IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISON, PRETORIA

CASE NO.: 49485/2020
(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED
DATE: 7/8/2023
SIGNATURE:

In the matter between:

MS MASHAKGOMO	First Applicant
SS MASHAKGOMO	Second Applicant
and	
THORN FIELD PARK HOME OWNERS ASSOCIATION NPC	First Respondent
SL ARCHITECTS CC	Second Respondent

JUDGEMENT

SARDIWALLA J:

[1] This is an unopposed urgent application in terms of the provisions of Rule 6(12)(a) of the Uniform Rules of Court to interdict and restrain the Respondents from interfering with the Applicants' attempts to finish up all other outstanding building works other than the roof.

[2] The Applicants sought the following relief:

"1. That the non-compliance with this honourable Court's rules relating to the set down of urgent applications be and is hereby condoned;

2. That the non-compliance with the rules relating to service and time periods be and is hereby condoned and that this matter be heard as urgent;

3. That the 1st Respondent is forthwith directed to allow contractors appointed by the Applicants entry into Thorn Field Estate to finish up construction activities on Erf 8[...], M[...] Extension 6, in relation to all other outstanding building works other than the roof. [The other aspects being installation of cupboards, tiles and all other works outstanding for completion of the construction].

4. That the Respondent is directed to forthwith interdicted from interfering with Applicants' attempts to finish up all other outstanding building works other than the roof.

5. That paragraphs 3-4 above shall serve as an interim interdict pending the finalisation of an application by the Applicants to review and set aside the 1st Respondent's refusal to approve Applicant's roof plans.

6. That the Respondent be ordered to pay the costs of this on an attorney and client scale in case they opposed the application.

7. That the Applicant be granted any further and alternative relief that the Honourable Court deems appropriate."

Background to the Application:

[3] The following are the material facts of the matter:

3.1 The Applicants purchased Erf 8[...], M[...] Extension 6 on 26 May 2019 and was transferred into their names on 28 August 2019;

3.2 In terms of the Architectural Guidelines of February 2019 construction and improvements on the erven must commence within two (2) years of registration of transfer of ownership and once the building has commenced it must be completed within 12 months;

3.3 The plans were drafted by RDL Investment and submitted to the Respondents for approval and a request for relaxation of the general aesthetics more in particular the flat concrete roof as the estate calls for all design work and development plans to be “Mediterranean”;

3.4 On 30 July 2019 the plans were rejected by the First Respondent Board on grounds that the plans constitute a substantial deviation from the Architectural Guidelines as they did not fit the elements of Italian Tuscan and French Provence style which the Estate terms is referred to as Mediterranean. It was recommended that the Architects review the plans and bring it in line with the Architectural Guidelines;

3.5 on 27 February 2020 amended drawings were submitted to the Estate’s Architect SL Architects. They were approved in principal on 2 March 2020. The Estate’s Architect also indicated that the final approval of the amended plans lies with the First Respondent but was not guaranteed as on site inspections will still be done with review of the amended plans and further weekly inspections will be done in order to monitor compliance.

3.6 On 3 March 2020, the Estate granted the Applicant’s permission to access the site to continue with the construction activities on condition that:

3.6.1 All construction activities are focus on the aesthetic elements identified by the Estate Architect in her letter of 2 March 2020 which are:

3.6.1.1 concrete tile pitch roof

3.6.1.2 decorative steel balustrading and no glass balustrades

3.6.1.3 decorative fibre cement feature panels at the entrance and between the columns on the Western elevations

3.6.1.4 plaster bands on the majority of the window and door openings

3.6.1.5 plaster feature on the bedroom 5 balcony (Western Elevation)

3.6.1.6 Timber garage doors with possible imitation bolt features

3.6.1.7 Timber entrance door to match garages or glass door with decorative steel feature to match balustrading

3.6.1.8 Confirmation of paint colours on the Estate approved list.

3.6.2 The Applicant's Architect is to finalise the amended plans and submit same for approval to the Estate Architect and the Estate in 7 days from 3 March 2020.

3.6.3 Construction activities will be inspected on a daily basis, in the event that there is a deviation from the agreed amendments the First Respondent will close the site, institute penalties and submit a report to the Municipality for the enforcement of by-laws.

