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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 36421/21

DELIVERED: 24/10/2022

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED: YES/NO

In the matter between:

PETRUS VAN DER MERWE N.O. In his capacity as the Executor of the Estate of the late Petrus van der Merwe (ID: [....])	**1ST APPLICANT**
PETRUS VAN DER MERWE	**2ND APPLICANT**
PETRO VAN DER MERWE	**3RD APPLICANT**

And

SUPERPLANT HIRE (PTY) LTD	**1ST RESPONDENT**
WILLIE MEYER	**2ND RESPONDENT**

DOTNET LOGISTICS (PTY) LTD	**3RD RESPONDENT**
MARK SWART	**4TH RESPONDENT**
KAREL KROG	**5TH RESPONDENT**
ELTON BVUMBI	**6TH RESPONDENT**
ELTON READY MIX CONCRETE (PTY) LTD	**7TH RESPONDENT**
BEN DZINGIRAYI	**8TH RESPONDENT**
M FARREL AND SONS (PTY) LTD	**9TH RESPONDNET**
BRIAN LAWRENCE FARREL	**10TH RESPONDENT**
PAUL COBB	**11TH RESPONDENT**
MOOIKLOOF EINAARSVERENIGING NPC	**12TH RESPONDENT**
CITY OF TSHWANE METROPOLITAN MUNICIPALITY	**13TH RESPONDENT**
GAUTENG DEPARTMENT OF ROADS AND TRANSPORT	**14TH RESPONDENT**
KEYSTONE DEVELOPMENT CC	**15TH RESPONDENT**

JUDGMENT

PHAHLANE, J

[1] This is an application in which the applicants seek an interdict against the first to eleventh respondents; a declaratory relief that the activities of the ninth and tenth respondents as they appear in the approval by the erstwhile Transvaal Provincial Administration be interpreted as defined in the Peri-Urban Town Planning Scheme of 1975 and the Pretoria Town Planning Scheme of 1976 read with the Conversion tables in the current Tshwane Town Planning Scheme 2008 (“Scheme”); as well as a *mandamus* against the fourteenth respondent. The application is opposed only by the sixth and seventh respondents (“the respondents”), while it remains unopposed by the rest of the respondents. The fourteenth respondent however filed a notice to oppose the application but failed or neglected to file an answering affidavit.

[2] Central to this application, stands a property known as Portion 67 of the farm S[....], [....], Registration Division JR ("the subject property") which is situated next to Atterbury Road, Pretoria.

[3] The facts can briefly be summarised as follows:

The first applicant is the executor of the estate of the late Petrus van der Merwe (“the deceased”). It is alleged that the estate is the owner of the subject property and that the deceased had (in his lifetime) concluded an agreement with the fifteenth respondent in respect of “future, mainly commercial developments on the subject property”. However, the first applicant had in his founding affidavit indicated that the estate is not yet finalised because of a pending legal dispute between the applicant’s predecessors and the developer who entered into an agreement for the purchase and sale of the property.

[4] It is not in dispute that various lease agreements were concluded between the applicants and the first to eleventh respondents for purposes of conducting their businesses on the subject property. It is also not in dispute that the first applicant has been served with a contravention notice by the thirteenth respondent in terms of The Spatial Planning and Land Use Management Act 16 of 2013 (“SPLUMA”), read with Clause 33(1) and (2) of the Scheme, to stop operating certain businesses which among others, included “concrete mixing plant” run by the sixth and seventh respondents on the subject property.

[5] It is averred that the applicant has written various letters of demand to the first to eleventh respondents, and to the fourteenth respondent to ask them to stop their activities in as far as they are illegally taking place on the subject property.

