THE SUPREME COURT OF APPEAL

REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 153/2008

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY (FORMERLY GREATER JOHANNESBURG TRANSITIONAL METROPOLITAN COUNCIL) **Appellant**

and

ENGEN PETROLEUM LIMITED **1st Respondent**

SANDTON GATE SERVICE STATION **2nd Respondent**

Neutral citation: *City of Johannesburg v Engen Petroleum Ltd* (153/2008) [2009] ZASCA 5 (10 March 2009)

Coram: Mpati P, Cloete, Lewis, Cachalia JJA and Leach AJA

Heard: 26 February 2009

Delivered: 10 March 2009

Summary: The elevation of four lanes of a road above an intersection amounts to a permanent diversion for the purpose of s 67 of the Local Government Ordinance 17 of 1939 (T).

ORDER

On appeal from: High Court, Johannesburg (Boruchowitz J sitting as court of first instance):

'The appeal is dismissed with costs including the costs of two counsel.'

JUDGMENT

LEWIS JA (MPATI P, CLOETE and CACHALIA JJA and LEACH AJA concur)

[1] Grayston Drive in Sandton, Johannesburg runs from east to west, from Rivonia Road to Wynberg and vice versa. It is a major thoroughfare that leads to and from on and off ramps of the M1 Highway. The highway connects Pretoria in the north and Johannesburg in the south. From 1992 to 1994 the City Council of Sandton effected substantial changes to Grayston Drive, in particular at its intersection with Katherine Street, also a major thoroughfare, which runs in part at right angles to Grayston Drive. The effect of the construction work was to elevate four lanes of Grayston Drive (two in each direction) above Katherine Street in such a way as to create a flyover above it. One lane on the southern side and two on the northern side of the flyover remained on the same plane as previously.

[2] The second respondent, Sandton Gate Service Station CC (Sandton Gate), owns a petrol filling station and a public garage on the south-west side of Grayston Drive, at the intersection with Katherine Street. Sandton Gate is supplied with petrol and other products by the second respondent, Engen Petroleum Ltd (Engen). Sandton Gate and Engen claimed damages from the appellant (the successor in title to the Sandton City Council, and to which I shall refer as the City Council)), allegedly caused by the diversion, or closure, of the lanes in Grayston Drive, which, they contended, impeded access by vehicles to the filling station owned by Sandton Gate (the filling station). The reduced access resulted, they alleged, in a decrease in sales of Engen products, such that both Sandton Gate and Engen have suffered losses.

[3] The right to claim damages that the respondents assert arises from subsections 67(3) and (4) of the Local Government Ordinance 17 of 1939 (T) which the parties agree was in operation at all relevant times. The pertinent provisions of section 67 follow:

'67 Permanent closing or diversion of street. – Notwithstanding anything to the contrary in this Ordinance contained the council may with the approval of the Administrator, permanently close or divert any street or portion of a street if and when the following conditions have been complied with –

(1) Notice of the intention to move that steps be taken for the closing or diversion of a street or portion of a street shall be given at a meeting of the council at least fourteen days prior to the meeting at which the motion will be dealt with.

(2) If the said motion be agreed to the council shall cause a plan to be prepared showing the position of the boundaries of the street or portion of the street proposed to be closed or diverted.

(3) (a) On completion of the said plan the council shall publish a notice in the Provincial Gazette and in at least one English and one Afrikaans newspaper circulating in the council's area of jurisdiction setting out briefly the council's proposals, stating that the said plan is open for inspection at a place and during the hours specified in such notice and calling upon any person who has any objection to the proposed closing or diversion or who will have any claim for compensation if such closing or diversion is carried out to lodge his objection or claim, as the case may be, with council, in writing, not later than a specified date which shall be at least sixty days from the date of publication of the Provincial Gazette or newspaper in which the notice will be published last.

