THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 940/18

In the matter between:

KWADUKUZA MUNICIPALITY **APPELLANT**

and

LAHAF (PTY) LTD **RESPONDENT**

Neutral Citation: *KwaDukuza Municipality v Lahaf (Pty) Ltd* (840/18) [2020] ZASCA 09 (18 March 2020)

Coram: PETSE DP and LEACH, ZONDI, PLASKET and MBATHA JJA

Heard: 12 November 2019

Delivered: 18 March 2020

Summary: Interpretation of a town planning scheme which applies exclusively to Lifestyle Centre, Ballito – meaning of the phrase 'the total gross lettable area (GLA) of the Property' – starting point is the language of the zoning provision which must be construed in the light of its context, the apparent purpose to which it is directed and material known to those responsible for its production.

ORDER

On appeal from: The KwaZulu-Natal Division of the High Court, Pietermaritzburg (Chili 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 replaced with the following order:

'The application is dismissed with costs.'

JUDGMENT

Zondi JA (Petse DP concurring):

[1] This appeal concerns 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. The scheme was approved by the appellant, KwaDukuza Municipality, in 2000. The scheme controls limit the permissible GLA for the Lifestyle Centre in terms of maximum square metres on the property. The precise meaning of GLA determines the nature and extent of what can lawfully be built at the Lifestyle Centre. The dispute is whether the third restriction in Table D : Density Zone of the current zoning (approved in November 2011), which refers to 'the total GLA of the property', should be interpreted to mean only the area of 'shops' as defined in the scheme clauses or all areas capable of being leased.

[2] The respondent, Lahaf (Pty) Ltd, 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. On the other hand, the

appellant contended that 'GLA' comprises all areas notionally capable of being let including storage areas and receiving yards. In other words, it draws no distinction between shop and non-shop areas.

[3] The dispute arose in those circumstances. The respondent and two of its tenants submitted to the appellant building plans for approval but, because of the disagreement regarding the meaning to be ascribed to 'GLA' the appellant had not considered the relevant plans. The apparent basis for the appellant's stance was its contention 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 respondent's position was that what it had built complies with applicable zoning provisions and scheme controls and what it intended to build complied or was capable of compliance. In short, the parties are in dispute as to which built areas in the centre constitute GLA and which areas do not.

[4] As a result of the disagreement, the respondent, on 27 March 2015, approached the Kwa-Zulu Natal Division of the High Court, Pietermaritzburg (the high court) seeking an order that:

1 It is declared that the term 'GLA' in the zoning controls of Ballito Town Planning Scheme for Special Zone 10: Lifestyle Centre:

1.1 means 'gross leasable area' and relates only to the relevant retail space for the exclusive use of retail shop tenants;

1.2 excludes uses other than 'shop' as defined in the scheme, and other uses as set out in sub-paras 1.2.1 to 1.2.12;

1.3 is measured according to the formula in the South African Property Owners' Association Guide, namely to the centre line of demising walls, to the inside finished surface of external walls and to the centre line of the shop front boundary;

1.4 The respondent sought an order directing the appellant to consider the three sets of the building plans submitted by respondent in the light of the declared definition of the GLA within 60 days of the order; it further sought an order that the appellant be ordered to consider all other building plans

submitted to it by the respondent or its tenants in the light of the definition of GLA also within 60 days of the order.

[5] The high court (Chili J) accepted the respondent's contention and granted a declaratory order to that effect. It, among others, directed the appellant to consider the relevant building plans submitted to it by the respondent or its tenants in accordance with the declared definition of 'GLA'. The appellant's appeal, with leave of this court, is directed at the conclusions and findings on which the order of the high court is based.

[6] The interpretation of the relevant provision of the zoning control should be considered in the context of these facts. The Ballito Lifestyle Centre (Centre) is situated on erven 3671 and 2348 Ballitoville (the property). The respondent is the registered owner of erf 3671 which it acquired from Paul & Bruce Investments (Pty) Ltd during July 2009. The Centre is situated within KwaDukuza Municipality area and falls under the Ballito Town Planning Scheme.

[7] The individual erven on which the Lifestyle Centre has been built were all originally part of the Ballito Business Park and zoned variously 'Activity', 'Agricultural' and 'Public Open Space'. The controls which applied to the erven zoned 'Activity' prescribed the maximum floor area ratio (FAR) at 1, coverage of 70% and set a height limitation of 3 storeys. (Paragraph 25). In terms of the zoning provisions shops were permitted on 'Activity' erven by special consent, but limited to 200 m². This limitation had been removed in respect of some of the original erven forming part of the Lifestyle Centre which had been zoned 'Activity', but not others.

The creation of Special Zone 10: Lifestyle Centre.

[8] In approximately 2000 the previous owners of the property, Seaward Estates, submitted an application to the appellant to rezone components of the property to create Special Zone 10: Lifestyle Centre. This was achieved by rezoning approximately 4.7 hectares of agricultural land to Activity and by converting the Activity into the Lifestyle Centre. It was envisaged that the

Special Zone would apply to the Lifestyle Centre. The Lifestyle Centre was to be different from a conventional shopping centre. It was to include lifestyle components, such as restaurants, a nursery, large open walkways and water features alongside conventional retail outlets and service providers such as the Post Office and Banks. In the rezoning application the Lifestyle Centre was described as 'a holistic complex of shops, restaurants and entertainment facilities which have, in addition to conventional shops, a focus on the outdoor living and a plant nursery together with recreational and entertainment uses such as an animal farm, gymnasium/health centres, open air tea gardens and extensive landscaping'.

