REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 41112/12

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

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DATE SIGNATURE

In the matter between:

THE CITY OF JOHANNESBURG Applicant

And

CABINET PROPS CC First Respondent
GIO CONSTRUCTION AND PLANT HIRE (PTY) LTD Second Respondent
GIO LOGISTICS (PTY) LTD Third Respondent

J U D G M E N T

KEIGHTLEY, AJ:

INTRODUCTION

[1] These two cases essentially involve the same issues and parties. It was both convenient for the parties, and for the court, to hear them together, and to deliver a combined judgment. Where necessary, I will refer to the matters as the "Cabinet Props matter" (case number 41112/12) and the "Abbatemarco matter" (case number 44622/12) respectively.

[2] In the Cabinet Props matter, the first respondent is the owner of certain immovable property, and in the Abbatemarco matter, the first and second respondents are the executors in the deceased estate of the late Mr Abbatemarco, who was the owner of a second immovable property. It seems that although the two properties are held under different title deeds, and identified as separate erfs, they form a physical unit and are occupied and used as one property.

[3] The applicant is the City of Johannesburg (the City). It seeks an interdict against the first and second respondents in each case from using, or permitting the use of the properties in contravention of the Johannesburg Town Planning Scheme, 1979 (the Scheme). I will deal with the position of the third respondent in more detail later in my judgment. For clarity's sake, when I refer generally to "the respondents" in this judgment, it must be read as a reference only to the first and second respondents in both cases. I will specifically refer to the third respondent where appropriate.

[4] The City avers that the properties are zoned “agricultural” under the Scheme. As such, the permitted use of the properties is restricted to that of “agricultural purposes” and “dwelling houses”. It avers further that the properties are being used for purposes of a brick and paving manufacturing plant and as offices for the business related to this manufacturing enterprise. This use, the City avers, is not permitted under the Scheme.

[5] The City submits that in terms of section 58 of the Townships and Town Planning Ordinance, it is obliged to enforce the provisions of the Scheme. It is applying for interdicts against the aforementioned respondents in compliance with this obligation. The City points out further that any person who contravenes the Scheme, or who uses property for purposes not permitted by the Scheme, is guilty of a criminal offence.

[6] None of the respondents dispute that the properties are being used for the purposes averred by the City. However, there is a dispute as to whether the properties are indeed zoned as agricultural under the Scheme. The respondents assert that they are zoned “Business and Commercial”. For reasons that will become apparent shortly, I will deal with this dispute at a later stage.

[7] Prior to hearing the merits of the City’s application, and without notice, I was faced with an application from the Bar by counsel representing the first and second respondents in both matters. He contended that the matter was not ripe for hearing as the joinder of the third respondent in both matters, Gio Logistics (Pty) Ltd, “was incomplete”. In order to avoid any unnecessary

delay, I decided to deal with this as a point *in limine*, rather than as a separate application (if indeed it can even be classified as such), and to hear argument from both sides on this point, as well as on the merits of the City's application, at the same time.

[8] Accordingly, the first issue I must deal with in my judgment is that of whether the City's application is ripe for hearing on the basis that the joinder of the third respondent is "incomplete". Of course, if I decide that it is not ripe for hearing, I will not proceed to deal with and decide the merits of the matter now, albeit that I heard argument on them.

IS THE MATTER RIPE FOR HEARING?

[9] By way of background to this issue, I should explain that the City sought to join the third respondent in both matters after the initial respondents took a non-joinder point in their respective answering affidavits. These respondents averred that the properties had been let to Geo Logistics (Pty) Ltd, which company was responsible for conducting the relevant activities on the properties. They contended that the non-joinder of Geo Logistics (Pty) Ltd was fatal to the application.

[10] Subsequent thereto the City brought an application to join Geo Logistics as the third respondent in each of the matters. The City made it clear in its application for joinder that it disputed that Geo Logistics had a direct and substantial interest in the City's application, and that it was seeking joinder as

a precautionary measure. There was no opposition to the joinder, and it was granted on 14 May 2014 in both matters.

