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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA

NOT REPORTABLE

CASE NO: 86552/2016

Date: 09 March 2016

In the matter between

MAGALIES-BRONBERG PROPERTY OWNERS ASSOCIATION (MBPA)	FIRST APPLICANT
HENDRIK WILLEM DUNSBERGEN	SECOND APPLICANT
RICHARD WAGNER	THIRD APPLICANT

AND

THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY	FIRST RESPONDENT
IMVULA ROAD AND CIVILS PTY LTD	SECOND RESPONDENT
JACQUES PELSER	THIRD RESPONDENT
THE **MEMBER** OF THE EXECUTIVE COUNCIL OF THE GAUTENG DEPARTMENT OF AGRICULTURAL AND RURAL DEVELOPMENT	FOURTH RESPONDENT

J U D G M E N T

MALI AJ:

[1] This application concerns the unlawful and illegal land-use by the second and third respondents within the jurisdiction of City of Tshwane Metropolitan Municipality. The applicants seek an interim order that the second and third respondent immediately cease:

1.1 Using the property of the third respondent to operate a commercial undertaking in conflict with the provisions of the Revised Pretoria Town- Planning Scheme, 2014 as well as the relevant zoning scheme and the provisions of the title deed of the property;

1.2 Erecting any structures on the property of the third respondent without the authorisation of the City of Tshwane Metropolitan Municipality;

1.3 Storing or the parking of any vehicles of the second respondent or third respondent or such other vehicles used for commercial purposes by the second or third respondent on the property of the third respondent;

1.4 Erecting or placing or storing of any shipping containers, building construction material and/or building associated material on the property of the third respondent; and

1.5 That the second and third respondent be directed to forthwith remove all vehicles parked or stored on the property of the third respondent

and be interdicted and restrained from exercising a listed activity in terms of the National Environmental Management Act, 1998 on the property of the third respondent.

[2] The applicants further seek the following orders:

2.1 an order to direct the first respondent to investigate the alleged contraventions of the second and third respondents in relation to the property known as [Portion 1.., Mooiplaas 3.. JR, C], held by Deed of Transfer T27572/2014, and file a report with an affidavit, with the Registrar and the parties within 90 days from granting of this order indicating the veracity of such alleged contraventions found by such investigation;

2.2 an order whereby the fourth respondent is directed to investigate the alleged contraventions of the provisions of the National Environmental Management Act, 1998 in respect of the property known as [Portion 1.., Mooiplaas 3… JR C], held by Deed of Transfer T27572/2014 and file a comprehensive report with the Registrar and the Applicants within 90 days from the granting of this order indicating the veracity of such alleged contraventions found by such investigation.

[3) The first applicant is a voluntary incorporated association and duly constituted as such with address at [Plot 2.., Mooiplaas, Pretoria, Gauteng]. The first applicant is a community based association established to advance, promote and protect the general interests and other interests of its members. The first applicant's further objectives are to represent and promote the interests of its members and the smallholding property owners in particular, relating but not limited to, sustainable and affordable municipal services and property rates. The first applicant exist to also attend to environmental issues and transgressions, development of the area and other common interests as may be determined from time to time by the members.

[4] The second applicant is an adult male businessman with residential address at Plot 2.., Mooiplaas, Cullinan, Gauteng. The third applicant is an adult male businessman with residential address at [Plot 5..(formerly Plot 140), Mooiplaas, Cullinan, Gauteng]. The second and third applicants are also landowners in the direct vicinity of the property which forms the subject of this application. The third respondent is the landowner of the property complained of and the director of the second respondent.

[5] The first respondent is a metropolitan municipality with legal capacity , established in terms of Notice 9600 of 2000 published in terms of section 12(1) of the Local Government Structures Act, 117 of 1998 with address at 11 Francis Baard Street, Pretoria, Gauteng. The second respondent is a company with registration number [M20…] incorporated in terms of the Companies Act 71 of 1973 with its registered address at [Ground Floor, 1. Bedfordview Office Park, Riley Road Bedfordview, Gauteng].