[9] It was further stated in the application that the purpose of the rezoning application was the creation of a larger single site to accommodate a more holistic shopping/Lifestyle Centre Complex, which could not be developed over the 12 individual erven as they existed.

[10] The rezoning application proposed certain scheme controls which would apply to the Lifestyle Centre zone. These introduced the term 'GLA' but unfortunately 'GLA' was not defined in the scheme and is still not defined.

[11] The rezoning application was granted and 'Special Zone 10: Lifestyle Centre' was established with its own zoning controls as set out in the following table:

TABLE C : USE ZONE : ACTIVITY ZONE

USE ZONE	NOTATION	PURPOSES FOR WHICH BUILDINGS MAY BE ERECTED AND USED	PURPOSES FOR WHICH BUILDINGS MAY BE ERECTED AND USED ONLY WITH SPECIAL CONSENT	PURPOSES FOR WHICH BUILDINGS MAY NOT BE ERECTED AND USED
(1)	(2)	(3)	(4)	(5)
Special Zone 10 Life Style Centre		Agriculture Arcade or Pedestrian Mall Arts and Crafts Workshop Commercial Workshop Educational Building Laundrette Office Building Place of Public	Crèche Dwelling House Funeral Parlour Motor Car Showroom Municipal Parking Garage Public Office	Building and land uses not included in Columns 3 and 4

		Amusement Place of Public Assembly Private Recreation Area Recreational Building Restaurant Shop (restricted to 14000m^2gla)	Residential Building Service Industrial	

TABLE D : DENSITY ZONE

DENSITY ZONE (1)	MAXIMUM PERMITTED F.A.R., COVERAGE AND HEIGHT (2)	ADDITIONAL CONTROLS (3)	COLOUR NOTATION ON SCHEME MAP (4)
Special Zone 10 Life Style Centre	1:70:3	1. Accommodation of motor vehicles to be provided on the lot as per Clause 6.4 2. Subject to the provision of a sewage disposal system to the satisfaction of the Local Authority 3. Total floorspace shall not exceed 25000m^2gla	

[12] As the above schedules demonstrate the adopted scheme controls comprised Table C and Table D. Table C dealt with permitted use of space and Table D dealt with density controls. (This you would find at page 87 of the record). In terms of Table C a maximum of 14 000 m^2 of GLA could be used for shops. In terms of Table D the permitted GLA for total floor space was 25 000 m^2.

The second amendment to the zoning.

[13] Again during July 2005 the former owners of the property submitted an application pursuant to s 47 of the Town Planning Ordinance, 27 of 1949 to amend the scheme controls applicable to Special Zone 10 so as to increase the maximum permitted GLA allowed for shops from 14 000 m² to 25 000 m² and remove the restriction on total floor space of 25 000 m² GLA in Table D. This application was granted on 17 October 2005 (p 95).The Council of the appellant resolved that the application for the proposed scheme amendment be approved as follows:

'1. PROPOSED REZONING OF ERVEN 2334, 2335 and 2336 BALLITOVILLE, DOUGLAS CROWE PLACE, BALLITO BUSINESS PARK FROM "ACTIVITY ZONE" TO "SPECIAL ZONE '10' LIFESTYLE CENTRE" PURPOSES; AND

2. PROPOSED AMENDMENT TO "TABLE D : DENSITY CONTROLS" AS APPLICABLE TO THE "SPECIAL ZONE 10' LIFESTYLE CENTRE" BY INCREASING THE 'GROSS LEASEABLE AREA (GLA)" IN RESPECT OF "SHOP" TO 25 000 SQUARE METERS AND BY DELETING "ADDITIONAL CONTROL 3" WHICH LIMITS THE TOTAL FLOOR SPACE TO 25 000 SQUARE METRES GLA.'

As a result of the amendment Table C and Table D were amended in the following manner:

TABLE C : USE ZONE : SPECIAL ZONE 10 : LIFESTYLE CENTRE

Use Zone (1)	Notation on scheme map (2)	Purposes for which buildings may be erected and used (3)	Purposes for which buildings may be erected and used only with special consent (4)	Purposes for which buildings may NOT be erected and used (5)
Special Zone 10 Lifestyle Centre	Red Cross Hatch	Agriculture Arcade or Pedestrian Mall Arts & Crafts Workshop Commercial Workshop Educational Building Laundrette Office Building Place of Public Amusement Private Recreation Area Recreational building Restaurant Shop Restricted to 25000m^2 GLA		Building and land uses NOT included in Columns 3 and 4

TABLE D : DENSITY ZONE: SPECIAL ZONE 10: LIFESTYLE CENTRE

Density Zone (1)	Maximum permitted F.A.R., Coverage and height (2)	Additional Controls (3)	Colour notation on scheme map (4)
Special Zone 10 Life Style Centre	1:70:3	1. Accommodation of motor vehicles to be provided on the lot as per Clause 6.4 2. Subject to the provision of a sewage disposal System to the satisfaction of the Local Authority 3. Total Floor Space be restricted to 25000m^2	

It is apparent from Table D that, as from 17 October 2005, a reference to GLA in para 3 in the third column was omitted following the amendment.

The third amendment to the zoning.

