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REPUBLIC OF SOUTH AFRICA



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

CASE NO.: 13191/17

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

4/6/2019

DATE

SIGNATURE

In the matter between:

EKURHULENI METROPOLITAN MUNICIPALITY Applicant

And

VELAPHI MOSES NKOSI First Respondent

(ID NUMBER: ...)

SIBONGILE PETRONELLA NKOSI Second Respondent

(ID NUMBER: ...)

JUDGMENT

BOKABA AJ

1. The applicant, Ekurhuleni Metropolitan Municipality, seeks an order interdicting and restraining the respondents from using, continuing to use or permitting the use of their property for purposes other than those permitted for properties zoned as “Residential” in terms of the Ekurhuleni Town Planning Scheme 2014 (“the Scheme”). In particular, the applicant seeks to interdict and restrain the respondents from using their property as a boarding house, a lodging house or for accommodation of more than one household.
2. The respondents, who are married in community of property, are the registered owners of the property situated at [...] Drive, Norkem Park, Extension 4, Kempton Park, Gauteng. It is common cause that the respondents do not live on the property but have erected and constructed seventeen (17) units on the property for purposes of boarding and lodging. It is also undisputed that the buildings and units were erected without the lawful approval by the applicant and that, to date, the respondents have not made any application to amend the Scheme to permit or include business rights.
3. The Scheme was promulgated on 14 January 2015 and established in terms of section 18 of the Town Planning and Township Ordinance 15

of 1986 (“the Ordinance”). In terms of section 19 of the Ordinance the general purpose of a town planning scheme is to achieve the coordinated and harmonious development of the area to which it relates in such a way as will most effectively tend to promote the health, safety, good order, amenity, convenience and general welfare of such area as well as efficiency and economy in the process of such a development.

4. Paragraph 13.1 of the Scheme provides that land or building shall only be used as stipulated in Table C of the Scheme. Table C of the Scheme prescribes that land use under “Residential” may only be used for boarding house or private room.

5. It is apparent that the municipality carried out an inspection on the applicant’s property on two separate occasions, through its City Planning Inspector, Ms Mokgadi Matlou. During the first inspection which was carried out on 20 July 2015, Ms Matlou found that there were seventeen rooms or units on the property which were not interconnected and seven (7) of which were still under construction. On 28 August 2015 and, following the inspection, the Municipality issued a contravention notice which reads, in part, as follows;

*“CONTRAVENTION OF THE EKURHULENI TOWN
PLANNING SCHEME, 2014: ALLEGED ILLEGAL LAND USE
OF ERF [...], [...] DRIVE, NORKEM PARK X4.*

A recent site inspection conducted by an official of this Department on 20 July 2015, has revealed that the subject property is being illegally used for the purpose of 'Boarding Rooms'.

In terms of the abovementioned Town Planning Scheme, the abovementioned property is currently zoned Residential 1 purposes. The use which is presently conducted from the property is illegal, in terms of this zoning and therefore constitutes a direct contravention of the said town planning scheme and consequently renders you liable for prosecution.

You are hereby accordingly instructed, in terms of the provisions of section 42 of the Town Planning and Township Ordinance 15 of 1986 (as amended), to cease the abovementioned illegal use and restore the property to its original purpose, within twenty-eight (28) days from the day of this letter.

...

6. The second inspection on the property was carried out by Ms Matlou on 30 June 2016. In terms of the inspection report compiled by Ms Matlou on 27 July 2016, there were seventeen (17) rooms on the property, seven (7) of which were still under construction and nine (9)

rooms were rented out. She also found out that one of the rooms was used by the caretaker of the property. The report also reveals that there was an adult male who confirmed to have been renting one of the rooms for a period of two (2) months. Another notice of contravention was issued by the Municipality through its attorneys on 3 November 2016. In terms of the notice, the respondents were instructed to cease using their residential home as boarding rooms and further instructed to restore the property to its original purpose in terms of the Scheme.

7. The respondents have, in their answering papers, conceded that the Scheme does not make provision for a boarding house to be erected on the property and that the owner may only, through special consent or written consent, use the property for purposes other than the primary uses as stipulated in the Scheme. The respondents further state that they intend to bring an application for special consent to the municipality in due course. They further state that the tenants who reside on the property do not have their own dwelling and depend on accommodation facilities offered by the respondents. It is also the respondents' contention that the application brought by the Municipality is tantamount to an application for eviction given that the tenants who are currently occupying the property will have to be moved, including some minor children who reside on the property.

