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

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

27/10/21
DATE SIGNITURE

CASE NUMBER:4532/2020

In the matter of

CITY OF JOHANNESBURG **APPLICANT**

PATCHAMMA NAIR **FIRST RESPONDENT**

ANY OTHER OCCUPANT OF ARF 4882 LENASIA EXTENTION 4 **SECOND RESPONDENT**

JUDGMENT

OOSTHUIZEN-SENEKAL CSP AJ:

Introduction

[1] The City of Johannesburg ("the applicant") is applying for an interdict against the first and second respondents ("the respondents"). The applicant seeks an interdict prohibiting and interdicting the respondents from using the Erf 4882 Lenasia, Extension 4 Johannesburg ("the property") for purposes of a Tavern in contravention of the Town-Planning legislation of the City of Johannesburg Land Use Scheme of 2018.

[2] The first respondent is the registered owner of the property.

[3] The first respondent opposed the applicant's application and filed her answering affidavit.

[4] The matter was placed on the Opposed Motion Court roll for hearing via teams on Monday, 4 October 2021 at 12h00. At the allocated time for the hearing counsel the first respondent's, advocate Kabu did not appear. Following assistance from Advocate Khoza (counsel for the applicant), Advocate Kabu came online, but no video or sound link was available. I instructed the matter to stand down until 14h00 in order for counsel 4 to attend to his difficulties in establishing a link for the hearing.

[5] At 14h00 Advocate Kabu was absent and no reasons for his absence were placed on record. I instructed the matter to stand down until Tuesday, 5 October 2021 at 12h00 in order for the registrar to again forward the teams link to Advocate Kabu and to assist him with any difficulties he might be experiencing.

[6] On Tuesday, 5 October 2021 I instructed the registrar to forward an email to all parties to the effect that in case they experience difficulties with the electronic link that I am willing to proceed with the matter in open court. Advocate Kabu did not reply to the email. When the matter was called at 12h00 counsel for the first respondent was still absent. No reason for his absence was placed on record.

[7] Mr Khoza on behalf of the applicant requested the court to proceed with the application in the absence of Mr Kabu as the application was previously postponed for the same reason.

[8] I ordered that the matter should proceed in the absence of counsel for the first respondent.

Relevant background relevant facts

[9] The applicant contends that the property owned by the first respondent is zoned as "Residential 1" and as such the property may only be used for purposes of *"dwelling houses"*[1] Following an inspection by a Planning Control Officer employed by the City of Johannesburg it was found that the property is being utilized for purposes of a Tavern. The usage of the property as a tavern is in contravention of the City of Johannesburg's Land Use Scheme.

[10] The first respondent in the answering affidavit raised two points *in limine*, which can be summarised as follows:

1. The Gauteng Liquor Board and/or the Finance and Economic Affairs Department should have been joined on the application as it has direct and material interest in the matter. This argument was founded on the fact that the late husband of the first respondent was issued with a Shebeen Permit by the Gauteng Liquor Board;
2. That the deponent of the founding affidavit, Mr Tempele Theo, lack authority in terms of the sub-delegation of the authority by the executive director Development and Planning.

[11] The first respondent denies that the property is utilized in contravention of the City of Johannesburg's Land Use Scheme of 2018 ("the Scheme"), because she argued that

[1] City of Johannesburg Land Use Scheme.

her late husband was issued with a shebeen permit by the Gauteng Liquor Board and as such she is utilizing the property within the requirements of the Scheme.

[12] The common cause facts are:

1. The respondent is the owner of the property;
2. The property is zoned in terms of the Scheme as *"Residential 1"* and as such may only be used for purposes of *"dwelling houses"*;
3. The first respondent is using or permitting the use of the property for purposes other than *"dwelling houses"*.

[13] The issues to be determined are as follows;

1. Whether the first respondent's points *in limine* succeed, which would dispose of the matter;
2. For what purpose is the property used by the first respondent; and
3. If the property is used as a tavern and or shebeen, whether such use is unlawful.

Submissions by the first respondent – Points in limine

[14] The first respondent raised two points *in limine.*

[15] The first point raised by the first respondent relates to none joinder. The first respondent argued that the Gauteng Liquor Board and/or the Finance and Economic Affairs Department should have been joined on the application as it has direct and material interest in the matter. This argument was founded on the fact that her late husband was issued with a Shebeen Permit by the Gauteng Liquor Board.

[16] The second point raised by the first respondent relates to lack of authority in that the deponent of the founding affidavit in the application lacked authority in terms of the sub-delegation of the of the authority by the executive director Development and Planning. It was argued that the sub delegation of authority should have been attached to the applicant's founding affidavit to confirm the same.