(b) The council shall at least sixty days before the time for the lodging of objections and claims will expire –

(i) cause copies of the said notice to be posted in a conspicuous manner on or near the street or portion of the street which it is desired to close or divert and shall cause such copies to remain posted as aforesaid until the time for lodging objections and claims has expired;

(ii) cause a copy of the said notice to be served on the owners or reputed owners, lessees or reputed lessees and the occupiers of all properties abutting upon the street or portion of the street which it is proposed to close or divert; provided that if the name and address of any such owner, reputed owner, lessee, reputed lessee or occupier cannot after reasonable enquiry be ascertained, a copy of the notice need not be served on him.

(iii) …

(4) (a) Any person who considers that his interests will be adversely affected by the proposed closing or diversion may at any time before the time for the lodging of objections

and claims has expired, lodge with the council a claim, in writing, for any loss or damage which will be sustained by him if the proposed closing or diversion is carried out. If such closing or diversion is carried out the council shall pay compensation for the damage or loss sustained by such person, the amount of compensation in default of mutual agreement to be determined by arbitration. In assessing the amount of compensation the benefit or advantage derived or to be derived by the claimant by reason of the closing or diversion shall be taken into account. If such person, however, fails to lodge his claim with the council during the period during which objections and claims may in terms of paragraph (3) of this section be lodged he shall not be entitled to any compensation for any damage or loss sustained by him.

(b) If the council finds that the payment of compensation will be too costly, it may resolve not to proceed with the proposed closing or diversion.

. . .

(10) The council shall supply the Surveyor-General with a diagram framed by an admitted Land Surveyor showing all the details of the closing or diversion. The Surveyor-General shall thereupon cause such amendments to be made in the general plan of the township as are necessary to show such closing or diversion and the Registrar of Deeds or other registration officer concerned shall thereupon make corresponding entries in his registers.

. . .'

[4] The City Council admits that it did not comply with the conditions prescribed by subsections 67(2) and (3). No notice was given to any of the affected property owners or occupiers (the City Council pleaded that since it did not effect a permanent closure or diversion notice was not necessary) and thus no objections were made in accordance with the section.

[5] At issue before the high court was the sole question whether the construction work effected by the City Council constituted a permanent diversion or closure of Grayston Drive as contemplated by s 67 of the Ordinance. (The high court had ordered a separation of issues in terms of r 33(4)). Boruchowitz J found that the elevation of four lanes of Grayston Drive did not amount to a permanent closure of the road (and there is no cross-appeal against that finding) but did constitute a permanent diversion. The City Council appeals against that decision with the leave of the high court.

[6] The only issue before this court is thus whether the high court correctly found that the elevation of four lanes above Katherine Street amounted to a diversion of a portion of Grayston Drive for the purpose of s 67 of the Ordinance. There are no factual disputes. The parties, in the pleadings and at the trial, made several admissions. These include: the southern boundary of the road reserve that existed prior to the construction of the Grayston flyover did not change after the construction work was completed. The intersection with Katherine Street has remained much the same, save that four lanes of Grayston Drive are elevated above it. Prior to the construction of the four-lane flyover, the southern portion of Grayston Road consisted of three lanes which intersected with Katherine Street at ground level, and the intersection was controlled by traffic lights. After the construction of the flyover, the southern portion, accommodating the traffic that flows from east to west, has been divided into two sections; two lanes are on the flyover, whilst the most southern lane still goes through the intersection with Katherine Street. (The same change was effected on the northern side, two lanes proceeding at ground level and two on the flyover.) The southern lane proceeds from east to west across Katherine Street past the Sandton Gate filling station and rejoins the other two lanes going in the same direction at the end of the flyover. Access from the southernmost lane to the filling station has not been affected. But once traffic proceeds on the lanes on the flyover it has no access to the filling station. If the construction of the flyover does constitute a permanent diversion or closure Engen and Sandton Gate are persons within the ambit of s 67 of the Ordinance.

[7] On appeal the City Council contends that the construction of the flyover did not amount to a permanent diversion: the elevation of four lanes of Grayston Drive does not divert the road. The City Council concedes that there has been a change to Grayston Drive, but argues that the change does not amount to a diversion because that requires a lateral change, on a horizontal plane. There is no change from a course or a route, it contends. Vehicles proceed along the same path as they would have done before the construction of the flyover.