[14] During October 2007, the respondent submitted a further application to amend scheme controls applicable to Special Zone 10: Lifestyle Centre to increase the total floor space from 25 000m² to 28 000m². At the time the respondent sought an additional space to enable it to construct a gym and lease that area to Virgin Active Gym. The Virgin Active Gym did not constitute a shop in terms of the scheme clauses. On 4 June 2008 the executive committee of the appellant resolved to increase the permitted GLA from 25 000m² to 28 000m². But for some other reason, the appellant erroneously amended the scheme controls by increasing GLA rather than the floor area. This error was, however, subsequently rectified by the municipal officials on 3 September 2008 to reflect that what was increased was the total floor area from 25 000m² to 28 000m² not GLA. Again a reference to GLA in Column 3, para 3 of Table D was omitted. The result of the amendment was that Tables C and D were amended as follows:

TABLE C : USE ZONE : SPECIAL ZONE 10 : LIFESTYLE CENTRE

Use Zone (1)	Notation on scheme map (2)	Purposes for which buildings may be erected and used (3)	Purposes for which buildings may be erected and used only with special consent (4)	Purposes for which buildings may NOT be erected and used (5)
Special Zone 10 Lifestyle Centre	Red Cross Hatch	Agriculture Arcade or Pedestrian Mall Arts & Crafts Workshop Commercial Workshop Educational Building Laundrette Office Building Place of Public Amusement Private Recreation Area Recreational building Restaurant Shop Restricted to 25000m^2 GLA		Building and land uses NOT included in Columns 3 and 4

TABLE D : DENSITY ZONE: SPECIAL ZONE 10: LIFESTYLE CENTRE

Density Zone	Maximum permitted F.A.R., Coverage and height	Additional Controls	Colour notation on scheme map

(1)	(2)	(3)	(4)
Special Zone 10 Life Style Centre	1:70:3	1. Accommodation of motor vehicles to be provided on the lot as per Clause 6.4 2. Subject to the provision of a sewage disposal System to the satisfaction of the Local Authority 3. Total Floor Space be restricted to 28000m^2	

The fourth amendment to the zoning.

[15] During June 2011, the respondent applied for a further amendment of the zoning controls. The respondent sought to delete the restriction (restricted to 25 000 m^2 GLA) in Table C in so far as it applied to the total shop GLA and remove condition 3 in Table D limiting total floor space (total floor space restricted to 28 000 m^2). In para 3.3 of the application the respondent explained the purposes of the amendment:

'The proposed amendments referred to in paragraph 3.1 above, therefore entails the deletion of the current "Shop" and "Total Floor Space" restriction, as tabulated in paragraph 3.2 above. The density parameters will then simply be applied conventionally, being the maximum permitted F.A.R., Coverage and Height, as tabulated in "Table D: Density Zone: Column 2 of Special Zone 10: Lifestyle Centre", being 1 : 70 and 3 respectively.'

[16] On 19 October 2011, Mr FG van der Merwe, a Registered Planner, prepared a valuation report on behalf of the appellant. According to Van der Merwe the purpose of the application was ‘to seek Council’s consideration for an application brought in terms of the Act, for the removal of a restriction. The ultimate purpose being to amend the current “Table C : Use Zone and Table D: Density Zone” as they apply to the “Special Zone 10: Lifestyle Centre”, to . . . permit an increase in the Gross Leasable Area (GLA) applicable to the Property…’

[17] Under the heading ‘Evaluation’ Van der Merwe set out the following background:

'Evaluation

During July 2005, an application was submitted by Paul & Bruce Investments (Pty) Ltd to rezone certain components of the [applicant’s] Property to "Special Zone 10 :

Lifestyle Centre" purposes, as well as to increase the maximum permitted G.L.A. (gross leasable area) of "shop" from 14000m^2 to 25000m^2. The said application further proposed the deletion of the total floor space requirement of 25000m^2 G.L.A. The above application was approved by the Municipality and subsequently became the subject of an appeal in terms of Section 47 bis C of the Town Planning Ordinance (Ordinance No. 27 of 1949). The Provincial Planning and Development Commission subsequently resolved to dismiss the appeal brought by the appellants, thereby giving effect to the KwaDukuza Council decision, with amended controls in Table C and Table D.

As mentioned above, the previous application submitted by Paul & Bruce Investments (Pty) Ltd was (apart from rezoning certain components of the application property) to increase the maximum G.L.A. for "shop" from 14000m^2 to 25000m^2 as well as to delete . . . the total floor space requirement of 25000m^2 G.L.A. The restriction placed on the maximum G.L.A. for "shop" has, since the introduction of the "Special Zone 10 : Lifestyle Centre" into the Ballito town planning scheme clauses, been an additional control with specific reference to "shop" only.

Resulting from the resolution taken by the Provincial Planning and Development Commission, referred above, not only buildings erected for "shop" use, but the total development of the Property was restricted to 25000m^2. During October 2007 the Applicant had to again submit an application to amend the scheme, with specific reference to "Special Zone 10 : Lifestyle Centre", to increase the total floor area from 25000m^2 to 28000m^2. Such application was approved during September 2008.

Generally, the purposes for which buildings may be erected and used in "Special Zone 10 : Lifestyle Centre", other than "shop" ought to be restricted by the maximum permitted F.A.R. of 1, Coverage of 70% and Height of 3 storeys. The latter principle applies to all adjoining erven situated within the Ballito Business Park, zoned for "Activity" purposes. This principle also applied to the Property, prior to its initial rezoning during the year 2000.

It is the Applicant's intention to further develop the Ballito Lifestyle Centre in the near future and therefore this application for the removal of the mentioned additional controls, hereby simplifying the development controls applicable to the Property.'

[18] After setting out how the respondent's zoning scheme had developed over the years and the proposed amended development controls sought by the respondent, Van der Merwe went on to state:

'The concerns raised by the Objector, as well as the KZN Department of Transport are shared, in the sense that traffic impact is a major consideration along the MR 398 and MR 445. The Lifestyle Centre was not ever intended to become a conventional centre with conventional town planning controls and it is therefore submitted that some form of additional control be maintained to limit the total G.L.A. of the Centre until such time as the larger central business area has been re-evaluated in terms of the Kwadukuza Scheme review process.