[11] The order directing the joinder did not include an order directing the City to serve a copy of the papers on the third respondent. It is common cause that the City never did so. However, it is apparent from the papers that the City served, by way of messenger, a copy of the Notices of Setdown, and the City's heads of argument on the third respondent in June and in August 2014.

[12] It is further common cause that the third respondent is represented by the same attorney that represents the other respondents, and that it has never requested a copy of the papers from the City. One would assume that it would be a simple matter for the third respondent to obtain a copy of the papers from its own attorney.

[13] I was also advised by counsel for the City, Mr Pullinger, at the hearing of the matter that the third respondent had served a notice of intention to oppose on the City in the Cabinet Props matter, although this Notice is not included in the court's file. A copy of the notice was handed to me. It seems to have been served in August 2014, but there is no answering affidavit in the court file following this notice of intention to oppose. I was also provided with copies of an email exchanged between the attorneys for both sides, which had been forwarded to both Mr Pullinger, for the City, and Mr Dobie, counsel for the respondents. In this email, dated 26 August 2014, the attorney for the respondents (including third respondent) confirms that he had served notices to oppose on behalf of the third respondent in both matters, but that the third

respondent hadn't yet been served with the application. From the remainder of the email it is clear that the respondent's attorney was aware that the application had been set down for 13 October 2014.

[14] Mr Dobie's submission is that until the application papers have been filed on the third respondent, the joinder of that respondent is not complete. Accordingly, he submits, the application is not ripe for hearing and it should be postponed to permit the application to be served and third respondent to participate as an active party in the proceedings, should it elect to do so.

[15] Mr Pullinger submits that the third respondent was only joined as a cautionary measure: it does not have a direct and substantial interest in the matter, and the matter can proceed without it. Mr Pullinger submits further that the Rules do not require an applicant for joinder to serve copies of the papers on the joined party, and the order of joinder contained no such direction. He also points to the fact that the third respondent is represented by the same attorney as the other respondents. Thus, it had a copy of the papers at its disposal. In addition, the third respondent was clearly aware that the matter was scheduled to be heard on 13 October 2014, and the inference that can be drawn from this is that it elected, at its own risk, not to appear in the hope that the technical non-joinder point raised by Mr Dobie on behalf of the remaining respondents would result in a postponement of the matter.

[16] In my view, this issue is quite easily resolved without my having to make a determination on whether the third respondent has a direct and substantial

interest in the matter, and whether the City was obliged to serve the application papers on the third respondent before it could move the application before me.

[17] I am not quite sure what is meant by Mr Dobie's submission that the non-service of the papers renders the joinder "incomplete". I can understand the merit in the argument that a court should not grant relief against a party in its absence in circumstances where they have been joined in the matter, and have not indicated that they will abide by the order of the court. This is a simple application of the *audi alteram partem* principle, i.e. an order should not be made against a party until that party has been given a proper opportunity to be heard.

[18] However, in the present matter, the City does not seek relief against the third respondent. Mr Pullinger made this quite clear at the hearing of the matter. It seeks only to interdict the first and second respondents in both matters from using, or permitting the properties to be used for purposes not permitted under the Scheme. Should it become necessary or advisable for the City to seek relief directly against the third respondent, it may do so by way of an additional application for an interdict against it.

[19] In my view, the third respondent has had ample notice of the application and its set down. It has had ample notice of the issues at hand by virtue of the City delivering the heads of argument on it. In addition, its attorneys have copies of all the papers in the application. The third respondent did not appear itself at the hearing to argue the technical point raised by Mr Dobie. It

appears to have elected not to put in an appearance, and accordingly it assumed the risk that the matter would not be postponed and that an interdict would be granted in its absence. In addition, as I have pointed out, the City does not seek an interdict against the third respondent.

