

IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

23/9/16

CASE NO: 41310/2015

Reportable: No

Before His Lordship Mr Acting Justice Davis

Date heard: 12 September 2016

Judgment delivered: 23 September 2016

In the matter between:

**KRANSPOORT EIENAARS KOMITEE**  
**(REGISTRATION NO: 2004/023323/08)**

Applicant

and

**M J**

First Respondent

**C J**

Second Respondent

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**JUDGMENT**

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**DAVIS, AJ:**

[1] This is matter concerning a barking dog, to whit a Chihuahua. It is to be deprecated that a high court is burdened with such a dispute as the present one and it is equally

deplorable that the parties cannot themselves resolve an issue of this nature.

[2] The identity of the parties and the nature of the dispute appear from the following summary as distilled from the papers:

- 2.1. The Applicant is a company previously incorporated in terms of Section 21 of the Companies Act, 1973 with registration number 2004/ 023323/08. It is a company incorporated not for gain and without share capital. Its Memorandum of Incorporation states its principal business as being the following:

*"Die hoofbesigheid wat die maatskappy gaan dryf is om as vereniging van die eienaars van erwe in Kranspoort Vakansiedorp en Kranspoort X1 Vakansiedorp, Mpumalanga Provinsie die administrasie, ontwikkeling en bestuur daarvan as 'n dorp oar te neem en te behartig en eiendomsreg te neem van bates wat die eienaars van erwe as 'n groep toekom."*

- 2.2. The First Respondent is the member of a close corporation, Carma Behuisings BK who is in turn the registered owner of an erf in Kranspoort X1 Vakansiedorp, Mpumalanga. Although the close corporation has been deregistered, the First Respondent intends applying for its re-registration. The First Respondent and her 37 year old son (the Second Respondent) have their residence on the aforementioned erf.

- 2.3. The close corporation had acquired the erf from the liquidators of the initial developer of the township in which the erf is situated and it was registered in the close corporation's name on 3 April 1996. This registration predates the incorporation of the Applicant and the relevance hereof shall be more apparent hereinlater. The Applicant alleges that all landowners within the two townships referred to in the Applicant's Memorandum of Incorporation (referred to by the Applicant as *"the development"* ) are members of the Applicant and subject to management rules prescribed for the township by the Applicant's board of directors.

- 2.4. In terms of the rules no pets or farm animals are allowed in any public

place, street or private property or erf in the townships.

2.5. The townships (or "*development*") are stated to constitute a rustic nature-lover's environment where various species of game like impala, kudu, giraffe, warthog, baboon, vervet monkey and many other varieties occur and is also home to a large variety of birds. The Applicant states that the management rule was accepted to enhance and maintain the township as being a development situated in unspoilt nature.

2.6. In 2012 and due to the fact that the Second Respondent had been involved in a car accident which, for a period of time, left him homebound, a pastoral counsellor and the First Respondent successfully motivated a request for permission for the Second Respondent to keep a miniature Chihuahua as a pet. The motivation *inter alia* read as follows:

*"Mnr C. D. J. is na my toe verwys vir pastorate sorg en hulpverlening. My waarneming was dat hy baie eensaam was en dat die lewe vir hom geen sin in gehad het nie. Hy was nie meer in kontak met sy emosies nie. Uit my praktyk-ervaring en ondervinding met kliente wat hut lewenswaarde verloor het is die sorg van 'n troeteldier dikwels geskikte en helende behandeling ... Ek is bewus van die Kranspoort reëls maar die feit om vir 'n jong man weer iets te gee om te lewe het vir my swaarder geweeg as 'n reel wat buigbaar kan wees in sekere omstandighede... Dit is klein, opgeleide hondjie wat geen skade kan aanrig nie en ook nie steurend is nie en die hele tyd in die huis is. Hierdie kan gesien word in dieselfde fig as 'n gidshond."*

2.7. Pursuant to the aforesaid motivation the Applicant granted consent that the Second Respondent may keep the pet. The consent contained the following caveat:

*"Indien daar in die toekoms ernstige klagtes oor die hondjie ontvang word, kan daar besluit word om die goedkeuring terug te trek."*

2.8. At some stage the Second Respondent acquired a second "large breed dog" but this dog has since died.

2.9. Since the beginning of January 2013 the Applicant has received various complaints from other landowners, the gist of which can be found in one of the complaining letters where it is stated as follows:

*"Die honde blaf vroeg in die oggende en wanneer die koedoes/rooibokke en selfs stappers by die huis verby beweeg en die skel geblaf uit die huis met die skoonmaakdienste is daar gereeld deur die dag mense wat sleutels kom optel en is daar 'n gedurige geblaf Dit is werklik steurend. Ons wit nie onnodig kla en daarom na deeglike oorweging die skrywe aan bestuur te rig."*

2.10. Photographic evidence also indicates that the Chihuahua is not always kept inside the house and in fact roams outside it. The Second Respondent also appears no longer to be homebound and is in fact employed in a liquor store close to the property.

2.11. Pursuant to this the Applicant revoked the permission granted. Pending finalisation of the application, the dog was however still kept at the property and in untested evidence presented by way of a supplementary affidavit on the date of hearing, the First Respondent with reference to an electronic media item stated that the Second Respondent attempted suicide on 9 November 2015 and it is alleged that the attempted suicide was directly related to the threats and ongoing attempts by the Applicant to remove the pet Chihuahua. The suicide attempt apparently involved the Second Respondent stabbing himself in the leg, in the stomach and cutting off his penis.

2.12. So far the background facts.

### **[3] THE ENFORCEMENT OF THE MANAGEMENT RULES:**

It is trite that in motion proceedings the Applicant can only succeed if, on its uncontested

version read with the version of the Respondent (unless the latter is so patently false and fanciful that it should be rejected) a proper case has been made out (the **Plascon-Evans-rule**). Regarding the enforceability of the management rules, the Respondents state that:

- 3.1. The two townships comprising the Kranspoort Vakansieoord were established, despite the inclusion of game and unspoilt nature, as townships in the true sense of the word and not as sectional title schemes or "*developments*" with homeowners associations.
- 3.2. Although the Respondents enjoy the benefits of the efforts of the Applicant and its board of directors and pay monthly levies, they nevertheless deny having become members of the Applicant.
- 3.3. Although the Applicant's statute states that when an erf in the township is registered in the name of an owner he thereupon *ipso facto* becomes a member of the Applicant and that a registered owner of an erf cannot resign his membership in the Applicant until such time as his ownership terminates, it further contains the following clause:

*" LIDMAATSKAP*

- 2.1. *Die lede van die maatskappy is die ondertekenaars van die akte van oprigting wat geag word lede te wees en daardie ander persone, regspersone of liggame wat op aansoek toegelaat is tot lidmaatskap ooreenkomstig die bepalinge van hierdie statute."*

- 3.4. The Respondents say that they never applied for membership and were never granted such membership. They further say that the ownership of the Carma Behuisings BK predates the incorporation of the Applicant and the Applicant cannot by way of its own incorporation alone, absent any title condition, impose its membership on the Respondents.
- 3.5. As a counter, the Applicant attempted to rely on the principles of estoppel namely that the Respondents have by their conduct as referred to above, created

the impression that they are members of the Applicant and therefore bound by its management rules and they cannot now say otherwise.

3.6. The issues of estoppel and how the incorporation of the Applicant came about or how it bound owners of erven within the townships contain, apart from the legal contentions, factual issues which clearly cannot and should not be resolved on the papers alone. There is therefore a factual dispute as to whether the Applicant is entitled to summarily enforce its management rules on the present Respondents.

[4] That is however not the end of the matter and to allow the *status quo* to continue unabated will clearly lead to further conflict and unhappiness and might also prejudice other landowners in the township. This issue needs to be considered as the Applicant also, as representative of its members, being the neighbours in the broad sense of the Respondents, rely on the principles of nuisance.