It is also important that further controls be introduced to control future expansions to the Lifestyle Centre, in the context of the Department of Transport's as well as Municipality's future road and public transport upgrading initiatives.

The Applicant was requested to provide a detailed site development plan, depicting the actual areas of expansion required. Attached hereto, marked C, is a detailed site development plan as referred to above, which depicts the areas of extension envisaged by the Applicant in the short to medium term. It is submitted that consideration can be given to logical and minor extensions to the current G.L.A., but limited to the current anchor tenants. *Such minor extensions should be limited to. No more than 20% of the current G.L.A. per anchor tenant shopping unit and aimed at the creation of storage space as well as a more functional shop layout*. Such extensions should also be limited to the southern and south western parts of the Centre, thereby not creating the opportunity for further self contained shopping units, resulting in a further impact on the current access and parking situation.

Based on the above, it is submitted that the proposed extension to Woolworths, Spar as well as the administration unit of the Centre be supported. The proposed extension to Mica is substantial and not considered appropriate in the context outlined in the paragraph above. It is therefore recommended that consideration be given to an additional G.L.A. of 3000m^2 only.' (My own emphasis.)

[19] After evaluating the application Van der Merwe made the following recommendation:

'RECOMMENDATION RESPONSIBLE OFFICIAL

1. That based on the information provided above, as well as the Applicant's response to the objection raised, the application in terms of Chapter 6 [Section 65(1) thereof] of the KZN Planning & Development Act (Act no. 6 of 2008), for the removal of restrictions be APPROVED but subject to the following underlined amendments to "Special Zone 10: Lifestyle Centre":

TABLE C : USE ZONE : SPECIAL ZONE 10 : LIFESTYLE CENTRE

USE ZONE (1)	NOTATION ON SCHEME MAP (2)	PURPOSES FOR WHICH BUILDINGS MAY BE ERECTED AND USED (3)	PURPOSES FOR WHICH BUILDINGS MAY BE ERECTED AND USED ONLY WITH SPECIAL CONSENT (4)	PURPOSES FOR WHICH BUILDINGS MAY NOT BE ERECTED AND USED (5)
Special Zone 10 Lifestyle Centre	Red Cross Hatch	Agriculture Arcade or Pedestrian Mall Arts & Crafts Workshop Commercial Workshop Educational Building Laundrette Office Building Place of Public Amusement Private Recreation Area Recreational building Restaurant Shop	Crèche Dwelling House Funeral Parlor Motor Car Showroom Municipal Parking Garage Public Office Residential Building Service Industrial	Building and land uses NOT included in Columns 3 and 4

TABLE D : DENSITY ZONE : SPECIAL ZONE : LIFESTYLE CENTRE

DENSITY ZONE (1)	MAXIMUM PERMITTED F.A.R., COVERAGE & HEIGHT (2)	ADDITIONAL COTROLS (3)	COLOUR NOTATION ON SCHEME MAP (4)
Special Zone 10 Lifestyle Centre	1 : 70 : 3	1. Accommodation of motor vehicles to be provided on the lot as per Clause 6.4 2. Subject to the provision of a sewerage disposal system to the satisfaction of the Local authority. 3. The total G.L.A. of the Property be restricted to 31 000m^2 and no development exceeding 28 000m^2 of G.L.A. will be permitted unless prior approval has been given by both the Municipality as well as the KZN Provincial Department of Transport; of a Traffic Impact Assessment, which is to be undertaken at the cost of the owner. That the further extensions be limited to those areas indicated on the plan – (ref: 0309 100/3) attached to the EDP October 2011 Agenda. The proposed extension to the Mica shopping unit, as shown on the said plan is not supported.	Red cross hatch

2. That both the Applicant as well as the Objector be informed of their rights to Appeal in terms of the provisions of the KZN Planning & Development Act (Act no. 6 of 2008).
3. . . . .'

[20] The appellant adopted Van der Merwe's recommendation and passed a resolution to that effect. The appellant's decision granting the application to amend the scheme controls was communicated to Helena Jacobs, the respondent's Town and Regional Planner, on 14 November 2011.

[21] To sum up, the following controls applied before and after they were amended in November 2011.Under Table C the maximum GLA for the building erected and used as a shop was 25 000 m^2 and in Table D the floor space restriction of 28 000 m^2 applied. The purpose of the application was to remove the restriction of shop GLA of 25 000 m^2 in Table C and to remove the floor space restriction of 28 000 m^2 in Table D. The respondent needed additional space to extend Woolworths, Spar, Administration Unit and Mica. The application was considered by Van der Merwe on behalf of the appellant. He prepared a report for the appellant. It is significant to note that in his report Van der Merwe pertinently stated that the restriction placed on the maximum GLA for 'shop' has since the introduction of the 'Special Zone 10: Lifestyle Centre' into the Ballito town planning scheme clauses, been an additional control with specific reference to 'shop' only which confirms that the GLA has always been associated with 'shops'.

[22] Mr van der Merwe suggested that logical and minor extensions to current GLA of 25 000 m^2 be granted but by no more than 20 percent of 25 000 m^2. His suggestion accordingly was that the GLA be extended by 5000 m^2 to 30 000 m^2. He, however, recommended that the application be approved subject to certain conditions to be included in Table D, additional control 3, in order to address the concerns raised by a certain objector. Instead of increasing the GLA to 30 000 m^2 he recommended that it be increased to 31,000 m^2 but that the consent of the appellant and the provincial Department of Transport be obtained for any development exceeding

28 000 m^2. His recommendation was that the restriction of shop GLA of 25 000 m^2 in Table C be removed.