3.7 As a result of being granted access to the site construction or budling began from May 2020.

3.8 The amended plans were provisionally approved by the First respondent on 18 August 2020.

3.9 The building woks did not focus on a concrete tile pitch roof as 5.1.1 of the Architectural Guidelines allowed for two types of roof covers. The relevant clause of 5.1.1 reads as follows:

> *The following covering will be allowed:*
>
> - *Concrete roof tiles (Coverland, Marley etc.)*
>   *Profiles:*
>
>   - *Monarch*
>   - *Mendip*
>   - *Double Roman*
>
> - *Flat concrete roofs (with non-reflecting waterproofing)*

3.10 The Applicants were advised by an engineer and roofing contractors that a concrete tile pitch roof on top of the slab could be risky as the roof contractors would not have access to the roof for inspection of the workmanship once the roof has been erected and covering put on it. The concerns were relayed to the Applicants project manager who in turn advised the First Respondent.

3.11 10 other units were observed with flat concrete roofs in the Estate.

3.12 The Applicants attempted to meet with the First Respondent numerous times to not his concerns and discontent but against the advice of the engineers and contractors the Applicants has undertaken to put up the concrete tile pitch roof by 10 November 2020 to avoid unnecessary wastage of building materials that were procured.

3.13 On 21 September 2020 the Applicants received an email from the First Respondent stating that all construction activities were suspended on the allegation that there was deviation of the construction activities with the plan as agreed with the Estate Architect in that the activities were above and beyond focusing on aesthetic elements and focused on adding finishes to the structure and the modified roof structure is not in place.

3.14 Subsequent to that email the First Respondent emailed the Applicant requiring the Applicants to commit to putting up a concrete pitch tile roof on top of the slap which the Applicants did and committed to do so by 10 November 2020.

3.15 Further attempts to meet with the First Respondent was in vain.

3.16 The Applicants attorney addressed a letter to the First Respondent on 23 September 2020 demanding the lifting of the suspension by 27 September 2020 failing which it would bring the current application. The First Respondent did not acknowledge the letter.

3.17 The suspension has severely prejudiced the Applicants financially as they already procured and paid for building materials.

3.18 Materials such as cement for the amount of R110 000 were purchased and if not used will harden due to weather/temperature and will not be usable.

3.19 Cupboards purchased for the interior in the amount of R1 9000 000.00 if not installed will bulge and be unusable due to weather/temperature.

3.20 The Applicants have given notice on their current lease ending 30 October 2020 as they envisaged that all building works would be done.

[4] The Respondent's filed a notice of opposition. Thereafter the Respondents filed an affidavit together with a notice of withdrawal of opposition on 2 October 2020. The matter was therefore heard as unopposed.

Applicant's Argument

[5] The Applicant contends that First Respondent has inconsistently applied its Architectural Guidelines by allowing 10 other units in the Estate to install flat concrete roof but insisted that the Applicants install a concrete pitch tile roof despite the fact that the Guidelines permit a flat concrete roof. That the Applicant's will suffer severe financial prejudice by the suspension of the construction activities imposed by the First Respondent as the building materials procured will become unusable. The Applicants have attempted in vain to resolve the dispute with the First Respondent and all correspondence was ignored until the launch of the present application.

[6] The Applicants have also lunched a review application of the First Respondents decision. The application was launched on 28 September 2020 and at the time of filing heads the Respondents had not filed an answering affidavit. The Applicants have demonstrated a *prima facie* right and stand to suffer irreparable harm if the interdict is not granted. Further that the Applicants would essentially would be left homeless. There will be no prejudice to the Respondents as the roof aspect is to be reviewed and the Applicants are not going to put the flat roof pending the determination of the review application. Therefore, there is no other satisfactory remedy other than an interdict allowing the Applicants to continue the building works. In the absence of the interdict the Applicants will suffer financial loss, undue hardship and an impairment to their dignity as persons.

Respondent's Argument

[7] Although the Respondent did not file an answering affidavit, they did file an affidavit together with a notice of withdrawal of opposition. Essentially the affidavit stated that the Applicants had unlawfully installed a concrete slab roof to the dwelling which they were busy constructing. The flat roof was installed contrary to the approved building plans which provides for a pitch tile roof. Soon thereafter an oral agreement was reached whereby the Applicants agreed that a pitch roof would be installed over the flat roof, however no date as to when this would occur was finalised. It was then agreed as part of an oral agreement that the Applicants would submit new buildings plan for approval to the Respondents to provide for a pitch tile roof over the flat roof. The Applicants submitted the draft building plan in this regard which the First Respondent's Architects have replied to with their notes. The draft plan and the notes constitute the provisionally approved amended building plans in respect of the roof. On 22 September 2020 the Applicants offered to have the pitch tile roof installed over the flat roof by no later than 10 November 2020. Whilst the offer was being considered by the Respondents the Applicants served the urgent application

[8] The Applicants offer was accepted and verbally communicated to Applicant's attorney on 30 September 2020. The aforementioned offer was accepted on condition that the pitch roof is erected in accordance with the specifications as per the drawings and notes as per the correspondence between Ms Sonia Cunha Leithgob & Tshepo Motau on or about 21 July 2020 and 1 August 2020. The offer and acceptance was made during the judicial proceedings and should be made an order of Court. It is on this basis that the Respondents have decided to withdraw their opposition to the application and to allow the applicants to proceed with their construction works which includes the installation of the pitch roof over the flat roof.

