REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 10020/2012

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

27/2/2013 .....
DATE SIGNATURE

In the matter between:

PLANET WAVES 581 (PTY) LTD **Applicant**

and

NEWMAN, SEAN **Respondent**

J U D G M E N T

MATHOPO J:

[1] The applicant applied on notice of motion for an order in the following terms:

1.1 An order of eviction of the respondent from the property known as the Remaining Portion of Erf 567 Bedfordview Ext. 97 and situated at 48A Arbroath Road, Bedfordview ('the property");

1.2 The respondent is ordered to vacate the property within one month of the date of the grant of the order referred to in 1.1 above;

1.3 If the respondent has not vacated the property by the date referred to in 1.2 above , the Sheriff is hereby authorised and required to carry out the eviction order, by removing from the property the respondent and all persons who occupy the property by, through or under him;

1.4 The respondent is interdicted and restrained from carrying on of a business in contravention of the Bedfordview Town Planning Scheme, 1995;

1.5 The respondent is ordered to pay the costs of this application.

Background

[2] This applicant is the owner of the immovable property described as the Remaining Portion of Erf 567 Bedfordview Extension 97 which is situated at 48A Arbroath Road, Bedvordview ("the property"). The respondent occupies the property together with his family pursuant to a written lease agreement. The respondent is also the director and the principal and responsible party of a private company Divine Branding Solution (Pty) Ltd, which trades under the name and style "Divine SA" which carries on business on a small scale catering to men and women employing trained personnel for massage therapy.

[3] The property is zoned residential in terms of the Bedfordview Planning Scheme ("the scheme"). In terms of the zoning ".... residential 1" the property may be used for dwelling houses.

[4] The applicant alleges that the respondent in contravention of the lease agreement carries on business of a massage parlour and brothel on the property. The applicant further alleges that the respondent is utilising the property for unlawful purposes i.e. carrying on business in contravention of the relevant zoning by conducting a business in an area designed for residential use and in contravention of the scheme.

POINTS *IN LIMINE*

[5] The respondent commenced his case by raising a number of points *in limine* which if decided in his favour would either be dispositive of the matter or would result in a postponement or stay of the application.

[6] In *limine*, the respondent challenged the applicant's *locus standi* to bring the application and further allege that as a result of the non-joinder of the Ekurhuleni Metropolitan Municipality (the local authority), the applicant was non-suited. The respondent's submission is that since the applicant alleges that the respondent is carrying on business in contravention of the relevant zoning i.e. conducting a business in an area designated for residential use and not based on the lease agreement, the applicant does not have *locus standi* and should have joined the local authority to evict the respondent.

[7] The submission made on behalf of the respondent is that prior to any action being instituted against the respondent, the local authority must first serve a notice on the respondent, notifying him of the alleged infringement and provide him with a period in order to make the application for business rights if necessary or motivate the basis as to why it needs rezoning, alternatively, no need for business rights. The argument advanced is that the applicant must first satisfy the court that

the local authority has been informed of the contravention and afforded the respondent an opportunity to remedy the alleged infringement before any action can be instituted against him. This argument is misconceived. A party should be joined of necessity if they have a direct and substantial interest in the order the court might make or if such order cannot be sustained or carried in effect without prejudicing that party, unless the court is satisfied that he has waived his right to be joined. See: ***Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A) and Pick 'N Pay Stores Ltd & Others vs Teazers Comedy and Revue CC and Others 2000 (3) SA 645 (W).***

[8] In my view the relief sought by the applicant will not in any way affect the local authority and neither will the order made by the court prejudice them. It would be fruitless to join the local authority in proceedings where they would play no role at all. Quite clearly there is no basis for challenging the authority of the applicant to institute the present proceedings. The point *in limine* is nothing else but a stratagem to unnecessarily delay the proceedings. I accordingly dismiss it.

[9] The second *point in limine* relating to the non-compliance with the Prevention of Illegal Eviction from the Unlawful Occupation of Land Act 19 of 1998 (PIE) was rightly not pursued by the respondent and I make no reference to it. In any event it was devoid of merit.

[10] The third *point in limine* raised is one of *lis pendes.* The respondent's contention is that the respondent has instituted an action against the applicant seeking a relief based on a lease agreement entered into between the respondent and one Jackson. The submission developed is that the subject matter of the application and the present application are identical and this action is currently pending.