[17] The first respondent argued that in the light of the above legal submissions the application should be dismissed.

Submissions by the applicant – Points in limine

[18] The applicant argued that the first *point in limine* raised by the first respondent has no substance as the first respondent failed to submit any clear reasons as to why the relevant parties should be joined on the application. The applicant contended that none of the parties mentioned have any interest in the outcome of the application.

[19] It was submitted by the applicant that the granting of a liquor license and/or Shebeen Permit does not *per se* dispense with the necessity to obtain business rights on a specific property. This condition is clearly stated on a liquor license and/or Shebeen Permit issued.

[20] The applicant further argued that a Shebeen Permit allows the sale of liquor subject to certain specific conditions, and clear reference is made to *"upon premises and plan approval"*. This unequivocally confirms that the granting of a liquor license and/or Shebeen Permit does not dispense with the necessity to comply with applicable provisions and legislation.

[21] The applicant argued that the Shebeen Permit referred to by the first respondent was in any event valid until 1 May 2006 and as such is not relevant anymore, and must therefore be disregarded for purposes of the application.

[22] Regarding the second point *in limine* the applicant argued that the applicant in the proceedings is cited as the City of Johannesburg. The deponent of the founding affidavit, Mr Theo was appointed Assistant Director: Planning Law Enforcement of the applicant. The deponent acted in terms of a delegation by the City of Johannesburg, and therefore he has the necessary authority to depose of the founding affidavit on behalf of the applicant.

[23] The applicant argued that the points *in limine* raised by the first respondent are void of substance and merit and must dismissed.

Submissions by the applicant on the main action

[24] The applicant argued that the first respondent relied on the alleged Shebeen Permit for the legal use of the property. Therefore the inference can be drawn that she admits that the property is being used for the purposes of a tavern or for purposes of selling liquor. Legal submissions were made by the applicant that the property is currently zoned *"Residential 1"* and this entails that it may only be used for the purposes of *dwelling houses* and not a tavern.

[25] The applicant contended that the reliance on the Shebeen Permit by the first respondent is of no relevance, reason being that the Shebeen Permit expired. Even if the first respondent was issued with a valid Shebeen Permit, she will have to adhere to the zoning scheme of the applicant. Therefore the applicant argued that the reliance on the Shebeen Permit, be it valid or invalid, is misplaced and of no relevance in the application.

[26] It was argued by the applicant that the first respondent does not intent to abide by the existing zoning of the property, and in doing so she made reference to her pending application with the applicant for re-zoning of the property. The reference made to the re-zoning application confirms the fact that the first respondent is using the property in contravention with the Scheme. The applicant argued that the application solely relies on the current and continuous contravention of the law, in that the first respondent use the property in contravention of the prescribe rules pertaining to the Scheme.

[27] It was stated by council for the applicant that the applicant does not have any powers to condone interim contravention of the law in the hope of a future possible re-zoning of the property, of which approval is not even certain nor guaranteed.

[28] It was argued that the applicant had no alternative remedy other than to approach the court for an interdict. The applicant pointed out that although the contravention of a Town Planning Scheme is in principal a criminal offence, it is unlikely that the normal criminal process regarding prosecution will be successful. It was contended that sanctions available to the Magistrate's Court are unlikely to deter the first respondent from continuing with the contraventions.

Submissions by the respondent

[29] The first respondent admitted that she is the owner of the property. She furthermore admits that she is residing on the said property with the second respondents. She further argued that she is utilizing the property as a shebeen and not as a tavern.

[30] The respondent in her answering affidavit argued that the applicant has to distinguish between a shebeen and a tavern. The operation of a shebeen is limited to the number of cases of beer to be sold, a shebeen permits trading in 12 cases of 750ml bottles beer per week.

[31] The first respondent argued that the Shebeen Permit would not have been granted by the Gauteng Liquor Board, if the plan of the premises was not approved for purpose of trade in liquor. Furthermore, she contended that she is not in contravention of any law as she is utilizing the property as a shebeen. It was argued that she applied for the re-zoning of the property, which application is currently pending.

Case law and evaluation: Points in limine

[32] The first point *in limine* should be dismissed on the premises that the first respondent gave no indication as to why and for what reason the Gauteng Liquor Board and/or the Finance and Economic Affairs Department have to be jointed as parties to the application. In my view there is no basis for joinder of the parties referred to. It is clear that both have no interest in the matter and neither in the outcome or result in the matter. This is zoning matter and not related to the permit which has in any event expired.

The first point *in limine* is dismissed.