[6] The relief sought by the applicants is quite extensive. Together with the relief sought, the applicants also seek an order for costs. I will only highlight the relief sought against the sixth and seventh respondents who oppose the application, which has been stated in the following terms:

> *"1. An order interdicting the first to eleventh respondents from conducting any activities, whether for personal or commercial purposes on the property known as Portion 67 of the Farm S[....], [....], JR ("the subject property"), which activities contravene the Spatial Planning and Land Use Management Act, Act 16 of 2013, the Tshwane Land Use By Law, 2016 and the Tshwane Town Plannig Scheme, 2008 (revised 2014), specifically where such activities contravene the zoning of the property as either "Agriculture", a "Farm Stall" or a "Dwelling House". Specifically:*
>
> *"1.4 The Sixth and Seventh Respondents are interdicted from operating a cement mixing plant on the subject property".*
>
> *4. A declaratory order that any lease agreements concluded between the late Petrus van der Merwe (ID Nr 240527 5024 08 8), and/or the Second Applicant, and the First to Eleventh Respondents which lease agreements were for the use of the property in contravention of the aforesaid legislation, be declared invalid and void.*
>
> *5. That the First to Eleventh Respondents vacate the premises within a period of 14 (fourteen) days and restore the subject property so as to comply with the aforesaid legislation, subject to granting or not of the interdictory relief against the Ninth and Tenth Respondents.*

6. That the First to Eleventh Respondents be ordered to remove all advertising next to Atterbury Road, which advertising boards were erected without the requisite permissions in terms of the City of Tshwane Municipality By-Laws for the Control of Outdoor Advertising, 2006.

8. That the First to Eleventh, and Thirteenth and Fourteenth Respondents be ordered to pay the costs of this application".

[7] The respondents raised certain *points in limine* in their answering affidavit, which are: (a) failure to comply with Rule 41A of the Uniform Rules of Court; (b) lack of *locus standi* by the applicants*;* and (c) failure to satisfy the requirements for the granting of a final interdict.

[8] With regards to the *point in limine* relating to failure to comply with Rule 41A, the respondents submitted that the applicants' application should be struck off or dismissed for non-compliance with Rule 41A because the application was issued and served without the required notice in terms of the rule. The applicants on the other hand argued that the circumstances of this case are such that mediation is inappropriate and will not suffice because the matter cannot simply be resolved by mediation.

[9] Rule 41A mandates that parties to a dispute consider mediation as a dispute resolution mechanism before proceeding with litigation. The rule requires that every new action or application must be accompanied by a notice. It follows that the applicants were compelled by sub-rule (2)(a) to serve a notice in terms of Rule 41A, stating whether they consent or opposes the matter to be referred for mediation, and such notice ought to have been filed prior to summons being issued or an application being launched. The respondents were similarly compelled by sub-rule (2)(b) to serve a notice stating whether they consent or opposes the matter to be referred for mediation, and this notice was supposed to be served prior to the filing of the opposing papers.

[10] It is clear from the requirement that a party must state its reasons for its belief that a dispute is or is not capable of being mediated. The applicants did not state the

reasons why they are of the view that the issues in dispute could not be resolved by mediation, save to state that the process is inappropriate and will not suffice. Nonetheless, neither party followed the rule, and it is rather disturbing for litigants to disregard this rule and its requirements.

[11] In the unreported judgment of *Koetsioe and Others v Minister of Defence and Military Veterans and Others* (12096/2021)[1], the court stated that:

> "*[Rule 41A] not only requires a notice but clearly contemplated that a party must have considered the issue earnestly prior to exercising its election. This is clear from the requirement that a party must state its reasons for its belief that a dispute is or is not capable of being mediated.*"

[12] With regards to the *point in limine* relating to lack of *locus standi,* Mr Ellis for the applicants argued that the subject property is registered in the name of the estate as proved by the Title Deed, and that ownership of the property has not been transferred to the developer (the fifteenth respondent) with whom the applicants are litigating, regarding the validity of the sale agreement they concluded.

[13] The respondents' contention that the applicants do not have *locus standi* is based on a letter dated 16 November 2020 addressed to the thirteenth respondent ("City of Tshwane") by the applicant's attorneys, and attached as annexure FA 15 to the founding affidavit, in which the following is stated on paragraphs 15 to 19:

> *"[15] We furthermore confirm that our client / his predecessor concluded an agreement with a developer, which in essence entail that a Township Establishment Application shall be submitted on the subject property, and that the developer shall buy the subject property after approval and proclamation of such township.*
>
> *[16] We confirm that the Township Application has been approved by the Municipality on the subject property……..*

[1] at para 6.2

[17] The validity of such sale agreement between our client's predecessors and the developer is currently under dispute, with the parties having already been in Court, as per the cover page of the Court proceedings attached hereto as Annexure E, and a leave to appeal application is currently pending.