[11] The respondent submits that if he is successful in the said action, the respondent would be entitled to occupy the property until 2012. However, in the event the current application is granted in favour of the applicant, it would have the effect that the respondent and his family would be forced to vacate the property and only to return and occupy same if the pending action is finalised in their favour. In support of his case he submit that no prejudice would be suffered by the applicant because it is receiving rental income from the respondent. In essence, the argument advanced is that the pending action is based on the same facts and or subject matter and that the application should be stayed pending the final outcome of the said action.

[12] The applicant in reply submitted that the *causa* is different because in the pending case, the relief sought is a declaration of rights. The respondent's point is further weakened by the fact that on his version in the said pending action, he still seeks enforcement of lease agreement with Jackson which is unlawful, for which the applicant has given him notice in terms of the lease to purge his default and he has failed to do so. I agree with the applicant that the *point in limine* is predicated on the unlawful use of the business which would render the occupation of the respondent unlawful. Again the submission that the subject matter or *causa* is the same, is flawed. The relief and subject matter is different to the present application. In my view even if the pending action is successfully determined in favour of the respondent, it will not result in the revival of the lease agreement that had existed between the applicant and the respondent. The applicant has terminated the lease agreement by written notice to the respondent after he failed to purge his default. At present there is no lease agreement existing between the parties.

[13] Turning to the merits. The applicant seeks to evict the respondent and his family on the basis that the respondent carries on business of a brothel or massage parlour on the property in contravention of the lease. Again the eviction is sought on the basis that the respondent is

utilizing the property for unlawful purpose due to the fact that the property is zoned as Residential 1 in terms of the scheme. On the 27th June 2012, the applicant sent a letter of demand to the respondent to purge his default. The respondent neglected or failed to purge his default with the result that the applicant terminated the lease agreement on the 21st February 2012 and instituted the present proceedings.

[14] The respondent disputes the applicant's right to cancel the lease agreement contending that he concluded a lease agreement with one Jackson in terms of which permission to carry on the business of Divine SA was granted. The respondent in resisting the eviction further contends that on the 14th January 2011, he received an email from one Roos acting on behalf of the applicant consenting to the business and stating that he was well aware of same. The email around which the dispute centred is annexed to the answering affidavit marked annexure "A". Of material relevance in the email is the statement by one Roos of the applicant wherein he stated as follows "*Both Alan and I are obviously aware of the current business*". This statement according to the respondent is sufficient confirmation that the applicant was aware of the nature of the respondent's business and thus cannot contend in these proceedings that same was illegal and cancel the lease agreement. Counsel for the respondent urged upon me to construe this concession as consent to conduct the business even though the requisite permission from the local authority was absent.

[15] The applicant in answer submits that for the respondent to conduct a business in an area zoned for residential business, a permission from the local authority was required. Absent any permission, the purported consent by Roos cannot make an illegal agreement legal. In essence, the contention of the applicant is that once the unlawful use of the property has been established, the court has no discretion in the matter but to grant the interdict or eviction. In support of his argument counsel for the applicant referred me to the case of ***United Technical***

Equipment Company v Johannesburg City Council 1987 (4) SA343 (T) at 347G where Harms J as he then was writing for the full bench held as follows:

"... I am not aware of any authority which would entitle the Court to suspend the operation of an interdict where the wrong complained of amounted to a crime. The court would thereby be abrogating its duty as the enforcer of the law." I am fortified by the ratio in the above case that the lease agreement or consent of Roos cannot override the provision of the Town Planning Scheme.

[16] The respondent is clearly conducting a business in contravention of the lease and the Bedfordview Town Planning Scheme. In terms of the said scheme, no provision is made for "grey areas". An occupier or an owner of an erf either uses the property for the purposes permitted by the scheme or he does not. In terms of Table 4 of the scheme, the zoning Residential 1 permits as primary right the use of the property and the erection of the building therein for purposes of dwelling houses. The respondent does not have the necessary consent of the local authority or the Town Planning Scheme to conduct a business in that area. See: in this regard ***Muangisa Ntangu-Reare v City of Johannesburg*** a judgment of Masipa J delivered on the 15 November 2012 in this division where she held that:

" A town planning scheme is a unique piece of legislative arrangement in terms whereof each erf within the geographical area covered by a scheme has a specific zoning attached to it, which zoning permits only certain uses specified in the scheme itself.