[23] This analysis provides the context, the purpose of the amendment of the controls and the background to their amendment in the light of which they should be construed.

[24] In the high court the appellant submitted that when the zoning was changed in November 2011 Table C was amended to remove the restriction on GLA of 'shop'. It argued that Table D was amended to limit the total GLA of the Centre, and to introduce controls relating to traffic and where expansion might take place. The appellant contended that it was only in Table C (which deals with use zone) that GLA relates to premises used as 'shop'. The appellant argued that Table D (which deals with density) never distinguished between shop and non-shop space, or between types of use at all. The appellant argued that prior to September 2005 and since November 2011 Table D fixed permissible density by reference to the GLA of the total property, between those dates it was fixed with reference to total floor area.

[25] The high court rejected the construction contended for by the appellant that GLA means anything whether it is lifestyle component or retail type component. The high court held that it was satisfied that, based on the correspondence exchanged between the parties' legal representatives and in particular the letter addressed to the appellant's attorneys of record by the respondent's attorneys on 24 August 2012, the parties had by their conduct understood the term GLA to refer to shop space. The high court accepted the construction contended for by the respondent on the grounds, first, that it was consistent with the manner in which the parties had implemented the zoning provisions, as reflected in the correspondence exchanged between the parties' attorneys. Secondly, that the interpretation contended for by the respondent advanced the purpose of the scheme. This holding was based on the reasoning that, if it were to adopt the construction of GLA contended for by the appellant that would result in uncertainty, because such interpretation would render the meaning of GLA elastic. Finally, the high court 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 high court accordingly granted an order in terms of prayers 1.1; 1,2; 1.3; 2 and 3 of the notice of motion.

[26] Before this court counsel for the appellant submitted that the words 'the total GLA of the Property' do not mean only the GLA of shops if the words are given their ordinary meaning, in the light of the ordinary rules of grammar and syntax. He argued that it was not contextually or purposively possible to ascribe a special meaning or different meaning to the words 'the total GLA of the property' so as to make them mean 'the GLA of shops only'.

[27] One is required to interpret the zoning provisions in accordance with the principles enunciated in recent cases such as *KPMG*[1], *Endumeni*[2], *Bothma-Batho*[3] and *Dexgroup*[4]. The approach to interpretation of written instruments, be they contracts or statutes is usefully summarized thus in *Dexgroup* para 16:

'…These cases make it clear that in interpreting the starting point is inevitably the language of the document but it falls to be construed in the light of its context, the apparent purpose to which it is directed and the material known to those responsible for its production. Context, the purpose of the provision under consideration in the background to the preparation and production of the document in question are not secondary matters introduced to resolve linguistic uncertainty but are fundamental to the process of interpretation from the outset'.

[28] Having regard to the context in which the words are used, the purpose to which they are directed and how their inclusion in Table D of Special Zone 10 came about, I conclude that the words 'the total GLA of the property' should 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. My

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[1] *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA) paras 29-40.
[2] *Natal Joint Municipal Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.
[3] *Bothma-Batho Transport* 2014 (2) SA 494 (SCA) para 12.
[4] *Dexgroup Pty Ltd v Trustco Group International (Pty) Ltd* [2013] ZASCA 120; [2014] (1) All SA 375(SCA).

conclusion is based on the following. First, it is apparent from the history of the Lifestyle Centre that the whole purpose of its design was to create a mix of uses and 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. In terms of the design, the Lifestyle Centre was to be different from a conventional shopping centre dominated by retail outlets. The whole purpose of creating the Lifestyle Centre would be defeated if GLA was not confined to shops, because, on the appellant's interpretation of GLA, 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, because notionally they are capable of being leased out. The result is that lifestyle features and service providers such as the banks and Post Office would compete with shops for permissible space which could lead to a situation where there would be no lifestyle features or service providers, because all GLA will be taken up by shops. This would undermine the whole notion of a Lifestyle Centre as conceived by the respondent from the outset.

[29] Secondly, if regard is had to the conduct of the parties both before and immediately after the amendment of the zoning provisions in November 2011 it is apparent that both parties understood GLA as comprising shop retail space and this position is reflected in the correspondence exchanged between the parties' legal representatives.[5] Additionally in his evaluation report dated 19 October 2011 Van der Merwe stated that 'the restriction placed on the maximum G.L.A. for "shop" has, since the introduction of the "Special Zone 10 : Lifestyle Centre" into the Ballito town planning scheme clauses, been an additional control with specific reference to "shop" only.' This approach is justified in this matter because this practice provides evidence which demonstrates that for a period of time both the appellant and the respondent shared a common understanding that GLA only relates to retail space.[6]

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[5] *Commissioner, South African Revenue Services v Bosch* [2014] ZASCA 171; 2015 (2) SA 174 (SCA) para 17.
[6] *Marshall NO v Commissioner for the South African Revenue Service* [2008] ZACC 11; 2019 (6) SA 246 (CC) para 10.

[30] That both parties understood that GLA relates only to 'shop' is further demonstrated by the following instances. Firstly, during 2006 in an appeal by a third party to the Provincial Planning and Development Commission against changes to the zoning provisions, the appellant's legal representatives submitted written argument defending its decision to grant an application to amend the zone controls by increasing the GLA from 14 000 to 25 000 m^2 and removing a total floor space restriction. The appellant argued that the increase in GLA in respect of shops did not give the respondent a blank cheque for development because the proposed development would still be subject to floor area ratio ('FAR'), coverage and height restrictions. The extent of the property exceeds 69 000 m^2, leaving a balance above the GLA limit of 25 000 m^2, which applied at the time, of more than 44 000 m^2. It would be absurd to suggest that the appellant's legal representative was contending that 44 000 m^2 would constitute areas that could not be let out at all.