[6] The third respondent is an adult male businessman with [identity number 74…] and Director of the second respondent with address for service at Roestoff Kruse Attorneys, 17 Dely Road, Hazelwood, Pretoria Gauteng. The fourth respondent is the member of the Executive Council of Gauteng Province who is accountable to the provincial legislature for the Department of Agricultural and Rural Development with address at [No 1.., Diagonal Street, Johannesburg, Gauteng]

[7] First and fourth respondent do not oppose the application, as a result they have agreed that the draft order between the parties be made an order of court.

[8] I first had to deal with the striking out application by the second and third respondent of the applicants replying affidavit. The basis for striking out is that the applicants did not establish a cause of action in the founding affidavit. The applicants created a new case on the replying affidavit. They introduced

a 2008 document linking to the repealed scheme. Furthermore that the town planning scheme was not attached in the founding affidavit.

[9] Applicants state that there is no basis to strike out the replying affidavit. The matter sought to be struck is the information that has been requested by the respondents in terms of Rule 35 (1). In **Minister of Land Affairs and Agriculture v D&F Wevell Trust** [2008] JOL 21213 (SCA); 2008 (2) SA 184 (SCA) at 200 D-E : it was stated;

"In motion proceedings, the affidavits constitute both the *pleadings and the evidence: Transnet Ltd v Rubenstein, and the issues and averments in support of the parties' cases should appear clearly therefrom..... Trial by ambush cannot be permitted".*

My view is that Rule 35 (1) has no bearing to the replying affidavit. It cannot be overemphasised that all the allegations on which the applicant relies must be in his founding affidavit. The applicant cannot adduce supporting facts in a replying affidavit. This rule is not absolute because the court has a discretion in certain instances, to allow new material in a replying affidavit. This is subject to *proviso* that the respondent should be given an opportunity to deal with it in a second set of answering. In the present matter the applicants have , not placed any circumstances before me for consideration.

[10] In **Sheperd v Tuckers Land and Development Corporation (Pty) Ltd** 1978 (1) SA 173 (>/1/) at 177 G-H the court stated:

"it is founded on the trite principle of our law of civil procedure that all the essential averments must appear in the founding affidavits or the Courts will not allow an applicant to supplement his case in his replying affidavits and will order any matter appearing therein which should have been in the founding affidavit to be struck out."

[11] In *casu* the complaint is that the applicants did not attach the 2008 Tshwane Town Planning Scheme forming the basis of their case. In support of the applicants' contention that the property is zoned for agricultural purposes they rely on the approval for the substitution of the Peri- Urban Areas Town-Planning Scheme, 1975 with the Tshwane Town Planning Scheme, 2008. In this regard the applicants in the founding papers attached Annexures "S" and "T". These are the first page of the approved resolution as well as the decision by the first respondent that respectively. These documents serve as confirmation that Tshwane Town Planning Scheme, 2008 be promulgated in accordance with the policies of the first respondent.

[12] The applicants argue that on 17 September 2014 the aforementioned substitution and incorporation was promulgated by publication in the Provincial Gazette no. 258 of 17 September 2014 thereby incorporating the property into the Tshwane Town Planning Scheme, 2008 (Revised 2014). The applicants further attached the zoning certificate marked annexure "V". The zoning certificate allows erection of buildings in the property in question for Agriculture Buildings and Dwelling- houses. The final note on the zoning certificate reads:

> *"the above zoning information must be read in conjuction with the relevant Annexure, if any, and the rest of the Clauses of the Peri – Urban Areas Town Planning Scheme, 1975. Where an annexure does not specify or stipulate* a *land use or development control (for eg. Height, F.S.R. etc) the stipulations of the said Scheme clauses and the above Zoning Certificate shall prevail."*

[13] Second and third respondents oppose the relief on basis that the applicants found their application on the alleged contravention of the zoning certificate in terms of the Peri – Urban Town- Planning Scheme, 1975 applicable to the property; that the applicants failed to identify the relevant applicable town-planning scheme upon which their case is founded. The zoning certificate relied upon by the applicants is invalid, in view of the fact that the 1975 Peri –

Urban Scheme, in terms of which it was issued, had been repealed, thus the applicants failed to make out a case based on a zoning contravention; and that the applicants failed to attach a copy of the relevant town- planning scheme relied upon in the founding affidavit. The scheme relied upon is the 2008 Tshwane Town Planning Scheme.

