehicles on the property in accordance with certain specifications as to the number and standard (on site parking). Bay Centre was, however, permitted to provide at its own expense, *in lieu* of the on site parking, the equivalent number of parking bays on adjoining land belonging to the Town Council, which land was reserved and zoned for public parking under the scheme. The land in question was made available to developers for this purpose. The parties' respective rights and obligations in respect of the parking are set out in clause 10.1 of the agreement which reads:

'10.1 Should the properties and/or any building or buildings thereon be used for purposes other than a Residential Building or a Hotel, the council may in its sole discretion and *in lieu* of the Purchaser having to provide on site parking on the properties:

10.1.1 instruct the Purchaser to provide at own cost, the number of parking spaces that the Purchaser would have been required to provide - - - at ground level on neighbouring land which is the property of the Council and which has been reserved for public vehicular parking purposes . . .' (off site parking).

Pursuant to this provision Bay Centre duly constructed 437 parking bays on Town Council land to the east, west and south of the property during the period March to October 1982 at the cost of R381 500. Other developers, acting under

like agreements with the Town Council, similarly and at own cost, constructed parking bays on the adjoining Town Council land.

[4] During or about 1994, some twelve years after the sale of the property to Bay Centre, the Town Council, acting in terms of a structure plan adopted and approved during July 1991 for the purpose of revitalising the CBD, commenced excavations to the east of the property with a view to establishing a water feature. The structure plan included the construction of a shopping centre, restaurant and plaza. The excavations resulted in some 175 parking bays being destroyed on Town Council land as set out above (off site). It is now common cause between the parties that 62 of the parking bays destroyed by the Town Council were constructed by Bay Centre and that their replacement cost was R249 999,65. We have not been told how this figure was arrived at. This is, however, an aspect of the case that has a bearing on the question of damages and which for present purposes need not detain us

[5] On 29 November 1994 Bay Centre applied for and obtained an interim interdict in the Durban High Court (before Meskin J), precluding the further destruction of parking bays by the Town Council as foreshadowed in the structure plan. The interdict remained in force and was replaced by the orders made by Levinsohn J at the conclusion of the trial in the Durban High Court on 22 November 1996. The learned judge made an order:

(a) interdicting and restraining the Town Council from interfering with, damaging or destroying certain parking bays identified in the annexures to Bay Centre's particulars of claim;

(b) interdicting and restraining the Town Council from interfering with the existing access routes to the aforesaid parking bays;

(c) declaring in favour of Bay Centre that the Town Council was, in terms of clause 10.5 of the agreement of sale between the parties obliged to maintain the said parking bays;

(d) directing the Town Council to pay an amount of R249 995,65 as and by way of damages to Bay Centre, together with interest an *a tempore morae* calculated from 1 July 1994 to date of payment;

(e) directing the Town Council to pay the costs of the action and further directing it to pay all the costs of the interlocutory proceedings which were reserved pending the decision of the action, which costs included costs consequent upon the employment of two counsel.

[6] The main dispute before Levinsohn J revolved around the proper interpretation of clause 10.5 of the agreement, in particular whether the Town Council had undertaken an obligation in perpetuity towards Bay Centre and whether that obligation related to the very same parking bays constructed off site by Bay Centre. Clause 10.5 reads:

'10.5 From the date of completion thereof the council (the Town Council) will accept full responsibility for the maintenance of parking which shall have been provided in terms of clause 10.1.1. . .'.

After referring in some detail to the background and the context in which the relevant clause should be interpreted, Levinsohn J dealt first with the ordinary meaning of the phrase 'neighbouring land' in clause 10.1.1. This he did by reference to the meaning given in the Shorter Oxford English Dictionary and determined that it meant, 'lying or living near, or adjacent'. From this starting point the judge found that common sense dictated that the parking would be located as close as possible to the particular shopping complex. The intention, he concluded, was that these parking bays would be situated on the perimeter of the property. This, according to the judge, was in keeping with the modern concept of a shopping centre which envisaged that shoppers would not wish to park their vehicles too far away from the shopping centre that they intend to patronise.

[7] The judge then proceeded to examine the word 'maintenance' and the phrase 'full liability' (for such maintenance), as contained in clause 10.5. Again, using the dictionary meaning of the words as the starting point, he determined that, in context, 'maintenance' meant 'to continue in, preserve, retain, to keep in being' and 'full liability' meant having a legal obligation to maintain the very parking bays established by Bay Centre pursuant to clause 10.1.1. The judge also considered the phrase 'date of completion thereof' in clause 10.5 and determined

that it referred to the parking which the developer (ie Bay Centre) had provided on neighbouring land (off site parking). Levinsohn J concluded that the Town Council did in effect undertake an obligation in perpetuity towards Bay Centre and proceeded to make the orders set out to in para [5] above.