[5] In **Burchell, Principles of Delict**, the learned author relies on the following description of the legal concept of nuisance (at 65 with reference to the work of Olivier, Pienaar & Van der Walt):

*"... an infringement upon the neighbours' use and enjoyment of his land amounting to the violation of a personal right (such as health) or a right of use (such as his right to uninterrupted enjoyment of his property which is violated by noise, smells, gasses and so on)."*

The learned authors further make the following applicable comment (at 66):

*"The essence of the enquiry into unlawfulness in nuisance cases involves an attempt to balance the sometimes conflicting interests of neighbours and others and to determine whether a person's conduct is unreasonable. Numerous factors may be relevant: the time and place of the commission of the alleged nuisance, the seriousness of the harm, the social utility of the conduct and the motive of the actor. These factors are by no means exhaustive and the central issue is one of balancing the interests of the conflicting parties and determining whether the*

*Defendant is exercising his or her rights reasonably."*

The learned authors Neethling Potgieter Visser in the 7<sup>th</sup> Edition of **The Law of Delict** state the following under the heading "*Nuisance*" (at 127):

*"Nuisance usually involves repeated infringement of the Plaintiff's property rights. An objective weighing up of the interests of the various parties, taking into account all the relevant circumstances is required in these matters. Examples of nuisance include repulsive odours, smoke and gasses drifting over the Plaintiff's property from the Defendant's land ... a disturbing noise ... (other examples are also furnished)."*

[6] Having regard to the abovementioned principles it is clear that:

- 6.1. The Applicant represents landowners constituting neighbours of the Respondents.
- 6.2. The Respondents as occupiers, irrespective of the ownership of the property in the name of a currently deregistered close corporation, are also neighbours of the other owners.
- 6.3. The Applicant's members are entitled to the peaceful and undisturbed use of their property and the enjoyment of the nature thereof as described above as also being the reason why they became owners in the townships (as distinct from urban townships without free roaming game).
- 6.4. The Respondents may not exercise their rights of enjoyment of their property including their ownership of a pet in such a manner or fashion that it encroaches on neighbours' (in the broad sense) rights.
- 6.5. The Applicant has made out a case for the restriction of the Respondents' ownership of their pet Chihuahua to such an extent that other property owners are not prejudiced.

[7] I have taken all the above factors into consideration including the clearly

compromised position of the Second Respondent as evinced in the circumstances referred to in paragraph 2.11 above in considering the nature and extent of the interdict claimed by the Applicant in prayer 3 of its notice of motion and in respect of the issue of costs.

[8] **ORDER:**

In the premises I make the following order:

- 8.1. The First and Second Respondents are interdicted from keeping a dog/s on Erf [...] X1 Kranspoort Vakansiedorp otherwise than on the following conditions:
  - 8.1.1. The dog/s may not roam outside the dwelling occupied by the Respondents;
  - 8.1.2. The dog/s may not be left unattended at the Respondents' dwelling;
  - 8.1.3. Active steps must be taken by the Respondents to ensure that the dog does not become a nuisance to any other landowner in the township which shall include the prevention of the dog making a noise or barking at game, wildlife, cleaning staff, visitors or other neighbours passing the property which the Respondents occupy in the township.
- 8.2. The Applicant is granted leave to supplement its papers and approach this court should the Respondents be or remain in breach of the aforesaid conditions.
- 8.3. Each party shall pay its own costs.

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**N DAVIS**

**ACTING JUDGE OF THE HIGH COURT**

Date of hearing:	12 September 2016
Judgment delivered:	23 September 2016
Counsel for Applicant:	Adv H A A Krige
Attorneys for Applicant:	Friedland Hart Solomon & Nicolson Monument Office Park 4-301 79 Steenbok Avenue



Monument Park

Pretoria

Counsel for Respondents:

Adv F Lamprecht

Attorneys for Respondents:

Ben van Lingen Attorneys

c/o Swaak Attorneys

79 Eras Street

Wonderboom Agricultural Holdings

Pretoria