8. The Municipality has invoked, in the main, the provisions of section 42 of the Ordinance in seeking the relief in this application. Section 42 of the Ordinance empowers the local authority, where any person acts in conflict with a provision of a town planning scheme and undertakes or proceeds with the erection or alteration or addition to a building to direct a person, to discontinue such erection, alteration, addition or other work. In terms of section 42(5) any person who contravenes or fails to comply with the directive issued in terms of subsection (1) shall be guilty of an offence. Furthermore, section 58 of the Ordinance provides that any person who contravenes or fails to comply with a provision of an approved scheme shall be guilty of an offence.
9. The respondents have clearly, both in their answering papers and during oral submissions, conceded that they are in breach of the Scheme and the Ordinance. They, however, state that they require reasonable time to apply for rezoning whilst their tenants are also afforded an opportunity to search for affordable alternative accommodation in the area.
10. I am only able to restate that a town planning scheme is conceived in the general interests of the community and the protection of those interests falls within the ambit of the municipal function.¹ In my view

¹ *BSB International Link CC v Readam South Africa (Pty) Ltd* 2016 (4) SA 83 (SCA), at para 24;

what the respondents seek is to continue with their illegality while at some point in the future, or an indeterminate time, they will apply to the Municipality for the rezoning. This is untenable. As stated, the law could not countenance an ongoing illegality which was also criminal offence as to do so would be to subvert the doctrine of legality and to undermine the rule of law.²

11. I find that the respondents have not raised a genuine concern about the alleged presence of minor children in the boarding houses. The respondents have made no genuine attempt to appraise the Court of the full facts around the presence of minor children who will be affected by the order sought by the Municipality. The respondents' claim in this regard is without any basis in fact.³

12. I am mindful that there are three (3) requirements for a final interdict sought by the Municipality in this matter. The three (3) requisites for the granting of a final interdict are;

12.1. A clear right on the part of the applicant;

12.2. An injury actually committed or reasonably apprehended;

The Administrator, Transvaal and The First Investments (Pty) Limited v Johannesburg City Council 1971 (1) SA 56 (A), at 70D.

² *BSB International Link CC*, supra, at para 22.

³ See - *Ekurhuleni Metropolitan Municipality v Erasmus* [2017] ZAGP JXC 393 (12 December 2017).

12.3. The absence of any other satisfactory remedy available to the applicant.

13. I am satisfied that the three (3) requisites are present for the grant of a final interdict in this matter. As to the existence of a clear right, the respondents have conceded, correctly so in my view, that the Municipality's right is founded under the Scheme. The respondents go further to concede that they have contravened the provisions of the Scheme.

14. As to the apprehension of harm, there is an obligation on the Municipality to enforce the law in the face of an ongoing illegality perpetrated by the respondents. This obligation has been expressed as follows;

“[27] I conclude by reverting to what Haram J said in United Technical Equipment (supra) with regard to the City Council's obligations to enforce the law in the face of an ongoing illegality being perpetrated by the appellant company in that case:

‘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 land illegally with the 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.”⁴

15. Allowing the respondents to continue to perpetuate their illegality with the hope that at some point in the future they will apply for the rezoning of the property whilst on the other hand precluding the Municipality from discharging its obligations under the Scheme, will be tantamount to countenancing an ongoing illegality which is also a criminal offence.

16. As to the alternative remedy, all the respondents could say is that they need time to apply for the rezoning of the property and that this will permit the resolution of any concerns raised by the Municipality in terms of the Scheme. The respondents seek to be afforded additional time to apply to the Municipality for rezoning, the outcome of which may not even provide the Municipality and the community in whose

⁴ *Lester v Ndlambe Municipality* 2015 (6) SA 283 (SCA), at para 27;
See also – *BSB International Link CC*, supra, at para 22.

interest the Scheme has been conceived, with a remedy. In my view, further delays in compliance with the law, in particular, the Scheme, will cause the continued violation of a clear right and a continuing injury to the Municipality and the community.

17. It is my view that there will not be any adequate remedy for the continued unlawfulness perpetrated by the respondents other than the enforcement of the Scheme. To fathom any other remedy or delay will lead to unjust result.
18. The applicant seeks costs on a scale between attorney and client. The respondents have been aware since 28 August 2015 that they are in contravention of the Scheme and have done nothing to try and regularise their activity. In their papers, the respondents only state that they will be instructing a Town Planner to begin the process of rezoning in due course. It is plain that the respondents are well aware that their conduct is in contravention of the Scheme and the Ordinance, yet they have to date not taken any steps to regularise that conduct. The Municipality, on the other hand, has a duty to enforce the Scheme. This justifies a special costs order.⁵
19. I am satisfied that the Municipality has met the requirements of a final interdict sought in the application. Owners of property governed by

⁵ *City of Tshwane Metropolitan Municipality v Grobler* 2005(6) SA 61 (T), at paras 10 to 12.

the Scheme are obliged to use the property and any building thereon in conformity with the requirements of the Scheme and comply with the lawful directives issued to them by the Municipality.⁶ I make the following order:

- 19.1. the respondents are interdicted and restrained from continuing to use Erf [...], [...] Drive, Norkem Park Extension 4, Kempton Park, for any purpose which is prohibited under the zoning of residential 1 in terms of Ekurhuleni Town Planning Scheme 2014 for as long as the property is so zoned;
- 19.2. the respondents are interdicted and restrained from using the property as boarding rooms and for lodging purposes and/or similar activity;
- 19.3. the respondents are ordered to pay the costs of this application, jointly and severally, the one paying the other to be absolved, on on the scale as between attorney and client.

TJB BOKABA
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

⁶ *City of Tshwane Metropolitan Municipality v Grobler* (supra), at para 6.

APPEARANCES:

FOR APPLICANT: ADV E SITHOLE

INSTRUCTED BY: MOHAMED RANDERA & ASSOCIATES

FOR RESPONDENTS: ADV TSALONG

INSTRUCTED BY: MAEMA ATTORNEYS