[31] Secondly, during December 2008, the appellant approved the as-built plans for the second phase of the development of the Lifestyle Centre. At that time, the limit on GLA was 25 000 m^2. In respect of those plans the respondent had calculated GLA on its interpretation and the appellant's current interpretation. On the appellant's current interpretation, GLA per that plan was 24 874 m^2 excluding the area occupied by the nursery. At that stage, the nursery measured 2 751 m^2. Had the nursery been taken into account by the appellant in calculating GLA, the appellant could never have approved the plans for phase 2 (as it did) because GLA, on its current version, would have been 27 625 m^2 when the limit was 25 000 m^2. The appellant now contends that, because a nursery is capable of being let out, it falls to be included in GLA (despite having earlier admitted that a nursery was a lifestyle component). If this was the case, the appellant could never have approved the plan during December 2008.

[32] To sum up, bearing in mind that when the amendment was sought in June 2011 the shop GLA restriction of 25 000 m^2 applied, it is quite inconceivable that the words ‘the total GLA of the Property’ appearing in Table D, additional control 3 were intended to apply to all areas - shop and non-

shop areas- at the Centre. If it were so, it means that there would be no more space for accommodating lifestyle features and service providers at the Centre which in terms of the scheme clauses are excluded from the definition of ‘shop’.

[33] The next question is what uses at the Lifestyle Centre should be excluded from the definition of 'shop' for the purposes of zoning controls. In terms of scheme clauses 'shop' *"means a building or land used for any retail trade or business wherein the primary purpose is the selling of goods and appliances by retail and includes a building used for the purpose of a hairdresser, ticket agency, showroom (including motor showroom restricted to the display and sale of vehicles only), auction mart or for the sale of food and drink for consumption off the premises or for the reception of goods to be washed, cleaned, altered, dry-cleaned or repaired and includes ancillary buildings ordinarily incidental to the conduct of the retail business, but does not include an industrial building, garage, service station, milk depot or hotel".*
I did not understand counsel for the appellant to dispute that the definition of a 'shop' excludes all uses as set out in paras 1.2.1 to 1.2.12 of the notice of motion. In these circumstances there existed no legal basis for the appellant to have refused to consider the building plans submitted to it by the respondent and two of its tenants.

[34] What remains to be considered is the relief. The high court granted the relief sought in prayers 1 to 4 of the notice of motion. In terms of paragraph 2 of the order, the appellant was directed to consider building plans concerned in terms of the declared definition of GLA and make decision within 60 days of the grant of the order. In paragraph 3 the high court ordered the appellant to consider all other building plans submitted to it by the respondent or its tenants in the light of the declared definition of GLA and make a decision within 60 days from the date of the submission of such plans to the appellant. In my view paragraphs 2 and 3 of the order should be amended in line with s 7 of the National Building Regulations and Building Standards Act, 103 of 1977 (the Building Standards Act) which governs the process of approving building plans. In terms of s 7 of the Building Standards Act a local authority

must consider the building control officer's recommendation made in terms of s 6. If a local authority is satisfied that the application for approval complies with the requirements of the Building Standards Act and other applicable law, it must grant the approval unless it is satisfied that the erection of the building to which the plans relate will trigger one of the disqualifying factors. In that event, the local authority must refuse to grant its approval in respect thereof and give written reasons for such refusal.

[35] It is therefore not necessary to include in paras 2 and 3 of the order a stipulation directing the appellant to consider the building plans concerned in the light of the declared definition of GLA.

[36] Had this been the majority judgment, I would have granted an order in the following terms:

1 The appeal is dismissed with costs including costs of two counsel.

2 Paragraphs [1] 1.1; 1.2 and 1.3 of the order of the high court are confirmed.

3 Paragraphs 2 and 3 of the order of the high court are set aside and replaced with the following:

'1. The respondent is ordered to consider the building plans submitted to it by the applicant with plan numbers 12/05/289; 12/08/523 and 13/06/307, and either approve such plans or properly inform the applicant in writing of the reason for any refusal, within 60 days of the grant of the order in this matter;

2. The respondent is further ordered to consider all other building plans submitted to it by the applicant or its tenants and either approve such plans or properly inform the applicant or the party submitting such plans in writing of the reason for any refusal, within 60 days of the grant of this order.'

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D H Zondi

Judge of Appeal

Mbatha JA (Leach JA concurring)

[37] I have had the benefit of reading the judgment of my brother Zondi JA (the main judgment). The main judgment dealt with the interpretation of the

town planning scheme which applies exclusively to the Lifestyle Centre in Ballito. In the main judgment, Zondi JA found in favour of the respondent in respect of both issues. I respectfully hold a different view. The crux of the matter is whether the total GLA of the Ballito Lifestyle Centre should be interpreted to mean only the area relating to the shops as defined in the scheme or rather to mean all the retail areas let out by the respondent.

[38] It is apposite that one should understand what is meant by the town planning scheme before dealing with the interpretation of the term GLA. The scheme is an essential part of the Town Planning Programme. The Constitutional Court, in *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & others* [2010] ZACC 11; 2010 (6) SA 182 (CC) para 57, aptly described the term municipal planning as follows: 'the term [municipal planning] is not defined in the Constitution. But "planning" in the context of municipal affairs is a term which has assumed a particular, well-established meaning which includes the zoning of land and the establishment of townships. In that context, the term is commonly used to define the control and regulation of the use of land.'

[39] The land management or town planning lies in the hands of the municipality through the scheme. The municipality exercises control of the town planning process through the scheme, hence applications for rezoning and special consents are to be made. The scheme may therefore be amended from time to time to accommodate changes in the development of the town.