[20] In these circumstances, the principle of *audi alteram partem* will not be violated by proceeding on the merits of the application without an appearance on the part of the third respondent. To hold differently would, in my view, be putting form above substance, and would permit a clearly technical argument to prevail in circumstances where the interests of justice do not require this.

[21] Are there any other considerations that might render the application not ripe for hearing on the basis of the non-service of the papers on the third respondent? To my mind, the only other basis on which the argument may succeed is that the non-joinder of the third respondent renders the application fatal. Of course, for this argument to succeed, I would have to find that joinder is only "complete" when the papers are served on the third respondent.

[22] In my view, I do not need to get to that point. For a non-joinder to be fatal in a case like this, the participation in the litigation of the party whose joinder is in issue must be necessary for the relief that is sought to be effective. It is common cause in this matter that the lease agreements between the other respondents and the third respondent contains a clause to the effect that:

> "The Lessee shall (n)ot contravene or permit the contravention of any law, by-law or statutory regulation or the provisions of any license or consent relating to or affecting the premises, the occupation thereof or the conduct of he Lessee's business therein."

[23] The lease agreements also contain a breach clause which provides that the Lessee will be in breach of the agreement if it "consistently breach(es) any one or more of the terms of this Lease in such manner as to justify the Lessor in holding that the Lessee's conduct is inconsistent with the Lessee's intention or ability to carry out the terms of the Lease".

[24] It is clear from these terms that the continued use of the property contrary to the Scheme will constitute a breach of the lease agreement permitting the Lessor (in this case the first respondent in the Cabinet Props matter, and the first and second respondents in the Abbatemarco matter) to cancel the lease.

[25] For this reason, the participation of the third respondent in the City's application is not necessary for the relief the City seeks to be effective. If an interdict is granted against the other respondents, they will be obliged, on pain of committing a criminal offence, to cancel the leases with the third respondent and so to give effect to the interdicts.

[26] For these reasons, I find that there is no merit in the respondents' contentions that the non-service of the application papers on the third respondent renders the joinder "incomplete", and that the matter is not ripe for hearing. I find that the City is entitled to proceed with its application.

THE MERITS OF THE APPLICATION

[27] The only issue in dispute between the parties in the City's application is whether the properties are in fact zoned agricultural. The respondents submit that they are not. They rely for their contention on a Tax Invoice issued by the City in September 2013 in respect of the properties. On the reverse side of the Tax Invoice, under "Property Rates", appears the following citation "Category of Property: BUSINESS & COMMERCIAL". The respondents assert that this places material doubt on whether the City is correct in its assertion that the properties are zoned agricultural.

[28] Quite how a Tax Invoice can ever be regarded as proof of the correct zoning of a property escapes me. There can be any number of reasons for a description like the one relied on by the Respondents to be included in a Tax Certificate. The description could be included in error, or it could be a description of the property rate applicable, rather than the zoning of the property under the Scheme. The evidence before me indicates that where properties are being used for purposes other than their permitted purpose, like those in the present case, they are rated on the nature of their use, rather than the nature of their zoning. In my view, this is a perfectly reasonable explanation for the particular description at issue before me.

[29] Be that as it may, I do not need to exercise myself further on this issue. On being challenged by the respondents as to the correctness of the zoning of the properties, the City attached to its replying affidavit a Zoning Information sheet completed by one Lerato Mahonga, who is employed by the City in its

Geo-Informatics Department. Ms Mahonga confirms by way of affidavit that the information on the Zoning sheet is correct. It is to the effect that according to the Scheme the properties are zoned "Agricultural and Undetermined".

[30] This puts to bed any dispute there may be as regards the zoning of the properties. While it is correct, as Mr Dobie pointed out, that the proof of zoning was only provided by the City in reply, this did not, in my view, amount to the City making out its case in its replying affidavit. The City made the necessary averment in its founding papers that the property was zoned agricultural. It provided proof to this effect when it became necessary to do so because the respondents disputed the zoning in their answering affidavit. There was nothing untoward in this.