[14] Having regard to the above the replying affidavit of the applicants in so far as the paragraphs introducing the 2008 Tshwane Town Planning Scheme is struck out.

MAIN ISSUE

[15] The issue to be determined is whether the applicants are entitled to the relief of the interim interdict.

[16] The rights sought be protected by the applicants are the illegal use of land for comm1:1rcial purposes including the erection of illegal building structures. According to the applicants the property which is the subject of complaint is zoned exclusively for agricultural purposes. The complaint is that the third respondent utilises the property for commercial purposes in the following ' manner:

16.1 the illegal storage of shipping containers on agricultural property;

16.2 the illegal bringing upon and storage of equipment and extra heavy duty vehicles on the agricultural property for commercial purposes;

16.3 the illegal conducting of commercial business and storage of goods on property zoned exclusively for agricultural activity;

16.4 the illegal removal of trees and shn1bs;

[17] The applicants further stated that despite various engagements with the third respondents he does not desist from the alleged illegal activities. In support of the contention that the property is zoned for agricultural purposes the applicants rely on the approval for the substitution of the Peri- Urban Areas Town- Planning Scheme, 1975 with the Tshwane Town Planning Scheme, 2008.

[18] As indicated paragraph above the second and third respondents oppose the interim interdict on basis that the rights sought be protected by the applicants are not founded. The applicants failed to identify the relevant applicable town-planning scheme upon which their case is founded, thus they have not established any prima facie right.

APPLICABLE LAW

[19] In **Webster v Mitchell** 1948 [1] SA 1186 (W) at 1189 the court stated:

«

'In the grant of a temporary interdict, apart from prejudice involved, the first question for the Court in my view is whether , if interim protection is given, the applicant could ever obtain the rights he seeks to protect. Prima facie that has to be shown. The use of the phrase "prima facie established though open to some doubt' indicates, I think, that more is required than merely look at the allegations of the applicant, but something short of a weighing up of the probabilities of conflicting versions is required. The proper manner of approach I consider is to take facts as set out by the applicant, together with any facts set out by the respondent, which the applicant cannot dispute, and to consider whether having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. The facts set up in contradiction by respondent should then be considered. If serious doubt is thrown on the case of applicant he could not succeed in obtaining temporary relief, for his right, prima facie established, may only be open to "some doubt'. But if there is mere contradiction, or unconvincing explanation, the matter

should be left for trial and the right protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief. Although the grant of a *temporary interdict interferes with* a *right which is apparently possessed by the respondent is protected because, although the applicant sets up* a *case which prima facie establishes that the respondent has not the right apparently exercised by him, the test whether or not the temporary relief is to be granted is the harm which will be done. And in* a *proper case it might well be that no relief would be granted to the applicant except on conditions which would compensate the respondent for interference with his right, should the applicant fail to show at the trial that he was entitled to interfere.* '

(20] In **Reckitt & Colman SA (Pty) Ltd v SC Johnson & Son (SA) (Pty) Ltd** (1995] 1 All SA 414 (T) 417-418; 1995 (1) SA 725 (T) at 729 I- 730 G , it was stated:

"The applicant seeks interim relief. The applicant must therefore establish:

(1) a *clear right or, if not clear that it has* a *prima facie right;*

(2) that there is a *we/I-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief (by way of the summons issued) is eventually granted;*

(3) that the balance of convenience favours the grant of an interim interdict; and

(4) that the applicant has no other satisfactory remedy. (L F Boshoff Investments (Piy) Ltd v Cape Town Municipality; Cape Town Municipality v L F Boshoff Investments (Piy) Ltd 1969 (2) SA 256 (C) at 267 B- E.)