[18] The outcome of the aforesaid Court proceedings will have an impact on the ownership of the subject property in the near future, and should any further actions by your Municipality against our client be halted, in view of dispute regarding ownership of the subject property in the near future, as well as the proclamation of the approved Township, which will/might legalize many or all of the alleged illegal land uses on the subject property. (own underlining)

[19] In view of the above our client request that no further actions be taken against our client at this stage, that our client is attempting to rectify some of the alleged illegal land uses and / or have the required permission to operate certain uses on the subject property, which inter alia, include a Nursery and Shop".

[14] Mr Ellis argued that the letter cannot be relied upon as it has not been confirmed and that the first applicant informed the sixth respondent about the letter during an informal discussion between them. It may very well be that annexure FA15 had not been confirmed but this annexure was attached by the first applicant in his founding papers. In my view, when facts are placed before court, the court cannot simply ignore them, particularly when those facts deal with issues in dispute. Having said that, the applicant stated in his replying affidavit that the dispute had been resolved without giving an explanation or clarification thereto, and yet on the other hand, he tells the court that the dispute is subject to a pending appeal before court.

[15] It is on this basis that Mr Mohlala for the respondent argued that the applicant had, by telling the court that there is a pending litigation regarding ownership on the subject property, created a dispute of fact without being provoked. He submitted that

the applicants lacked the *locus standi* to claim a clear right over the subject property considering the fact that there is still a pending litigation before court, more particularly because the applicant stated that the outcome of those court proceedings will have an impact on the ownership of the subject property.

[16] The fact that the applicant indicates the significance of the issue of ownership in the subject property and the impact thereof, raises a doubt as regards *locus standi* of the applicants. I am mindful of the applicant's argument that the applicant has a Title Deed to the subject property, but when on the same breath the applicant states under oath that there is uncertainty and a pending dispute regarding the same subject property, this court can clearly not come to a conclusion that the applicants have *locus standi* to the said property. In my view, it would be careless of this court to declare that the applicants have *locus standi*, when this court does not know the outcome of the court where the application for leave to appeal is currently pending.

[17] The issue of *locus standi* also begs an answer to the question whether the applicants have a clear right, which I will now deal with, as it relates to the requirements for the granting of an interdict. It is clear from the notice of motion that the applicants are seeking a final interdict against the respondents from operating a cement mixing plant on the subject property. The respondents' contention is that the applicants have not met the requirements for the granting of a final interdict. The primary requisites for the grant of a final interdict were enunciated by the Constitutional Court in ***Pilane v Pilane and Another***[2] as follows:

> *"The requisites for the right to claim a final interdict were articulated by Innes JA in* ***Setlogelo v Setlogelo***[3]*. An applicant desirous of approaching a court for a final interdict must demonstrate: (i)* a *clear right; (ii) an injury actually committed or reasonably apprehended; and (iii) the absence of an alternative remedy."*

[2] 2013 (4) BCLR 431 (CC) at para 39.
[3] 1914 AD 221.

[18] It was argued on behalf of the applicants that the applicants have a clear right because they are the owners of the subject property and are entitled to have the property used for legal purposes in compliance with the provisions of SPLUMA and the Scheme. Further that the applicants will continue to suffer irreparable harm, being an infringement of the rights which the applicants have over the property and the resultant prejudice because the applicants have no alternative remedy available to them to resolve the dispute.

[19] The respondents on the other hand argued that the applicants have failed to demonstrate a clear right – because this was proven when they asked an indulgence from City of Tshwane not to proceed in taking any action against the applicants, in view of a pending dispute regarding ownership of the subject property. It was submitted that this application was brought *mala fide* and is an abuse of the court processes in order to achieve an eviction of the respondents from the subject property.

