REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

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

DATE SIGNATURE

CASE NO: 2017/6617

In the matter between: -

EKURHULENI METROPLITAN MUNICIPALITY Applicant

And

ERASMUS, JACOBUS HENDRIKUS Respondent

JUDGMENT

OPPERMAN J

INTRODUCTION

[1] The respondent is the registered owner of […] K. Street, Kempton Park Extension 2 (Erf […] Kempton Park, Extension 2 Township, Registration Division I.R., Gauteng) ("*the property*").

[2] The applicant has launched this application against the respondent by virtue of the fact that he is the registered owner of the property and is contravening the applicant's Ekurhuleni Town Planning Scheme 2014 ("*the Scheme*"), by using the property for purposes of a boarding house and boarding rooms which do not form part of the dwelling house erected on the property. The respondent has not placed the material express terms of the Scheme, upon which the applicant relies, in dispute.

[3] The applicant seeks an order interdicting and restraining the respondent from:

3.1. using or causing or permitting the use of the property for any purpose other than for dwelling houses and private roads, as permitted by the zoning '*Residential 1*' in the Ekurhuleni Town Planning Scheme 2014;

3.2. carrying on or causing or permitting the property to be used for purposes of a boarding house and boarding rooms; and

3.3. costs on the scale as between attorney and client.

FACTS UNDERPINNING THE RELIEF SOUGHT

[4] The Scheme was prepared, and published, by the applicant as an approved scheme in Provincial Gazette 103 of 14 January 2015 from which date it came into

operation ("*the effective date*"). At all material times and subsequent to the effective date, the applicant has been obliged, in terms of Section 58 of the Town Planning and Townships Ordinance, 1986 ("*the Ordinance*"), to observe and enforce the provisions of the Scheme.

[5] In terms of Section 58 of the Ordinance, any person who contravenes or fails to comply with the provisions of the Scheme shall be guilty of an offence.

[6] The property is zoned '*Residential 1*' in terms of the Scheme. The Scheme provides that the only purpose for which buildings may be erected and used and the only purposes for which land may be used which are zoned as '*Residential 1*', are '*dwelling house*' and '*private roads'*. The terms '*dwelling house*' and *'private roads*' are defined in the Scheme as follows: '*dwelling house*' means '*a dwelling unit which has no other dwelling unit above or below it, but which may abut or be physically connected with one or more dwelling houses and may include related outbuildings'* and '*private roads*' means '*land used for access purposes of which the ownership is vested in a legal entity other that the Municipality or Controlling Authority and shall be regarded as a street for the purposes of building lines and servitudes'*

[7] By reason that the property is zoned '*Residential 1*' in terms of the Scheme, the only purpose for which buildings may be erected and used and for which the land may be used is a dwelling house and private roads.

[8] The Premier has, in Proclamation No 23 dated 3 December 1994, declared the Greater Germiston Transitional Local Council an authorized local authority for the purposes of chapters II, III and IV of the said Ordinance. The applicant is the successor in law of the Greater Germiston Transitional Local Council and is an

authorized local authority for the purposes of chapters II, III and IV of the said Ordinance.

[9] On 16 September 2015 Monah Motsemme ('*Motsemme*'), a City Development Inspector employed by the applicant, conducted an inspection of the property and observed that it was being illegally used as a 'Boarding House and Rooms' in contravention of the Scheme. The use of the property for this purpose is undisputed.

[10] On 28 September 2015 the applicant addressed to the respondent, via registered mail, a notice of contravention of the Scheme ('*the notice*'). In addition, the applicant instructed the respondent, in terms of s 42 of the Town Planning and Townships Ordinance, 15 of 1986, to cease all illegal use of the property and restore it to its original purpose within 28 days of receipt of the notice.

[11] The respondent denies having received any of the demands or letters sent prior to the application having been launched. He denies being resident at the property and draws attention to the sheriff's return in respect of the letter of demand which is dated 28 September 2015 but only served on 22 September 2016 (a year later), which reflects that the letter was affixed to the principal door of the property.

[12] In opposition to the application the respondent has filed both an answering affidavit and a document styled "*Notice of Counter Motion*." The Notice of Counter Motion serves as a counter-application. In the Notice of Counter Motion the respondent sought a postponement of the main application and in the event that the relief sought in the main application is granted, that such relief be suspended pending the final adjudication of an application, lodged with the applicant on 14 June 2017, four months after the application was served, for the rezoning of the property.

In the heads of argument filed on behalf of the respondent he stated that he would no longer be persisting with the application for a postponement of the matter.

DEFENCES RAISED

[13] The respondent relied on the following defences, namely:

13.1. the non-joinder of those people presently leasing buildings on the property;

13.2. the applicant's decision to institute these proceedings is "*ultra vires*"; and

13.3. the fact that he has now made application to the applicant to have the property rezoned from Residential 1 to Residential 4.