[21] In **Beecham Group Ltd v B-M Group (Pty) Ltd** 1977 (1) SA 50 (T) at 55 B-E) the court said with regard to the various factors, which must be considered:

> *"I consider that both the question of the applicant's prospects of success in the action and the question whether he would be adequately compensated by an award of damages at the trial* are *factors which should be taken into account as part of* a *general discretion to be exercised by the Court in considering whether to grant or refuse* a *temporary interdict. Those two elements should not be considered separately or in isolation, but as part of the discretionary function of the Court which includes* a *consideration of the balance of convenience and the respective prejudice which would be suffered by each party as a result of the grant or refusal of* a *temporary interdict."*

[22] In **Olympic Passenger Services (Pty) Ltd v Ramlagan 1957 (2) SA 382 (D) at 383 C-D** the court stated that:

> " *It thus appears* that *where the applicant's right is clear and the other requisites of an interdict* are *present no difficulty presents itself about granting an interim interdict. Where, however, the applicant's prospects of success* are *nil, obviously the Court will refuse an interdict".*

[23] The facts as set out by the applicant are that the respondents by bringing bulldozers, grass cutting are in clear contravention of zoning provisions as provided for in the certificate. The respondents do no dispute some of the facts; however they maintain that they are not in contravention of any law as the property in question is not zoned for Agricultural purposes. The property is zoned by the scheme which the applicants failed to produce. In support of his argument Counsel for the respondents referred me to the case of **Daniel Jacobus Lukas Jacobs and another [unreported judgment]** a judgment

of Yekiso J delivered on 14 November 2014 in the Western Cape Division where at paragraph 17 and 18 he held that:

> *"At the hearing of the rule nisi Transand produced an unreported judgment of* a *Full Bench of this Court in the form of Frenvest cc & v Smith &others Appeal Number A476196 handed down on 20 February 1997. The existence of this authority was not known to the applicants or their legal advisors.....On the basis of that authority the Full Bench of this Division held that* a *zoning certificate issued by* a *municipality such as the one issued by the Mossel Bay Municipality was not sufficient proof of the zoning of* a *property, and that evidence of* a *decision by the relevant council in respect of the zoning of the property concerned was required."*

[24) The applicants' counter .argument to the above is that Town Planning Scheme is a legislative document which cannot be attached to the founding affidavit. In my view without having to categorise a Town Planning Scheme; the importance of same cannot be over emphasised in that the applicants' case is largely found in the references made in 2008 scheme substituting the 1975 Peri-Urban Scheme. The contention that it is not necessary to attach the scheme is unacceptable. See: in this regard **Muangisa Ntangu-Reare v City of Johannesburg** [unreported judgement] a judgment of Masipa J delivered on 15 November 2012 in Gauteng Local 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 <u>only</u> certain uses specified in the scheme itself.*
>
> *No provision is made in* a *scheme for "grey areas". <u>An occupier of an owner of an erf either uses the property for the purposes permitted by the scheme or he does n</u>ot'. (my emphasis)"*

[25) I am fortified by the ratio in the above case that a town planning scheme is a document of significance in establishing the use of property. A zoning certificate cannot override the provisions of the Town Planning Scheme.Thus prima facie right cannot be established through the certificate.

[26) Furthermore the applicants have more than enough satisfactory remedies *inter alia* in that the first and fourth respondents have been ordered to investigate the respondents. The said respondents by virtue of their authority are definitely clothed with powers of redress in the event the respondents are found to have contravened the law. In the exercise of my discretion I do not see how at a trial the applicants could ever obtain the rights they seek to protect, relying on the zoning certificate alone. In the result the application must fail.

ORDER

[27) Application is dismissed with costs. Applicants are ordered to pay second and third respondents costs.

[28) Draft order marked "X" is made an order of court.

MALI AJ
JUDGE OF THE GAUTENG DIVISION HIGH COURT

APPEARANCES

FOR THE APPLICANTS	ADV J A Venter
Instructed by	A B Lowe Attorneys

For first and fourth respondent	
Instructed by	Adv Manala State Attorney
For Second and third respondent:	
Instructed by	Adv. A Liversage Roestoff & Kruse
Date of hearing	12 October 2015
Date handed down	09 March 2016