Urgency

[9] The general principles applicable in establishing urgency are dealt with in Rule 6(12) of the Uniform Rules of this Court. The importance of these provisions is that the procedure set out in Rule 6(12) is not there for the mere taking. Notshe AJ said in **East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley**

Granite (Pty) Ltd and Others [1]in paras 6 and 7 as follows:

'[6] The import thereof is that the procedure set out in rule 6(12) is not there for taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.

[7] It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his case in that regard."

[10] Urgent applications must be brought in accordance with the provisions of rule 6(12) of the Uniform Rules of Court, with due regard to the guidelines set out in cases such as **Die Republikeinse Publikasies (Edms) Bpk vs Afrikaanse Pers Publikasies (Edms) Bpk**[2] as well as a well-known case of **Luna Meubelvervaardigers (Edms) Bpk v Makin and Another**[3].

[11] This leaves the requirement of the Applicant's ability to obtain proper substantive redress in due course, for consideration. Obviously, and where a matter is struck from the roll for want of urgency, then the merits of the application remains undetermined. It follows that the application can still be

[1] (11/33767) [2011] ZAGPJHC 196 (23 September 2011)
[2] 1972(1) SA 773 (A) at para 782A - G
[3] 1977(4) SA 135 (W), see further also Sikwe vs SA Mutual Fire and General Insurance 1977 (3) SA 438 (W) at 440G - 441A.

considered and granted by a Court in the ordinary course. But I understand that in this case, there is a unique consideration. Considering the undeniable realities of litigating in the ordinary course, by the time the review application is determined the building materials procured would be unusable and the Applicants would be left homeless. The Applicants are therefore not able to obtain substantive redress in the ordinary course. However even if the application failed on urgency, it is possible, in appropriate circumstances, to even dispose of the matter on the merits, where a matter is regarded as not being urgent, instead of striking the matter from the roll. The Court in **February v Envirochem CC and Another**[4] dealt with this kind of consideration, and even though the Court accepted that urgency was not established, the Court nonetheless proceeded to dismiss the matter in the interest of finality and so the matter should be dealt with once and for all.

Interim Interdict

[12] A request for an interim interdict is a court order preserving or restoring the status quo pending the determination of rights of the parties. It is important to emphasize that an interim interdict does not involve a final determination of these rights and does not affect their final determination. In this regard the Constitutional Court said the following:[5]

"An interim interdict is by definition 'a court order preserving or restoring the status quo pending the final determination of the rights of the parties. It does not involve a final determination of these rights and does not affect their final determination.' The dispute in an application for an interim interdict is therefore not the same as that in the main application to which the interim interdict relates. In an application for an interim interdict the dispute is whether, applying the relevant legal requirements, the status quo should be preserved or restored pending the decision of the main dispute. At common law, a court's jurisdiction to entertain an application for an interim interdict

[4] *(2013) 34 ILJ 135 (LC) at para 17. See also Bumatech (supra) at para 33; Bethape v Public Servants Association and Others [2016] ZALCJHB 573 (9 September 2016) at para 53.*
[5] *In National Gambling Board v Premier, Kwa-Zulu Natal and Others 2002(2) SA 715 CC*

depends on whether it has jurisdiction to preserve or restore the status quo."[6]

[13] The requirements for the granting of an interim interdict are the following: a *prima facie* right, a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted, that the balance of convenience favours the granting of an interim relief, and that the applicant has no other satisfactory remedy.[7] **In this regard Holmes JA**[8] **said the following:**

"The granting of an interim interdict pending an action is an extraordinary remedy within the discretion of the Court. Where the right which it is sought to protect is not clear, the Court's approach in the matter of an interim interdict was lucidly laid down by INNES, J.A., in Setlogelo v Setlogelo, 1914 AD 221 at p. 227. In general the requisites are –

(a) a right which, 'though prima facie established, is open to some doubt';

(b) a well-grounded apprehension of irreparable injury;

(c) the absence of ordinary remedy.