[14] During argument, the *ultra vires* argument was abandoned and the non-joinder point, conceded.

Non-joinder of the tenants

[15] If a party has a direct and substantial interest in any order the court might make in proceedings he or she is a necessary party. The term '*direct and substantial interest'* means an interest in the right which is the subject matter of the litigation and not merely a financial interest which is only an indirect interest in such litigation.[1] In High Court practice, it has been held that the rule of joining all parties who have a direct and substantial interest is not a mechanical or technical one which *'must be*

[1] *ABBM Printing and Publishing (Pty) Ltd v Transnet Ltd* 1998 (2) SA 109 (W)

ritualistically applied'[2] and compliance should not be insisted on if it would be impractical.[3] It must be borne in mind that a defendant's right to demand that other parties be joined, which must be distinguished from the position where the court is asked to exercise its discretion to join some other party, is very limited. A plaintiff need not join as co-defendant(s) lodgers, boarders or subtenants, when the plaintiff sues the defendant (tenant) for ejectment.[4] The respondent has, other than to baldly state that '*they have a direct and substantial interest in the outcome of this application*', made no attempt to appraise the court of what that interest comprises. His claims that, should prayers 1 and/or 2 of the notice of motion be granted, they shall be bereft of adequate housing and shall have to be ejected from the property; and in the event that the relief sought by the applicant is granted, the occupants will have to be ejected and that '*They have no other place to stay other than the property…*' has no foundation in fact. He has failed to attach a single affidavit from any of the occupants confirming these allegations. The respondent has not alleged that the '*some 45* ' occupants are impecunious people or are unemployed. His suggestion that without his benevolent benefaction the occupants would be relegated to '*typical informal settlements*' and be severely disadvantaged are without any basis in fact.

[16] For all these reasons, the point of non-joinder was correctly conceded and is dismissed.

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2 *Wholesale Provisions Supplies CC v Exim International CC* 1995 (1) SA 150 (T) at 158D–E; and *Rosebank Mall (Pty) Ltd v Cradock Heights (Pty) Ltd* 2004 (2) SA 353 (W) at 368C–E

3 *Transvaal Agricultural Union v Minister of Agriculture and Land Affairs* 2005 (4) SA 212 (SCA) at 226H–J

4 *Sheshe v Vereeniging Municipality 1951 (3) SA 661 (A); Rosebank Mall (Pty) Ltd v Cradock Heights (Pty) Ltd 2004 (2) SA 353 (W) at 371H–373B*

Pending application for rezoning of the property

[17] The only substantive defence upon which the respondent relies is that he has submitted an application to the applicant for the rezoning of the property from Residential 1 to Residential 4. That application was lodged with the applicant on 14 June 2017.

[18] The respondent admits that he acquired the property with the express purpose of providing people with transient housing and also affordable and adequate housing for those setting out in life and, in fact, he adapted the property for that very purpose. The fact that the respondent has made an application for the rezoning of the property is an express acknowledgement that his use of the property as a boarding house is unlawful and in contravention of the Scheme and that he is guilty of an offence. He, however, waited until after he had been served with this application before applying to the council for the rezoning of the property.

[19] Until such time as the respondent's application has been adjudicated upon, he is obliged to comply with the laws of the Scheme and adhere to its regulations.

INTERDICT

[20] The applicant seeks an interdict against the respondent in order to prevent him from using or causing or permitting the use of the property for any purpose other than for dwelling houses and private roads, as permitted by the zoning '*Residential 1*' in the Ekurhuleni Town Planning Scheme 2014.

[21] The law in regard to the grant of a final interdict is settled.[5] An applicant for such an order must show a clear right; an injury actually committed or reasonably apprehended; and the absence of similar protection by any other ordinary remedy. Once the applicant has established the three requisite elements for the grant of an interdict, the scope, if any, for refusing relief is limited. There is no general discretion to refuse relief. That is a logical corollary of the court holding that the applicant has suffered an injury or has a reasonable apprehension of injury and that there is no similar protection against that injury by way of another ordinary remedy.

A Clear Right

[22] The source of the applicant's right is statutory and is recorded in the Scheme. The respondent does not deny that the applicant has a clear right to the interdict.

Apprehension of harm

[23] In *United Technical Equipment Co v Johannesburg City Council*[6] the Full Court of this Division summarised the position as follows at 348 I - J (the respondent being the City Council):

> '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 the illegal use will be protected indirectly by the suspension of an interdict.'** (emphasis provided)

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5 *Hotz and Others v University of Cape Town* 2017 (2) SA p 497

6 1987 (4) SA 343 (T) at 348 I-J; *Lester v Ndlambe Municipality and others,* 2015 (6) SA 283 (SCA) at para [27]

[24] By failing to assist the applicant to comply with its legislative mandate would ensure the harm, which the Scheme is aimed at preventing.