[20] With regards to the second and third requirements to claiming a final interdict, the respondents oppose the granting of the relief sought on the basis of an alternative remedy available to the applicants. It is common cause that after the applicants received a contravention notice, the respondents proposed that a rezoning application be made in order to remedy noncompliance with the statutory requirements and also offered to indemnify the applicants against any penalties or actions taken by the Municipality, and this offer was accepted by the applicants. It must however be noted that this offer of indemnity was made even though the respondents are disputing the allegation that they are operating a cement mixing plant, but a 'concrete ready-mix company'.

[21] The argument that an alternative remedy is available to the applicants was based on the provisions of section 26(5) of SPLUMA[4] which empowers the

[4] section 26 (5) - A municipality may, after public consultation, amend its land use scheme if the amendment is:
(a) in the public interest
(b) to advance, or is in the interest of, a disadvantaged community; and
(c) in order to further the vision and development goals of the municipality.

Municipality to amend its land use scheme if the amendments met certain criteria stipulated under the section. In this regard, the respondents submitted that the applicants have not satisfied the requirement that an alternative remedy is not available to them because they were open to apply for a rezoning as the respondents proposed.

[22] The applicants on the other hand argued that there is no alternative remedy available to rectify the activities of the respondents on the subject property and further that they cannot be forced to submit an application to the municipality to obtain certain land use rights or zoning on their property to make provision for the business of the respondents. They insisted that there is no obligation on the applicants to submit the application which will at the outset be moot. They contended that even if an application could be lodged with the municipality, that application would not be supported and approved by the municipality. They have in their replying affidavit, attached several correspondences between the City of Tshwane and the applicant's attorney, one of which is a trail of emails attached as Annexure "RA1".

[23] What is rather disturbing about these emails is what Mr. Mohlala for the respondents referred to as "a collusion between the applicant's attorneys and the City of Tshwane in terms of which a third party would instruct the municipality that - even if an application for the rezoning is lodged, the municipality should not support or approve it". The aforesaid email dated 13 September 2021 from Admin Le Roux sent to the Regional Deputy Director, Renier van Rooyen of City of Tshwane reads as follows:

> *"You are most likely aware of the fact that our clients, the Applicants, lodge a High Court application against numerous entities / people which operate illegal activities from the aforesaid property. Only three of the Respondents opposed the Application, i.e. Gautrans and the 6th and 7th Respondents, with only the later filing an Answering Affidavit. We attach a copy of such Answering Affidavit hereto.*
>
> *You will note from the attached documents that some allegations are aimed against the Municipality, and it would be appreciated if your Municipality*

could file an affidavit in this matter, to provide clarity on some of the issues raised in the Answering Affidavit, specifically relating to the fact that the Municipality will not support or approve a land development application for a cement / pre-mixing plant. (my underlining)

Your urgent assistance herein would be greatly appreciated.

Kind Regards, Nicole Foster"

[24] A reaction to this e-mail from Renier van Rooyen to Andre Du Plessis of City of Tshwane at 14:33 the same day reads as follows:

"Hi Andre,

We are in the process of enforcing the Town Planning Scheme against the owner/occupant of the above property. Our process advanced to such a stage that the Executor of the Estate of the late owner of the property is now in court. He has now, pending our case against himself, lodged an application in the High Court against the occupants of the property using it against the zoning, seeking an order to stop them from doing so.

The sixth and seventh respondents are opposing the application against them. One of the grounds of their defence is referred to in Par 4.10 of their affidavit insofar that the Applicant had an alternative remedy, being the submission of a "new establishment of a township that accommodates Industrial" etc uses. The gist of the request from the Applicant's Attorney is whether the Municipality will not support or approve a land development application for a cement/pre-mixing plant in the area of Zwavelpoort,

Should you be able to answer the latter question„ it is suggested that you do it in conjunction with Wardah's office".

[25] In a response to this email from Hannes M. v/d Westhuizen from City of Tshwane, the following is noted:

"Good day Renier

Although we cannot predict the outcome of a compete land use application process and we do not have any detail regarding proposed land uses for the property, the following can be mentioned:

In general, the type of land use described as "cement/pre-mixing plant" or "concrete mixing" ***should not be supported at that location****……."*

[26] These emails reflect the basis of the respondents' submission that there is an alternative remedy available for the applicants for them not to be granted the relief sought for an interdict. Mr Ellis submitted that emails annexed to the replying affidavit are nothing more than just a plea by the applicant's attorney to request the City of Tshwane to file its affidavit.

