IN THE SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE NO: 7618/09

DATE: 2010-02-12

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE YES/NO
(2) OF INTEREST TO OTHER JUDGES YES/NO
(3) REVISED

DATE 13 September 2010 SIGNATURE

In the matter between

CITY OF JOHANNESBURG Applicant

and

AMPCOR CONSULTING CC Respondent

JUDGMENT

BORUCHOWITZ, J: The applicant, a Metropolitan Municipality established in terms of Act 117 of 1998, seeks a final interdict to restrain the respondents from using, or permitting the use of certain immovable property, situate at 59 Impala Road, Ris Park Johannesburg in contravention of the Johannesburg Town Planning Scheme, 1979 (the scheme).

The property in question is zoned "Agricultural" in terms of the scheme and the only purpose for which it may lawfully be used is for of dwelling houses and agricultural purposes.

The first and the second respondents conduct the business of an electrical engineering services company and a furniture manufacturing company, respectively, at the property. The third respondent is the owner of the property and permits the first and the second respondents to use the property for the aforesaid purposes.

On the face of it, the activities carried on by the first and second respondents, amount to a contravention of the relevant provisions of the scheme, and this is conceded by the respondents in paragraph 11 of their answering affidavit.

Despite the issue of a written notice, calling upon the respondents to discontinue the unauthorised use of the property, the respondents have until the present time failed to take any steps to terminate or procure termination of such unauthorised use. Although the respondents concede that they are *"prima facie"* acting in contravention of the scheme, they deny an actual contravention on a number of grounds, which they submit renders the respondents' conduct lawful.

The purported defences sought to be relied upon are, acquiescence waiver, undue delay and changes in the character of the neighbourhood. These they submit are recognised defences in planning law which render the respondents conduct lawful. They also contend that the applicant is selectively targeting the respondents in violation of their constitutional right to equality, in terms of Sections 9 (1) (3) of the Constitution.

Broadly stated, the facts relied on by the respondents are the

following: They say that the rural character of the area began to change some 30 years ago. Since 1979, there has been a gradual increase of business use in the area. In support of this contention, respondents attach Google Earth Satellite photographs and land-based photographs depicting such use in many of the contiguous and adjoining properties.

In a regional spatial development framework, an extract of which is attached to the papers, the applicant acknowledges contraventions of the scheme as far back as 2004 and recognises that the Ris Park and Patlynn is an area in transition.

There has been a radical change in the character of the area and that the present zoning for agricultural purposes is substantially out of kilter with the present use's in the area. A survey of all interested residents has been conducted which reveals that 63.9 percent of the residents in the area support a change of the present zoning.

Business activities on the property of the respondents has been carried on for some 25 years. The deponent to the answering affidavit, who is the sole member of the first respondents, states that as far as he is aware, the applicant has not enforced the scheme since 1979, despite the continuous increase in use for purposes other than agricultural. Moreover the applicant has acquiesced in the present state of affairs, by delaying over a substantial period of time to enforce the provisions of the scheme. This attitude of the applicant is consistent with a deliberate decision not to enforce the provisions of the scheme.

The deponent to the answering affidavit states that enforcement of the interdict will be unduly harsh and will cause enormous damage

with disastrous results, especially where the majority of the residents are in favour of change.

He also states that the applicant applies selective enforcement. Such selective enforcement is unconstitutional and violates Section 9 (1) of the Constitution, in that the applicant does not treat the owners equally. It also violates Section 9 (3) of the Constitution in that it arbitrarily and in a discriminating way enforces compliance with a scheme.

Accordingly, the respondents ask that the application be dismissed with costs, alternatively that the operation of the interdict be deferred or suspended, pending the outcome of the decision by the applicant to accept a precinct plan of the Ris Park and Patlynn area, Johannesburg as envisaged in terms of Local Government; Municipal Systems Act, 32 of 2000, read together with the Development Facilitation Act 67, of 1995.

Counsel for the respondent submitted that in the context of planning law, acquiescence waiver and the change in the character of a neighbourhood are recognised defences to enforcement proceedings. In support of this contention, counsel referred the court to Van Wyk (1999) Planning Law; Principles and Procedures of Land Use Management pp 226 to 228 where reference is made to three cases.

Siegfried v Tidswell, 1952 (4) SA 319 (C); *Macgillivray v WR Investments (Pty) Limited*, 1959 (3) SA 17 (W) and *Cannon v Piccadilly Mansions (Pty) Limited*, 1939 (WLD) 187.

The respondents' reliance in the context of the present case on

acquiescence waiver and changes in the character of the neighbourhood, is in my view misplaced.

The applicant is a statutory body, which by law is obliged to observe and enforce the provisions of the scheme. This is specifically provided for in Section 58 of the Town Planning and Township's ordinance number 15, of 1986.

The applicant cannot act beyond or in excess of the legal powers expressly or impliedly granted to it. Being enjoined to observe and enforce the scheme, the applicant cannot acquiesce in any contraventions of the scheme. To do so would be unlawful and therefore *ultra vires* Put differently, the applicant cannot by virtue of acquiescence be prevented from or excused from the performance of its statutory duty. See for example, *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Limited*, 2008 (3) SA 1 (SA) at paras 12 and 13 and cases there cited.

The fact that the applicant, according to the respondent has for many years not enforced the scheme, a fact denied by the applicant, cannot preclude it from now performing its statutory duty, to enforce the scheme. There is also no room for any waiver of rights, as contended for by the respondents. A local authority as a representative body, cannot waive rights which are entrusted to it for the public benefit.

Tidwell's case is distinguishable, it did not involve an action by a local authority for the enforcement of a duty imposed by statute. It involved stopped by acquiescence in the context of an action between two private entities.