[8] With the leave of the trial judge the Town Council appealed successfully to the Natal Provincial Division. The orders made by Levinsohn J were set aside and replaced with a judgment in favour of the Town Council. Combrink J agreed with Levinsohn J that, giving the word 'maintenance' its ordinary dictionary meaning, the obligation assumed by the Town Council to maintain the bays, entailed an obligation to 'preserve or keep' the parking bays 'in a particular state or condition'. Taking a slightly different view to that taken by the trial judge, however, Combrink J held that the obligation assumed by the Town Council entailed a duty to 'maintain' the relevant parking bays on its property, in the sense of keeping them in a good state of repair and fit for use by members of the public to park their motor vehicles.

[9] The question whether, upon a proper interpretation of clause 10.5, the obligation undertaken by the Town Council was to maintain in perpetuity the very same parking bays constructed by Bay Centre was not discussed by Combrink J. It is, however, fair to assume from his reasoning that he and Levinsohn J were not *ad idem* on this aspect, especially given that the former

held that the obligation assumed by the Town Council was not one owed to Bay Centre, but to the general public. This, Combrink J reasoned, was in keeping with the local authority's obligation to maintain all public amenities created under the scheme, such as parks and recreation areas. The public parking was, he said, such an amenity. I am not altogether convinced that, in complying with its duty to the public, the Town Council would have been entitled to ignore the rights acquired by Bay Centre or the obligations assumed by it under the agreement. However, in the view which I take of the matter, it is not necessary to decide the correctness of the findings of the court *a quo* on this aspect.

[10] As indicated earlier in the judgment, the key issue in this appeal is whether, on a proper interpretation of clause 10.5 of the agreement, the obligation undertaken by the Town Council was to maintain in perpetuity the very same parking bays constructed by Bay Centre and whether, in destroying them, it breached this clause. If one accepts the interpretation contended for by the Town Council, namely that it was *not* obliged to maintain in perpetuity the very same bays, the other issues flowing from the orders granted by Levinsohn J, the interdict relating to existing access routes to the parking bays, the declarator and damages claimed by Bay Centre in the sum of R249 995,65, will become academic and fall away. If, on the other hand, an interpretation favourable to Bay Centre, namely that the council undertook to maintain the very same bays in perpetuity, is adopted, it would then be necessary to deal with these other issues.

[11] Because the outcome of the appeal depends primarily upon the interpretation of the clause 10.5, it is useful to set out first the general approach to interpretation of contracts which has guided the courts over many years. The first step in construing the relevant clause is to determine the ordinary grammatical meaning of the words employed in the agreement in order to ascertain the common intention of the parties.[1] Both Levinsohn and Combrink J began from this starting point, even though they ultimately came to different conclusions. If the ordinary sense of the words necessarily leads to some absurdity or inconsistency with the rest of the contract, then the court may modify the words just so much as to avoid that absurdity or inconsistency, but no more.[2]

[12] Furthermore, and perhaps more importantly in this case, the court is also enjoined to have regard to the nature and purpose of the contract,[3] which would entail considering the nature and purpose of the obligation assumed by the Town Council in accepting 'full liability for the maintenance' of the parking bays. Finally, it is essential to have regard to the context in which the word or phrase is used with its interrelation to the contract as a whole.[4]

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[1] See *PG Bison Ltd and Others v The Master and Another* 2000 (1) SA 859 (SCA) at para 7 and the cases referred to therein.
[2] See *Metcash Trading Ltd v Credit Guarantee Insurance Corporation of Africa Ltd* 2004 (5) SA 520 (SCA) at para 10 and the cases referred to therein; also *Coopers & Lybrand and Others v Bryant* 1995 (3) SA 761 (A) at 767E-F.
[3] *Langston Clothing (Properties) CC v Danco Clothing (Pty) Ltd* 1998 (4) SA 885 (SCA) at 888H; *Swart en 'n Ander v Cape Fabrix (Pty) Ltd* 1979 (1) SA 195(A) at 202C-D.
[4] *Metcash supra* at para 10.