[8] The City Council relies in this regard on *Bellevue Motors CC v Johannesburg City Council*[1] in which it was held that the reverse of traffic flow on a

[1] 1994 (4) SA 339 (W).

road did not amount to a diversion for the purpose of s 67 of the Ordinance. Rockey Street, Bellevue, Johannesburg, is a one-way street. The Council changed the direction of the flow of the traffic. The court found that this did not amount to a diversion of the road. The court said:[2]

'Its [divert's] plain meaning is related to the words 'any street or portion of a street' and has nothing to do with the direction of traffic flows on the street however adversely these may affect a particular party . . . *The Oxford English Dictionary* 2nd ed (1991) vol 4 at 888 gives the following meaning to the word 'divert':

'To turn aside (a thing, as a stream, etc) from its (proper) direction or course; to deflect (the course of something); to turn from one destination or object to another.'

. . .

In my view, the diversions of traffic flows on Rockey Street . . . do not have the effect of turning Rockey Street from its proper direction or course . . . . It seems to me that the section envisages a diversion of a street in the sense that the street, I stress 'street', as opposed to the traffic that travels thereon, is diverted, in the sense that it is deflected from its proper course.'

[9] Boruchowitz J, in the high court, considered that in this case the issue was different. It was not traffic flow, or the direction of traffic flow, that was the diversion contended for, but the deviation of the road itself. Prior to the construction of the flyover, the three lanes of Grayston Drive running from west to east had been on a level plane: after the construction two lanes were on a different plane. There had been a vertical diversion – the physical location of the two lanes had changed and been diverted away from the intersection with Katherine Street.

[10] The City Council argues that this conclusion is not consonant with dictionary definitions of 'divert'. A diversion, dictionary definitions suggest, must be on a horizontal plane. Thus, it contends, when an aeroplane flies at a higher or lower altitude than planned it does not 'divert' from its course: it continues in the same direction. Sandton Gate and Engen contend, on the other hand, that while it is correct that various dictionary definitions indicate that the usual meaning of 'divert' is to turn in a different direction, or to alter the course of something, dictionary definitions are not decisive. In *Monsanto Co v MDB Animal Health (Pty) Ltd*[3] Harms JA repeated the general principle that, while dictionary definitions may be a

[2] At 343D-H.
[3] 2001 (2) SA 887 (SCA) para 9.

useful guide to the meaning of a word, the task of an interpreter is to ascertain the meaning of a word in its context. The court cited the dictum of Hefer JA in *Fundstrust (Pty) Ltd (in liquidation) v Van Deventer* [4] where he had said:

'As a rule every word or expression must be given its ordinary meaning and in this regard lexical research is useful and at times indispensable. Occasionally, however, it is not.'

[11] Counsel for Sandton Gate and Engen have provided numerous examples of statutes and cases in the United Kingdom and elsewhere where the word 'divert' is used to indicate a change on a vertical plane. But these are all context-specific and do not, in my view, assist in the interpretation of s 67 of the Ordinance. Counsel refer also, however, to W G Berry *Local Government Law in the Transvaal* (1978),[5] which, commenting on s 67(4) observes, although without reference to authority, that: 'The raising or lowering of the level of a street may, however, possibly constitute a closing or diversion of the street (ie, on the vertical as opposed to the horizontal plane), which might possibly give rise to a claim for compensation in terms of s 67(4). . . '.

[12] Counsel for the City Council, who take issue with this construction, were driven to contend that if the four lanes of Grayston Drive had been built underground, in a tunnel rather than on a flyover, that too would not amount to a diversion since there would not be any deviation away from the original path of the road. The fallacy in this approach is self-evident.

[13] The City Council also argues that a general plan of the road system, which is two-dimensional, does not show any change to the path of the road. The plan shows only changes in direction – that is, horizontal movements to left and right, or to north, south, east or west. Regard must be had, the argument continues, to the definition of 'street' in the Ordinance: s 2 defines a 'street, road or thoroughfare' as one shown as such on the general plan of a township. The elevation of lanes on Grayston Drive to create a flyover does not require a change to the general plan, which is two-dimensional. This, it is argued, demonstrates that there has been no

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[4] 1997 (1) SA 710 (A) at 726H-727B. See also *De Beers Industrial Diamond Division (Pty) Ltd v Ishizuka* 1980 (2) SA 191 (T) at 196E-F, and *Seven Eleven Corporation of SA (Pty) Ltd v Cancun Trading No 150 CC* 2005 (5) SA 186 (SCA) para 24.