[27] I do not agree with that submission. Reflecting back on the provisions of Rule 41A to which both parties ignored and failed to comply with, this court will reiterate on what the court in ***Koetsioe*** *supra* stated, that: "*the circumstances of this case screams for an alternate dispute resolution attempt, rather than a purely legal challenge".* In my view, had this process been followed, most probably, the parties would have reached an agreement to resolve their disputes. A blunt refusal by the applicants to even consider the proposal by the respondents regarding the zoning application, let alone attempt it, is in the circumstances of the case very disturbing to say the least, that the applicants would go as far as influencing the decision makers at the City of Tshwane, considering the alternative provided for by section 26 of SPLUMA.

[28] I am also mindful of the submission made by the respondents at the end of their address that – 'had there been no alternative remedy available to the applicants and the applicants telling them that they are no longer welcome to remain in the property, they would have left'. Mr Mohlala however submitted, and correctly so, that the applicants also failed to make out a case for an eviction in their application because eviction is not supported in any way in their founding affidavit and replying affidavit.

[29] I have seriously considered the circumstances of this case, including the racial issues raised by the respondents, which in my view should not have been raised because they were irrelevant for purposes of the issues to be determined by this court. Having said that, the applicants expressed the view that they do not want the respondents to conduct business in the subject property, which the applicants allege is illegal and has to be stopped because it contravenes the provisions of SPLUMA.

[30] While the respondents argued that they have a valid Lease Agreement with the applicants, and that the parties should have explored the provisions of Clause 20 of the Lease Agreement in an attempt to remedy the contraventions as contained in the Contravention Notice, the applicants contend that the Lease Agreement concluded between the late Petrus van der Merwe and the first to eleventh respondents for the use of the property in contravention of the legislation those Lease Agreements should be declared invalid.

[31] With regards to the question whether the applicants fulfilled the requirements for the granting of a final interdict, I am of the view that the applicants did not satisfy the requirements to be granted such a relief for the following reasons:

(a) The applicants failed to proof a clear right.

(b) The applicants failed to proof that they will suffer irreparable harm. In any event, the respondents had already offered to indemnify the applicants for any penalties imposed by the municipality, and this offer was accepted by the applicants.

(c) The applicant had the alternative remedy at their disposal which unfortunately could not be explored as demonstrated.

[32] Turning to the unopposed portion of the application, the applicants also seek an order for the eviction of the first to eleventh respondents, and a declaratory order relating to the interpretation of certain clauses or words as they appear in the old Transvaal Provincial Administration, to be interpreted so as to comply with the definition as defined in the Scheme.

[33] As indicated above, the applicants failed to make out a case for an eviction order to be granted in their favour because eviction is not supported in any way in their papers. I have already ruled that the applicants have also not satisfied the requirements to be granted an order for a final interdict. Consequently, I can find no reason why these two orders should be granted against the first to fifth respondents, as well as the eighth to eleventh respondents even where the applications are not opposed. In the circumstance, the application falls to be dismissed.

[34] With regards to the issue of costs, Mr. Mkhabela on behalf of the fourteenth respondent submitted that no cost order should be granted against the fourteenth respondent because the fourteenth respondent had been wrongly cited and brought to court. He further submitted that it would wrong in law and not be in the interest of justice to hold a wrong party liable for cost. There was no counter submission by the applicants in this regard.

[35] While I hold the view that the both parties would have benefited from the process of mediation as envisioned by Rule 41A to resolve their disputes, it remains of paramount importance for parties not to disregard the rule and its requirements. Had this been done, the costs of this application could have been avoided.

[36] In the circumstances, the following order is made:

1. The application is dismissed with costs.

PD. PHAHLANE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES

For the Applicant	: ADV. R. ELLIS
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Date of hearing	: 12 April 2022