[40] This court, in *JDJ Properties CC and Another v Umgeni Local Municipality and Another* [2012] ZASCA 186; 2013 (2) SA 3955 (SCA) para 28, stated that the Town Planning Ordinance 27 of 1949 (Kwa-Zulu Natal) contained the general purpose of a town planning scheme which is to achieve 'a co-ordinated and harmonious development of the municipal area . . . in such a way as will most effectively tend to promote health, safety, order, amenity, convenience and general welfare'. In general town planning schemes are conceived not only in the interests of the general public but in

the interests of inhabitants of the area covered by the scheme. (*Administrator Transvaal and the Firs Investments (Pty) Ltd v Johannesburg City Council* 1971 (1) SA 56 (A) at 70D; *BEF (Pty) Ltd v Cape Town Municipality & others* 1983 (2) SA 387 (C) at 401F).

[41] The previous applications for rezoning were submitted to the appellant in terms of s 47 of the Town Planning Ordinance 27 of 1949. The current planning legislation applicable to KwaDukuza is the KwaZulu-Natal Planning and Development Act 6 of 2008. The former, amongst other things, provides for the adoption, replacement and amendment of the scheme. Most significantly, it provides for the alteration, suspension and deletion of restrictions to land. The aim being to promote a uniform planning and development system, which treats all citizens of the province equitably, provide a fair and equitable standard of planning and development to everyone and favour lawful development and other values. In this regard, the appellant was empowered to alter the previous determinations on the GLA, for the purposes of controlling density in line with the development of the town and the nature of the Lifestyle Centre. Therefore the provisions of the scheme apply to the respondent as well. The appellant being a regulatory authority has a duty to amend the scheme for the benefit of the inhabitants of the area covered by the scheme. In that regard it has a duty to balance the interests of the public as well as those of the respondent, the developer.

[42] The respondent had a duty to submit plans for approval prior to commencing with building extensions on the Lifestyle Centre. The respondent's reliance on previously approved plans under previous schemes instead of the current version of the town planning scheme was misplaced. By so doing the respondent tried to bypass the special zoning provisions in the current scheme.

[43] In seeking an order compelling the appellant to consider the plans the respondent was forcing the appellant to consider plans that would be in line with its own definition of GLA. The calculations of the GLA by the respondent were made *ex post facto* the submission of the plans for approval. The

respondent caused the buildings to be built without approved plans and was trying to regularize the position by relying on the previous determinations by the appellant.

[44] In considering how the term GLA should be defined, a material consideration should be the nature of the Lifestyle Centre, as the term GLA is not defined in the scheme. It is common cause that the nature of the Lifestyle Centre, rezoned to Special Zone 10, is not a conventional shopping complex. The main judgment describes it as a holistic complex of shops, restaurants and entertainment facilities, with the focus on outdoor living areas, including a nursery, having recreational facilities like an animal farm, gymnasium, wellness centre, open air gardens and extensive landscaping. It is clear from this description that the purpose of a lifestyle centre is for 'lifestyle' enjoyment rather than for shopping. It 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. The dominance of the shops over the lifestyle activities was never envisaged in the town planning scheme.

[45] I do not agree that the definition for which the appellant contends will defeat the purpose of a Lifestyle Centre. A lifestyle centre was not intended to have the shops dominate the entire development area. The finding in the main judgment that the proposed development would still be subject to the floor area ratio (FAR), coverage and height restriction, would defeat the purpose of a lifestyle centre.

[46] My colleague is of the view that it is quite inconceivable that the words the total GLA of the property appearing in Table D, additional control 3, were intended to apply to all areas, shop and non-shop areas. This was introduced as a measure of control in the latest scheme to control density. The increase in shop area only, would have the effect of increasing density to the Lifestyle Centre, without consideration of the traffic volumes and environmental impact on the part of the town. The appellant confirmed that in the previous schemes the nursery was not taken into account. However, it was considered when the

current controls were introduced in November 2011 to limit the total GLA. There is nothing amiss with regard to that amendment, as the nursery is a lettable area.

[47] In *Tronox KZN Sands (Pty) Ltd and KwaZulu-Natal Planning and Development Appeal Tribunal and Others* [2016] ZACC 2; 2016 (4) BCLR 469 (CC), the Constitutional Court confirmed that municipal planning decisions lie within the exclusive competence of municipalities. The term GLA can therefore not be interpreted in isolation from the considerations taken into account by the appellant when amending the scheme. The short to medium term solutions, limiting extensions to no more than 20 percent of the current GLA per anchor tenant, mostly to the southern and south western parts of the centre, to curtail the impact on the current access and parking areas were well considered and within the competency of the appellant. The extension of the MICA shop was not accepted as it was too substantial. This was in line with Van der Merwe's recommendations which were based on traffic considerations which have not been challenged by the respondent. Van der Merwe recommended that the total GLA of the property be restricted to 31 000 m² and that the development was not to exceed 28 000 m² subject to approval by the appellant and the Department of Transport.

[48] Van der Merwe, an expert, who considered the application by the respondent, proposed progressive adjustments to accommodate the respondent's plans, subject to the approval by the Department of Transport. This was done after consideration of the concerns raised by an objector and the Department of Transport. The main considerations being traffic consideration along the MR398 and MR445 and that the Lifestyle Centre was never intended to be a conventional shopping complex. It was therefore incumbent upon the appellant to place additional controls to limit the total GLA of the centre, until such time as the larger central business area had been evaluated in terms of the Kwa-Dukuza Scheme review process.