[31] In the circumstances, it seems to me that the City is entitled to its relief. To refuse to grant an interdict in this case would be to permit the commission of a criminal offence. I would be acting contrary to the principal of legality were I to do this. As the Supreme Court of Appeal recently held:

> "Courts have a duty to ensure that the doctrine of legality is upheld and to grant recourse at the instance of public bodies charged with the duty of upholding the law."[1]

[32] As regards the question of whether a court has a discretion to refuse to grant an interdict in cases like the present, the SCA quoted with approval[2] the

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1 Lester v Ndlambe Municipality [2013] ZASCA 95 at para 24

following dictum of Harms J in United Technical Equipment Company (Pty) Ltd v Johannesburg City Council:[3]

> "It follows from an analysis of these cases that discretion can, if at all, only arise under exceptional circumstances.

[33] No exceptional circumstances arise in this case.

[34] Two final issues remain to be dealt with briefly. Firstly, while the respondents initially sought relief in the form of a counter-application for an order staying the interdict application pending the outcome of a consent-use application, rezoning application or realignment application on its part, they did not persist in seeking this relief when the matter was heard.

[35] The second issue is that of costs. Mr Pullinger for the City sought an order for costs on a punitive scale. In my view, this is not a case where an order to this effect would be appropriate. The respondents were entitled to oppose the relief sought even if the effect of so doing was to extend the illegal use of the property. This is part and parcel of litigation. While the City is entitled to its costs, it is not entitled to a punitive costs order.

ORDER

[36] In the circumstances, I make the following orders:

[37] Under Case no: 41112/2012

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2 At para 23
3 1987 (4) SA 343 (T) at 347F-H

1. The first and second respondents are hereby interdicted and restrained from using or causing or permitting the use of certain immovable property, being PORTION 50 REMAINING EXTENT FARM 327 OLIFANTSVLEI TOWNSHIP, REGISTRATION DIVISION I.Q., GAUTENG, situate at 50 MAIN SERVICE ROAD, OLIFANTSVLEI ("the property") for any purpose other than for agricultural purposes, and dwelling houses, as permitted and prescribed by the zoning "Agricultural" in terms of 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 and second respondents are interdicted and restrained from using or permitting the property to be used for purposes of a brick manufacturing business, and for business purposes;

3. Within 4 (FOUR) weeks from the date of this order, the first and second respondents are to remove from the property, or cause to be removed from the property 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 same scheme;

4. The first and second respondents' counter application is dismissed;

5. The first and second respondents are ordered to pay the costs of and in connection with this application, and the counter application, on a party and party scale.

[38] Under Case no: 44622/2012

1. The first and second respondents are hereby interdicted and restrained from using or causing or permitting the use of certain immovable property, being PORTION 88 OF FARM 327 OLIFANTSVLEI TOWNSHIP, REGISTRATION DIVISION I.Q., GAUTENG, situate at 88 MAIN SERVICE ROAD, OLIFANTSVLEI ("the property") for any purpose other than for agricultural purposes, and dwelling houses, as permitted and prescribed by the zoning "Agricultural" in terms of 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 and second respondents are interdicted and restrained from using or permitting the property to be used for purposes of a brick manufacturing business, and for business purposes;

3. Within 4 (FOUR) weeks from the date of this order, the first and second respondents are to remove from the property, or cause to be removed from the property 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 same scheme;

4. The first and second respondents' counter application is dismissed;

5. The first and second respondents are ordered to pay the costs of and in connection with this application, and the counter application, on a party and party scale.

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R KEIGHTLEY
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date Heard: 13 October 2014

Date of Judgment: October 2014

Counsel for the Applicants: Adv. A W Pullinger

Instructed by: Moodie & Robertson

Counsel for the Respondent: Adv. Dobie

Instructed by: Michael Mclouchlin & Co Athe Attorney