No provision is made in a scheme for "grey areas". An occupier of an owner of an erf either uses the property for the purposes permitted by the scheme or he does not". (my emphasis)

In the present matter, the operative from planning scheme in respect of the property is the Bedfordview Town Planning Scheme. In my view reliance on the Consolidated Johannesburg Town Planning Scheme 2011 by the respondent is misplaced.

[17] As regards the contention that the respondent acquired the right to use the property for the purposes of a business by virtue of a lease agreement concluded between him and one Jackson, which agreement became the agreement between the respondent and the applicant when applicant became owner of the property, the applicant submits that the agreement was concluded for an illegal purpose or that the property was used for an unlawful purpose. Relying on the case of ***Claasen v Africa Batignolles Construction (Pty) Ltd 1954 (1) SA 552 (O),*** the applicant contention is that since the property was let for an unlawful purpose, the agreement is void. The court in Claasen *supra* held as follows:

"... a contract perfectly valid on the face of it may stipulate for performance of an act which is illegal at the time the contract is entered into and then is void ab initio. A contract, however, is not necessarily illegal because it may be performed in a manner contrary to law. There is a presumption that the parties intended to act unlawfully and a contract which may be performed in two ways, one lawful, the other unlawful, will not be void except on proof that it was intended to perform it in the illegal way."

[18] Another reason contended for by the applicant for the eviction of the respondent is the unlawful use of the property. It is clear that the respondent was not required by the lease agreement to use the property for an unlawful purpose (i.e. conducting a business). The property was zoned Residential 1 which means the respondent was entitled to use it for the purpose of residing with his family. The alleged consent relied upon by the respondent as emanating from Roos in the email dated 14 January 2012, cannot be used as a basis to make an

illegal agreement legal. The respondent use of the premises was clearly in contrast to the Town Planning Scheme. He did not have a license to operate the business and neither was the area zoned for such purposes. The reliance on the alleged consent of the Ross cannot assist the respondent. The agreement would not be enforceable by the respondent if it was made with the object of breaking the law. In the case of ***North Western Salt Co. Ltd v Electrolytie Alkali Co. Ltd 1914AC 461***, the Court held in effect that where the court is satisfied that all the relevant facts are before it and it can see clearly from them that the contract had an illegal object it may not enforce the contract, whether the facts were pleaded or not. The defence of the respondent is defeated by clause 12 of the lease agreement concluded between him and one Jackson which provides as follows: *"The Lessee shall comply with all laws, by-laws and regulations relating to tenants or occupiers of business premises or affecting the conducting of any business carried on in the Leased Premises. The Lessee shall not contravene or permit the contravention of any of the conditions of title under which the Leased Premises are held by the Lessor, or any of the provisions of the Town Planning Scheme (refer to Annexure "K") applicable to the Leased Premises and not to do or cause or permit to be done in or about the Leased Premises anything which may be or cause a nuisance or disturbance."*

[19[*Quiet clearly the assertion of the respondent does not bear scrutiny. The respondent's conduct is clearly in contravention of the lease and the Town Planning Scheme. The consent by Roos clearly cannot override the scheme. In my view the undisputed facts are (a)* the respondent did not have the necessary permit to run a business. (b) the property is zoned Residential 1 thus no business of any kind is permitted without the requisite permission of the local authority or Town Planning Scheme and cannot be used to sanction an illegal contract.

[20] I now turn to examine the nature of the respondent's business. The applicant submits that on a proper construction of the respondent's advertising brochure particularly the treatment provided, the only inference that can be drawn is that the respondent conducts a brothel disguised as a massage parlour.

[21] The question to be determined is whether the description of the respondent's business from its advertising brochure is capable of being construed as an erotic adult entertainment or massage parlour or not.