[13] The parking facilities which the developers were requested to provide on Town Council land, under their respective agreements with the local authority, were not identified in the agreements in relation to specific areas identifiable with each individual developer. Such was the case with the agreement between Bay Centre and the Town Council. Each developer had to provide a number of parking bays proportionate to the floor size of the building to be erected. In the case of Bay Centre, as with other developers in the CBD, the ratio was one parking bay per 15 square metres. The developers, including Bay Centre, were aware that they were purchasing properties which were subject to the scheme and they agreed to abide by it. The 62 parking bays in issue in this case fell into the pool of parking bays which Bay Centre and the other developers had constructed on Town Council land in order to meet the requirements of the town planning scheme and to provide parking pursuant to the agreement. By making land available to the developers, the Town Council made it possible for the developers (including Bay Centre) to comply with the requirements provided for in the scheme (one parking bay per 15 square metres). That it was the 'number' rather than identifiable parking bays that the Town Council undertook to maintain, is clear from the agreement itself: the parking bays were not identified in the agreement. In clause 10.1.1 reference is made merely to the 'number of parking spaces' and, in clause 10.5, to 'parking' rather than to identifiable parking bays. This point, I think, is reinforced by the trial court's inability to specify in the restraining orders granted by it in favour of Bay Centre the parking bays to which

the order relates. The interdict simply refers to 'the parking bays' identified in the prayer set forth in Bay Centre's particulars of claim. But when one examines the relevant prayer in the particulars of claim, it merely refers to '120 destroyed parking bays depicted in blue shading in annexure 'D' to the plaintiff's particulars of claim.' Curiously the shaded document thus referred to in the order is not mentioned at all in clauses 10.1.1 and 10.5. In these clauses reference is made to the 'number of parking spaces . . . on neighbouring land' and to 'parking', respectively.

[14] Applying the above principles of the interpretation of contracts I am of the view that, on a proper interpretation of clause 10.5 read with 10.1.1, the obligation assumed by the Town Council was simply to maintain the 'number' of parking bays, rather than the very same parking bays constructed by Bay Centre. That follows not only from the wording of the relevant clauses but also from the nature and purpose of the agreement. The purpose of the sale of the property was to secure a commercial complex with malls and arcades. In terms of the scheme the property was zoned general commercial and could only be utilized for that purpose. Because of this Levinsohn J was driven to conclude that common sense dictated that the parking would be as close as possible to the particular shopping complex. That may well be so, but the parking had to be built (1) on 'neighbouring land' belonging to the Town Council and (2) on that land 'which has been reserved for public vehicular parking purposes'. The second aspect does

not appear to have been given due recognition by the trial judge. By its very nature, a shopping complex of this size and nature is open for use (including use of its parking facilities) by all and sundry (which includes members of the public who have not come to do business with Bay Centre).

[15] In my view the fact that the parking bays had to be located where the public had access has some significance. What it meant was that, after Bay Centre had constructed the bays, it ceased to have control over them; the bays were no longer there for the exclusive use of its clients or customers. If the parties intended to vest Bay Centre with the sole control of the parking bays constructed by it, they would have identified them in clauses 10.1.1 and 10.5 and not referred to them simply as the 'number' of parking bays and 'parking', respectively. The interpretation contended for by Bay Centre of necessity requires one to read more into the agreement than it actually provides. While the trial judge was correct in his finding that the word 'neighbouring' meant 'lying or living near, or adjacent', the dictionary definition must be considered in the context in which the word or phrase is used, with its interrelation to the contract as a whole. In *Swart en 'n Ander v Cape Fabrix (Pty) Ltd*,[5] this court said that when the meaning of words in a contract has to be determined, they cannot possibly be cut out and pasted on a clean sheet of paper and then considered with a view to determining the meaning thereof. Rather, the words must be considered

[5] 1979 (1) SA 195 (A) at 202C-D.

having regard to the nature and purpose of the contract, and in the context of the words in the contract as a whole.[6] If the matter is approached on that basis the interpretation adopted by the trial court cannot be upheld.

[16] It remains to consider whether Bay Centre has succeeded in establishing that there was a breach of clause 10.5 of the agreement on the part of the Town Council. In the light of the reasoning above, the breach could only be successfully established if it is shown that as a result of the excavations the Town Council had and/or intended to destroy parking bays paid for by Bay Centre without intention to replace them with the same number of bays. Bay Centre has failed to establish this. The undisputed evidence was that there was sufficient parking on the adjoining Town Council land for Bay Centre's customers and other members of the public to park, despite the destruction of some of the bays and that in any event the construction of a further number of bays adjacent to the property of Bay Centre was being planned.

[17] I am not persuaded that the Town Council has breached clause 10.5. It is not necessary to express a view on the rest of the findings of the court *a quo* nor is it necessary to deal with the further issues referred to in paragraph 5(b), (c) and (d) above.

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[6] *Metcash supra* at para 10.

[18] The appeal is therefore dismissed with costs, including the costs consequent upon the employment of two counsel.

KK MTHIYANE
JUDGE OF APPEAL

CONCUR:

HOWIE P
NAVSA JA
BRAND JA
MAYA AJA