Similar considerations in my view apply to the defence that there has been a radical change in the character of the neighbourhood. This too cannot prevent or absolve the applicant, which is a statutory body from the performance of its statutory duty and obligation to enforce the provisions of the scheme.

The defence that there has been a radical change in the character of the area, has been recognised in the context of actions brought by private individuals or entities to enforce conditions of title that had become valueless. The Macgillivry and Cannon cases are also distinguishable from the present, as both concern actions or proceedings for the enforcement of conditions of title brought by a property owners and not a local authority.

Respondent's contention that there has been selective enforcement and that their constitutional right to equality in terms of Section of the 9 of the Constitution had been infringed, also cannot be sustained. At the heart of the Constitution, is the principle of legality. The Rule of law which is entrenched in the Constitution requires state institutions to act in accordance with the law. The applicant is by law required to enforce the scheme. The fact that the applicant has elected to proceed against the respondent and no other contraveners of the Scheme, does not constitute a misuse of power, or amount to unfair discrimination or differentiation in violation of the equality provisions of a Constitution.

The respondent's Remedy is to apply for the rezoning of the property, or to apply for consent use, after removing any restrictive

conditions that may be applicable. Until such application for rezoning or consent use has been granted, the use of the property for the present purposes remains illegal, and indeed constitutes a criminal offence. The respondents have to date not submitted an application for rezoning or consent use.

By virtue of their continued contravention of the zoning provisions of the scheme, the applicant is entitled to the interdictory relief sought in the notice of motion.

What remains to be considered is the respondents' prayer to the effect that the operation of the interdict should be deferred or suspended. It is settled law, at least in this Division, that save in the exceptional circumstances the court does not have a general discretion to defer the operation of an interdict, where the wrong complained of, amounts to a crime. See, *United Technical Equipment Company (Pty) Limited v Johannesburg City Council*, 1987 (4) SA 343 (T) at 347 G to H. Counsel for the respondents submitted that the following constitute exceptional circumstances as envisaged in the United Technical case.

1. The area is in transition;
2. There has been a long delay over a period of some 25 years to enforce the provisions of the scheme against the property specifically and in the area generally;
3. Steps have been taken to remedy the current objections of the applicant.

It was submitted, based on the expert evidence of a town planner that until July 2010 or the end of 2010 would be an appropriate period to suspend the operation of the interdict.

The courts in this Division have consistently followed the approach outlined in the United Technical Equipment case. See, *City of Tshwane Metropolitan Municipality v Grobler and Others*, 2005 (JDR) 0254 (T) (per Softwood J):, *City of Johannesburg v JFM Luton*, unreported case number 19868/03, (per Claassen J). *City of Johannesburg v 336 Ontdekkers Road Property Investments CC and Others*, unreported case number 2005/6412, (per Labe J). *City of Johannesburg v Rainbow Coaches and Another,* unreported case number 25417/03 (per Frevrier AJ). *City of Johannesburg v Business Education Design (Pty) Limited and Another*, unreported case number 04/30147 (per Msimeki AJ).

The most recent pronouncement in this regard, is to be found in the case of *Bitou Local Municipality v Timber Two Processors CC and Another*, 2009 (5) SA 618 (C) (per Fourie J).

The factors mentioned by counsel for the respondents, do not in my view constitute a sufficient reason to suspend the operation of the interdict.

The following considerations which militated against suspension in the United Technical case apply with equal force to the present matter. A lengthy period of time will be required in order to finalise the proposed rezoning of the area.; The process that is envisaged is outlined in an affidavit deposed to by a Town Planner, Mr van der Linde

(answering affidavit, pages 455 to 462). To suspend the interdict in these circumstances would be tantamount to the condonation of criminal behaviour and an abrogation of the court's duty as an enforcer of the law. The position is aptly summarised by Harms J, as he then was in the United Technical case in the following passage at 348 I to J.

> "The respondent has not only a statutory duty but also a moral duty to uphold the law and to see to due compliance with its town planning scheme. It would in general be wrong to whittle away the obligation of the respondent as a public authority to uphold the law. A lenient approach could be an open invitation to members of the public to follow the course adopted by the appellant, namely to use the land illegally with a hope that the use will be legalised in due course and that pending finalisation of the illegal use, will be protected indirectly by the suspension of an interdict."

For these reasons, the following order is granted:

1) The first, second and third respondents are hereby interdicted and restrained from using or causing or permitting the use of certain immovable property, being Holding 59 Ris Park, Agricultural Holdings, registration division, I.R. Gauteng situated at

59 Impala Road, Ris Park, Johannesburg (the property) for any purpose other than for agricultural purposes and dwelling houses as permitted and prescribed by the zoning "agricultural" in the Johannesburg Town Planning Scheme, 1979 for so long as the property is so zoned.

2) In particular and without limiting the generality of the order in paragraph 1 above, the first respondent is interdicted and restrained from carrying on or causing or permitting the property to be used for business purposes, as officers, for the parking and storing of trucks, like delivery vehicles, horses and trailers, plant used in connection with its business, the storage of materials, as a scrap yard and for the repair and maintenance of vehicles.

3) In particular and without limiting the generality of the order in paragraph 1 above, the second respondent is interdicted and restrained from carrying on or causing or permitting the property to be used for business purposes, as offices and for the manufacturing of steel furniture.

4) Within 4 (four) weeks from the date of this

order, the first, second and third respondents are to remove from the property, or cause to be removed from the property, all items of whatsoever nature which have the effect of constituting the use of the property for the purposes described above, or any other use which contravenes the said Johannesburg Town Planning Scheme, 1979.

5) The first, second and third respondents are ordered to pay the costs of this application, jointly and severaly, on the attorney and client scale.

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