[33] The second point *in limine* raised by the first respondent of the lack of authority also stands to be dismissed. The deponent of the founding affidavit, Mr Theo is employed by the City of Johannesburg as Assistant Director: Planning Law Enforcement. As such he acted in terms of a delegation issued by the Johannesburg City Council dated 2 June 2015 which states:
" In terms of Paragraph 18 of the document Powers and Functions assigned to the Executive Director: Development Planning as approved in item 37 on 19 June 2013 by the City of Johannesburg Council the attached Power/Duty with regard to "Legal Proceeding" is sub-delegated to the Director. Land Use Development Management and Assistant Director: Planning Law Enforcement."

[34] It is evident that the said delegation was assigned to the position and not to an individual person.[2] Mr Theo was appointed in the position of Assistant Director: Planning Law Enforcement, Land Use Management, Development Planning on 23 March 2018.[3]

[35] Therefore Mr Theo, deponent of the founding affidavit has the necessary authority to depose of the founding affidavit in the application launched by the applicant.

[36] The second point *in limine* is dismissed.

Case law and evaluation
[37] The applicant applies for an interdict ordering the respondents to cease the use of the property as a tavern and/or any other related use. The first respondent denies that the use of the property, operating a business on the property, is in contravention of the Scheme.

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[2] See RA1 of the replying affidavit.
[3] See RA2 of the replying affidavit.

[38] Following an inspection on 7 March 2018 by Mr Netshirungulu, a Planning Control Officer employed by the applicant, it was evident that the property is being utilized for purposes of a tavern and not a shebeen. During the inspection the latter took photographs of the property. The photographs are evidence of the fact that the property is being utilized as a tavern and not a shebeen. I am therefore satisfied that the property is utilized for purposes of a tavern, which is operational because inside the building were three upright commercial refrigerators filled with liquor, not beer, a pool table and several table and chairs. The version of the first respondent that she is utilizing the property as shebeen is rejected.

[39] Case law dictates three requisites for granting an interdict which are:

1. A clear right on part of the applicant;
2. An injury actually committed or reasonably apprehended;
3. The absence of any other satisfactory remedy available to the applicant.

Clear Right

[40] In terms of the Spatial Planning and Land Use Management Act[4], a municipality must adopt and approve a single Land Use Scheme in its entire area. Section 26 of the Act states the following;

"26 (1) An adopted and approved land use scheme-

(a) has the force of law, and all land owners and users of land, including a municipality, a state- owned enterprise and organs of state within the municipal area are bound by the provisions of such a land use scheme;

(b) replaces all existing schemes within the municipal area to which the land use scheme applies; and

(c) provides for land use and development rights.

[4] Act 16 of 2013.

(2) Land may be used only for the purposes permitted-

(a) by a land use scheme;

(b) by a town planning scheme, until such scheme is replaced by a land use scheme; or

(c) in terms of subsection (3)."

[41] The applicant has adopted and approved the City of Johannesburg Land Use Scheme, 2018. The Scheme came into effect on 1 February 2019. The said scheme is a town-planning scheme and in essence the Scheme designates a "zoning" to each property in its area of operation The following provisions of the Scheme are relevant in the context of the application before me.

[42] Section 1: Land Development rights in part II the following definition can be found which relates to *"Dwelling house";*
" Dwelling house- means a detached self-contained inter-connected suite of rooms containing a kitchen and the applicable ablution, used for the living accommodation and housing of one household, together with such outbuildings and subsidiary dwelling units as is ordinarily permitted therewith, as long as the subsidiary dwelling units complies with the requirement stipulated in this Land Use Scheme in use zone "Residential 1"

[43] It is common cause that the applicant had not consented to any use of the property other than for dwelling units and residential buildings.

[44] Therefore the applicant has an established right which is clearly stated in the City of Johannesburg Land Use Scheme of 2018 thus, it has a "*clear right*" or "*definite right*" on any usage of the said property. Furthermore the applicant has a clear right to enforce compliance with the provisions of the Scheme by virtue of the legal duty imposed on the applicant to ensure compliance with the said provisions.

An injury actually committed or reasonably apprehended

[45] The applicant argued that the first respondent used the property in contravention of the Scheme and operate a tavern on the premises. The first respondent has been warned and is aware that the activities conducted at the property are not permitted in accordance with the zoning of the property and therefore are in contravention of the Scheme. She applied for the re-zoning of the property which is a clear indication of her knowledge that she is utilizing the property illegally. Furthermore the first respondent has failed to take any steps to terminate the aforesaid contravention.

[46] This actions of the first respondent are proof of actions which interfere with the applicants rights in that the property is not currently utilized for purposes of housing. The invasion of the applicants right as substantiated by the Scheme is continuing as the first respondent operates a tavern on a daily basis on the property, which is an injury committed against the applicant.