No Alternative Remedy

[25] The purpose of an interdict is to put an end to conduct in breach of the applicant's rights. The applicant invokes the aid of the court to order the respondent to desist from such conduct and, if the respondent does not comply, to enforce its order by way of the sanctions for contempt of court. Secondly, the existence of another remedy will only preclude the grant of an interdict where the proposed alternative will afford the injured party a remedy that gives it similar protection to an interdict against the injury that is occurring or is apprehended. That is why in many cases a court will weigh up whether an award of damages will be adequate to compensate the injured party for any harm they may suffer. There may also be instances where, in the case of a statutory breach, a criminal prosecution, in appropriate circumstances, will provide an adequate remedy, but there are likely to be few instances where that will be the case. Thirdly, the alternative remedy must be a legal remedy, that is, a remedy that a court may grant and, if need be, enforce, either by the process of execution or by way of proceedings for contempt of court. The fact that one of the parties, or even the judge, may think that the problem would be better resolved, or can ultimately only be resolved, by extra-curial means, is not a justification for refusing to grant an interdict.[7]

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[7] *Hotz* matter *supra*

[26] The applicant submits that it has exhausted all other remedies that are available to it. It delivered a Notice to the respondent, which was followed up by a letter of demand both of which failed to elicit a response from the respondent.

NOTICE OF COUNTER MOTION

[27] The relief relating to the postponement was not pursued. The respondent did, however, request that in the event of the order being granted, it be stayed pending finalisation of the re-zoning application. The applicant opposed this request relying on, in the main, *United Technical Equipment* (supra)[8] at p 347 where the general principle was stated that a court has no general discretion to defer the operation of an interdict and has none when doing so would permit the commission of an offence. Mr Birkowitz drew attention to the decisions of *Hotz* (supra) and *Readam*[9], where such principles were re-stated.

[28] Mr Thompson, representing the respondent, argued that this matter is to be distinguished from the *United Technical Equipment* matter as this case does not involve a business whereas the *United Technical Equipment* matter related to a company. The distinction escapes me, but it would appear that the *United Technical Equipment* principle has been applied to both companies and individuals.[10] Be that as it may, the respondent is clearly too, running a business although he failed to disclose the terms of the agreements concluded with his tenants.

[29] Assuming, the court were empowered to order such a stay, no facts have been placed before me to assess what the considerations for a successful application

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8 Footnote 6
9 *Readam SA (Pty) Ltd v BSB*, 2017 (5) SA 184 (GLD)
10 *Hotz* (supra)

for re-zoning are, what the respondents prospects of success in this regard are and when this process will, in all likelihood, be completed. I thus have no facts upon which to exercise a judicial discretion, assuming I have one.

COSTS ON AN ATTORNEY CLIENT SCALE

[30] The applicant seeks a costs order on the scale as between attorney and client and argues that it has a statutory duty to enforce the provisions of the Scheme. The respondent contends that he did not receive the notices sent to him. The respondent was, however, aware that his activities at the property contravened the Scheme. From acquisition of the property until receipt of this application, the respondent has done very little to ensure that his activities are legalised. In the words of Southwood J[11]:

> 'This deliberate flouting of the law in the face of lawful attempts by the applicant to perform its statutory duty warrants a special costs order. To permit such conduct would result in anarchy, particularly in a city where it is notorious that contraventions of the scheme, in circumstances such as the present, are widespread.'

[31] There is no good reason why the applicant should be out of pocket when it performs its statutory duty of enforcing the Scheme.

ORDER

[32] The applicant has made out a proper case for the relief sought in the notice of motion and I accordingly grant the following order:

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[11] *City of Tshwane Metropolitan Municipality v Grobler and Others* 2005 (6) SA 61 (T) at para12

32.1. The respondent is interdicted and restrained from using or causing or permitting the use of the immovable property being Erf […] Kempton Park, Extension 2 Township, Registration Division I.R., Gauteng situate at […] K. Street, Kempton Park extension 2 (‘*the property*’) for any purpose other than for dwelling houses and private roads, as permitted and prescribed by the zoning ‘*Residential 1*’ in the Ekurhuleni Town Planning Scheme 2014 for so long as the property is so zoned.

32.2. In particular, and without limiting the generality of the Order in paragraph 33.1 hereof, the respondent is interdicted and restrained from carrying on or causing or permitting the property to be used for purposes of a boarding house and boarding rooms.

32.3. The respondent is ordered to pay the costs of this application as between attorney and client.

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I OPPERMAN
Judge of the High Court
Gauteng Division, Johannesburg

Heard: 5 December 2017
Judgment delivered: 12 December 2017
Appearances:
For Applicant: Adv Birkowitz
Instructed by: Moodie & Robertson
For Respondent: Adv Thompson
Instructed by: Schumann Van Den Heever & Slabbert Inc