[5] Page 64.

diversion. The effect of the argument is that the general plan is determinative of the question whether there has been a permanent diversion.

[14] There is, however, nothing in the Ordinance that suggests that a diversion is only such if the general plan requires amendment pursuant to its construction. Moreover, s 67(10) requires the City Council to supply the Surveyor-General with a diagram of a diversion only after the work has been completed. The question whether there has been a diversion is one of fact, not decided by the Surveyor-General or any other functionary. Thus in my view whether or not a change is reflected on the general plan cannot be determinative of the nature of the change.

[15] I consider that meaning must be given to 'diversion' by examining the purpose of s 67 (read of course in the light of the entire Ordinance). I deal here only with a diversion since closure is not in issue: but the principles applicable would of course be the same. Section 67 requires notice to be given to persons affected by a permanent diversion, who may in turn object to the proposed change and claim compensation for any loss sustained as a result of the diversion. The purpose of the provision is clearly to compensate for pecuniary loss sustained as a result of a change to the road that has an adverse financial effect on owners, lessees or occupiers whose property abuts the road. The question to be considered, then, is whether the change to the road itself has such an effect. If raising the elevation of the two lanes of Grayston Road in issue has that effect then the change must fall within the ambit of the section.

[16] It is clear that the elevation of the lanes on Grayston Drive has had a material impact on the ability of drivers to gain access to the filling station. If a driver proceeding from east to west along the road is in any but the outer (southern) lane he or she must drive on to the flyover over Katherine Street, and will not be able to gain access to the filling station. Similarly, motorists travelling in the other direction, who before the construction could have turned into the filling station, now cannot do so unless they first turn into Katherine Street, and then back again in to the southernmost lane of Grayston Drive. The elevation of the lanes has thus changed the access of drivers to the filling station no matter in which direction they are travelling. A substantial portion of Grayston Drive has been moved upwards, on to a different plane, such that access to and from

adjoining properties has been materially altered. It should be noted that s 67 contemplates permanent diversion also of a portion of a road, not only the whole road.

[17] I consider that this is pre-eminently the kind of road change that affects adjacent landowners, lessees and occupiers whom the provisions of the ordinance are designed to compensate in the event of loss. It would be artificial to regard Grayston Drive and the land abutting it as being in the same position as they were prior to the construction of the flyover. There is no justification for construing s 67(4) so as to limit its application to horizontal diversions. In any event, such a limitation would give rise to absurdity. The purpose of s 67(4) is to compensate property owners, lessees or occupiers who suffer pecuniary loss because of the change in the road. If the two lanes in Grayston Drive had been moved further to the north, for example, rather than on to a flyover, and that had the effect of diverting traffic, and thus business, away from the filling station, Sandton Gate and Engen would have been entitled to recover their losses. If the effect of moving the two lanes up vertically is the same, why should they, or any other right holder in a similar position, be non-suited? The distinction contended for is not only illogical, but could lead to inequitable results. I can see no reason why s 67(4) should allow compensation for pecuniary loss suffered only where there is a horizontal relocation of a road.

[18] I consider therefore that the construction of the flyover did constitute a permanent diversion for the purpose of s 67(4) and thus that the decision of the court below was correct on this point.

[20] The appeal is accordingly dismissed with costs including those attendant on the employment of two counsel.

C H Lewis
Judge of Appeal

Appearances:

For the Appellant:	J Suttner SC T Motau Instructed by: Knowles Husain Lindsay Inc Sandton Johannesburg McIntyre & van der Post Bloemfontein
For the 1st Respondent:	O L Rogers SC P L Carstensen Instructed by: Kritzinger & Co Rosebank Johannesburg Matsepes Attorneys Bloemfontein