[22] In support of his case the respondent further submit that the property was inspected by the Hawks as well as the Ekurhuleni Municipal Police Service and found nothing untoward with the business. In essence it is the respondent's contention that the business is purely a massage parlour and dispute the applicant's averment that it is a brothel. In support of his argument, the respondent submits that if the business was illegal, the Hawks or the Police would have closed it down. This argument is far from the truth, it is not the respondent's case that the Hawks or the Police during their alleged inspection were provided with the advertising brochures and permitted to view the semi-nude women in the respondent's business or brochure. In my view if the brochures and the photographs were provided to the said law enforcement agencies I have no doubt that they would have reached a different conclusion. It is abundantly clear to me that the treatment provided by the respondent's therapists suggest that the services provided is nothing more than adult erotic entertainment which is not permitted by law and against public policy.

[23] This brochure is annexed to the applicant founding affidavit and was not disputed by the respondent. Under the heading Treatment and Rates, the following is stated:

"Treatment and Rates

All of our therapists are trained in house on how to give a proper body to body massage; while some are formally qualified others are naturally sensual and seductive.

Your therapist of choice will begin the treatment by slowly running her hands up and down your body, gently introducing herself to your body as she gets undressed, leaving your mind wonder about the beauty on the other end of the gently touch you feel.

As you become accustomed to this, she will introduce a warm non scented oil of the highest quality, allowing her hands to glide up your legs and back. She then begins to give a proper Swedish massage, while enticingly using her naked body to tease your senses.

Slowly yet firmly she will work out all the aches and pains of day to day life, all the while using her naked oiled up sensual body to bring you a heightened sense of anticipation.

After putting your body under her spell with the full body to body massage technique, she will slowly ask you to turn around and begin to work the same magic on the front as she did the back.

With front body to body, warm oil and magical hands you will be no match for her and this will all culminate in a magnificent extended release that will leave your entire body tingling and ready to tackle the world afresh."

[24] This brochure also has a catalogue of semi-nude women displaying their breasts, naked bodies, pulling their underwears, sucking their fingers, one sitting on her ankles in a suggestive manner.

[25] On the undisputed evidence before me it is clear that the treatment provided in the brochure as well as a catalogue of semi-nude women displaying their naked bodies indicate that the respondent's business is

the provision of erotic adult entertainment masquerading as a massage parlour. This is impermissible especially because the business is conducted in a residential area where people from all walks of life especially young children have access to.

[26] Another submission made by the respondent is that by consenting to the use of the business as stated in the email dated the 14 January 2013, the applicants are now approaching the court with "dirty hands" and in terms of the *pari delicto* rule, the rule should be relaxed in favour of the respondent. I do not agree. In ***Jajbhay v Cassim 1939 AD 537***, the AD while affirming the principle underlying the *delictum* rule held that courts must discourage illegal transactions and that the rule must be relaxed where it is necessary to prevent injustice or to promote public policy. I do not agree that public policy would allow an adult erotic entertainment to be run under the pretext of a massage parlour without the necessary permit.

[27] In my view it would be wrong and against public policy to allow the respondent to use the property illegally with a hope that the use will be legalised in due course. In conclusion I am satisfied that the respondent has no rights to be in the business and never had such rights. A suspension or stay of the proceedings to afford the respondent an opportunity to legalise his illegal use or occupation would be tantamount to condonation of criminal behaviour. It follows that the applicant is entitled to relief sought in the notice of motion and for the above reasons the counter-application has no merit and falls to be dismissed.

I make the order in the following terms:

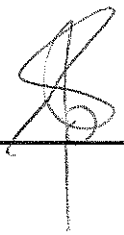
1. The respondent and all those holding occupation through or under the Respondent is evicted from the property known as the Remaining Portion of Erf 567 Bedford Extension 97 and situated 48A Arbroath Road, Bedfordview ("the property");

2. The Respondent and all those holding occupation through or under the Respondent are ordered to vacate the property on or before 28 March 2013;

3. If the respondent has not vacated the property by the date referred to in 2 above, the Sheriff is hereby authorised and required to carry out the eviction order, by removing from the property the Respondent and all persons who occupy the property by, through or under him;

4. The Respondent is interdicted and restrained from carrying on of a business in contravention of the Bedfordview Town Planning Scheme, 1995;

5. The Respondent is to pay the costs of this application.



MATHOPO J

Appearances:

For the plaintiff	:	Adv Pullinger
Instructed by	:	David Hugo Attorneys
For the defendant	:	Adv Steyn
Instructed by	:	Allis Attorneys
Date of hearing	:	31 January 2013
Date of judgment	:	27 February 2013

REPUBLIC OF SOUTH AFRICA