The absence of any other satisfactory remedy available to the applicant

[47] It is evident that the respondent can be held criminally liable for their illegal actions on the property. The question has to be raised whether this negates the application for an interdict in circumstances set out in the founding affidavit.

[48] In *Berg Rivier Municipality v Zelpy*[5] the following was stated regarding any other satisfactory remedy available to the applicant, and in this case, criminal prosecution*;*

"refers to the absence of similar protection by any other ordinary remedy. One would not usually regard a criminal remedy as one which is available to the harmed individual. It is a pubic remedy at the discretion of the prosecuting authorities. Only if the directorate of public prosecutions declines to prosecute can the individual launch a private prosecution, and I would hesitate to call a private prosecution an 'ordinary remedy' (they are very rare in this country). A criminal conviction also does not, in a case like this, provide 'similar protection': the protection afforded by an interdict is the

[5] 2013 (4) SA 154 (WCC).

cessation of the unlawful activity; a criminal prosecution does not achieve anything similar – it punishes past conduct (see Ebrahim v Twala & Others 1951 (2) SA 490 (W) at 493A-B).”

[49] It is evident that the first respondent will not abide in utilizing the property in accordance with the Scheme. She has been warned in refraining from her illegal activities on the property without any avail. It is unlikely that the first respondent will terminate such contravention unless an order to do so is granted by a Court. In my view the applicant has no other remedy but to approach this Court for the relief set out in the Notice of Motion.

Conclusion

[50] It is clear that the respondents persist in using the property in contravention of the Scheme. The applicant represents the public interests of residents in the area of the Scheme and thus has a duty towards the community to ensure that the activities and acts performed by the respondents are unlawful and in contravention of the Scheme.

[51]As stated in the matter of *Lester v Ndlambe Municipality and Others*[6]*;*

“I conclude by reverting to what Harms 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 a hope

[6] 2015 (6) SA 283 (SCA) at paragraph [27], also see *United Technical Equipment Co v Johannesburg City Council 1987 (4) SA 343 (T).*

that the use will be legalise in due course and that pending finalisation the illegal use will be protected indirectly by the suspension of an interdict."

[52] One is acutely aware of the financial implications, inconvenience and disruption which the first respondent will go through when the requested remedy, namely an interdict is granted. But upholding the doctrine of legality, a fundamental component of the rule of law, must inevitably trump personal considerations. Therefore the arguments presented by the first respondent are rejected.

Costs

[53] The general rule pertaining to costs is that the unsuccessful party will be ordered to reimburse the successful party for the costs that has been incurred as a result of litigation. I am of the view that the general rule should apply in this matter.

Order

[54] In the premises the following order is made:

1. The Respondents shall forthwith cease the use of Erf: 4882 Lenasia Ext. 4, Registration Division IQ, Province of Gauteng, situated at no. 56 Saligna Avenue, Lenasia Ext.4- City of Johannesburg ("the Property") as a Tavern and/or for any other use related thereto.

2. The Respondents are interdicted from using or permitting the use of the property, through or by any person or persons, for the purpose of a Tavern and/or for any other use related thereto, for so long as such use is prohibited on the property in terms of the City of Johannesburg Land Use Scheme, 2018 and as long as the property remains zoned "Residential 1".

3. The Respondents are interdicted from using or permitting the use of the property for any purpose other than for dwelling house as permitted and prescribed in terms of the zoning "Residential 1".

4. The Respondents shall forthwith remove from the property all structures, chairs and all equipment associated with the said use and any other items, which relate to the use of the property as a place of worship and/or for similar uses.

5. The Respondents shall forthwith rehabilitate the property to conform with the zoning "Residential 1" in terms of the City of Johannesburg Land Use Scheme of 2018.

6. Should the Respondents fail to comply with the orders set out above within 15 days of date of service of this Notice upon it:
   6.1 The Sheriff of this Honourable Court is authorised and directed to take all necessary steps for purposes of giving effect to the above orders, inclusive of removing all and any property, goods, materials or items found stored or kept at the property in relation to the use of the property as a Tavern and/or any other related use pending compliance with 6.2 hereunder;

   6.2 The Respondents be held liable for payment of the Sheriff's reasonable taxed fees and disbursements, including storage costs incurred for the purposes of 6.1 above, which sums shall become due, owing and payable within 10 days after presentation to the Respondents of taxed account in respect of the Sheriff's said fees and disbursements.

7. The first respondent is ordered to pay the costs of this application on party and party scale.

CSP OOSTHUIZEN-SENEKAL

ACTING JUDGE OF THE HIGH COURT

Date of hearing: 05 October 2021
Date of Judgment: 27 October 2021

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