[49] Town planning, management and considerations of traffic volumes lie only within the competency of the appellant. The respondent seemed to

suggest that because the town has not grown in terms of development and volumes in traffic the rules which were applicable when the town was static, should apply in the present times. The GLA definition which should be accepted is the one provided in Table D, as it caters for density controls of the centre. The term GLA should be interpreted in the context of the nature of the centre and purposively. Density control is the main consideration here, not the ambitions of the respondent.

[50] For the definition of GLA, one can only look at the definition provided in Table D, which deals with density controls. It refers to 'the total GLA of the property' it does not refer to 'the total GLA of the shop'. The meaning of the words interpreted in their context and purposively, within the constraints imposed by the language should be accepted as the proper interpretation. (See *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 ALL SA 262 (SCA) para 20–24). Density control is the main controlling factor in considering the proposals by the respondent.

[51] The scheme defines 'Gross shop area' – 'as the sum of the floor areas of both the storage and retail areas of a shop and shall include wall thickness and basements used other than for parking purposes but shall exclude public convenience'. This is significant as it shows that the GLA applies to all lettable areas. The purpose of leasing property is to generate income from all lettable areas hence GLA should apply not only to shops, but to exclusive use areas and the nursery.

[52] There is nothing irregular from the proposals made by Van der Merwe that the proposed amendment related to the GLA of the property. 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. Van der Merwe was open-minded in stating that should the appellant wish to consider a further development of the centre; it will have to be subject to 'the pre-approval of other state organs.'

[53] The current planning legislation, the KwaZulu-Natal Planning and Development Act 6 of 2008, provides in s 6(7) that the current scheme replaces all planning schemes within the area of its operation. Furthermore, in s 6(10) it provides that '[a]ny extension to buildings or structures on land contemplated in subsection 9 must comply with the scheme'. Section 9(1) provides that the municipality may initiate the amendment of the scheme. These provisions allow for a rectification on any previous genuine mistakes in the scheme by both parties. Even if there was no mistake on the part of the parties, it could still be argued that the previous amendments were in line with the existing scheme at the time. The appellant in this case was not bound by previous rulings on rezoning and special consent which were made in line with the previous schemes. The current approvals should be in line with the scheme that is currently in existence.

[54] The recommendations made by Van der Merwe that the total GLA, of the property will be permitted subject to the approval of the appellant and the KZN Department of Transport should prevail. The definition of the GLA of the shop as stated in the main judgment is not in line with the nature of the centre and the current scheme of the KwaDukuza town.

[55] I respectfully find that the appellant should not be ordered to consider the plans submitted by the respondent. 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. This was a ruse on the part of the respondent.

[56] The appellant did not refuse to consider the plans submitted by the respondent. The appellant merely sent a referral to the respondent in terms of s 7(5) of the National Building Regulations and Building Standards Act 103 of 1977, advising the respondent that it will refuse to approve plans whilst the GLA on the property exceeded the permitted area in terms of the current scheme. The appellant was exercising its regulatory authority in this regard.

[57] In the result, I make the following order:

1 The appeal is upheld with costs.

2 The order of the court below is set aside and replaced with the following order:

'The application is dismissed with costs.'

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YT Mbatha

Judge of Appeal

Plasket JA (Leach JA concurring)

[58] I agree with the order proposed by my sister Mbatha. I am consequently unable to agree with the conclusion reached by my brother Zondi. I shall set out briefly my reasons for that disagreement.

[59] As Zondi JA has set out the facts and the context within which the interpretation of the zoning scheme must occur, I proceed directly to our point of divergence. That involves a consideration of the use and density controls from the inception of the zoning scheme to the last amendments that were effected in 2011, and which apply at present.

[60] At its inception, the use controls applicable to the lifestyle centre referred to a restriction of 14 000m^2 GLA in relation to shops and, in the density controls, it was provided that the total floor space could not exceed 25 000m^2 GLA.

[61] When the scheme was amended in July 2005, GLA in respect of shops in the use controls was increased to a maximum of 25 000m^2 and, in the density controls, total floor space was limited to 25 000m^2. Total floor space was thus de-linked from GLA.

[62] When the scheme was amended in October 2007, GLA in respect of shops continued to be restricted to 25 000m^2 in the use controls and, in the

density controls, total floor space was increased to 28 000m^2. Again, no linkage between total floor space and GLA was maintained.

[63] Finally, when the scheme was amended in 2011, the prior reference to GLA in relation to shops was deleted in the use controls, and the density controls were amended to provide that the 'total G.L.A. of the Property be restricted to 31 000m^2 and no development exceeding 28 000m^2 of G.L.A. will be permitted unless . . .'.

[64] What emerges from this history of the use and density controls is that over a period of time, 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.

[65] The complete de-linking of GLA from shops in the 2011 amendment cannot be wished away. The words used in the use and density controls cannot simply be ignored. To read into those words precisely what the appellant deliberately left out would be to legislate for the appellant, rather than to interpret the product of the appellant's application of mind.

[66] I do not believe that the plain meaning of the use and density controls, within their historical context, can be trumped by reliance on the purpose of the scheme: if the result of the 2011 amendment was impermissible for want of a proper purpose on the part of the appellant, review rather than interpretation would be the remedy.

[67] In my view, the respondent was not entitled to the declarator that the term 'GLA' in the scheme relates 'only to the relevant retail space for the exclusive use of retail shop tenants' and 'excludes uses other than "shop" as defined in the scheme . . .'. The rest of the relief that was sought and granted was reliant on the grant of this declarator. The application in the court below ought, for this reason, to have been dismissed.

[68] In the result, I would uphold the appeal with costs, set aside the order of the court below and replace it with an order dismissing the application with costs.

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C Plasket

Judge of Appeal

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