In exercising its discretion the Court weighs, inter alia, the prejudice to the applicant, if the interdict is withheld, against the prejudice to the respondent if it is granted. This is sometimes called the balance of convenience. The foregoing considerations are not individually decisive, but are interrelated; for example, the stronger the applicant's prospects of success the less his need to rely on prejudice to himself. Conversely, the more the element of 'some doubt', the greater the need for the other factors to favour him. The Court considers the affidavits as a whole, and the interrelation of the foregoing considerations, according to the facts and probabilities; see Olympic Passenger Service (Pty.) Ltd. v Ramlagan, 1957 (2) SA 382 (D) at p. 383D -

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[6] At 730 - 731[49]
[7] See: Eriksen Motors (Welkom) Ltd v Protea Motors Warrenton and Another 1973(3)SA 685 (A) Knox D Arcy Ltd v Jamison and Other 1996(4) SA 348 (A) at 361
[8] In Eriksen Motors (Welkom) Ltd v Protea Motors Warrenton and Another, supra, at 691.

G. Viewed in that light, the reference to a right which, 'though prima facie established, is open to some doubt' is apt, flexible and practical, and needs no further elaboration."

[14] Where the right is clear "… the remaining questions are whether the applicant has also shown:

(a) an infringement of his right by the respondent; or a well-grounded apprehension of such an infringement;

(b) the absence of any other satisfactory remedy;

(c) that the balance of convenience favours the granting of an interlocutory interdict."[9]

[15] In this case the Applicants seek an interdict against the First Respondent's suspension of the construction works on their home. The dispute relates to whether the Applicants are permitted to erect a flat concrete roof as opposed to a concrete pitch tile roof. The question therefore is whether the Applicants have established a *prima facie* right. The approach to be adopted in considering whether an applicant has established a *prima facie* right has been stated to be the following:[10]

"The accepted test for a prima facie right in the context of an interim interdict is to take the facts averred by the applicant, together with such facts set out by the respondent that are not or cannot be disputed and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered and, if serious doubt is thrown upon the case of the applicant, he cannot succeed."[11]

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[9] Knox D'Arcy Ltd and Others v Jamieson and Others 1995 (2) SA 579 (W) at 592 – 593.
[10] In Simon NO v Air Operations of Europe AB and Others 1999 (1) SA 217 (SCA).
[11] At 228;
See also Webster v Mitchell 1948 (1) SA 1186 (W) at 1189,
Manong & Associates (Pty) LTD v Minister of Public Works and Another 2010 (2) SA 167

Analysis and findings

[16] It is common cause that the First Respondent suspended the construction works on the Applicants site that they are building their home which directly and adversely affects the Applicant's rights. The Respondents have offered no explanation to this Court for its refusal of the Applicant's election to erect a flat concrete roof as this is permitted in the First Respondent's Architectural Guideline. It has further not disputed that there are 10 other units in the Estate that have flat concrete roofs which is in contradiction to its refusal to permit the Applicants to do the same, given the Guidelines clearly permit this option. The First Respondent also offers no explanation and/or does not dispute the that the Applicants made several requests for a meeting to resolve the issue and therefore the Respondents have offered no explanation why they failed to respond. It is important to note then that the Respondents never sought it fit to engage with the Applicants at any stage prior to this application being launched which in my view could have prevented the current litigation.

[17] The Respondent although clearly entitled to conduct its administrative functions, in terms of the principles of natural justice is also expected to interact with a person or institute whose rights may be adversely affected by its decisions. In the present matter the First Respondent refused to do so leaving the Applicant with no alternative but to approach this Court for relief. I am satisfied that the Applicants have established a *prima facie* right more particularly to challenge the roof aspect.

[18] It cannot be disputed that the First Respondent's suspension threatens the Applicant's aforesaid right to natural justice, fair procedures and will prejudice the Applicants. It cannot be denied that if the Applicants are not granted the relief that it seeks that the Applicants will suffer irreparable harm and will interfere with their constitutional rights. The Respondents have failed to set out what prejudice, if any, they will suffer and therefore this Court must accept that there is no prejudice to be suffered by the Respondents. I am therefore

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(SCA) at 180.

satisfied that the balance of convenience favours the Applicants.

[19] It is important to note that the proceedings that the Applicant seeks to institute is to review and set aside the decision by the First Respondent. On the version of the Applicants and the lack of evidence to the contrary by the First Respondents there are strong prospects of succeeding in the review wherein the Applicants will be granted the opportunity to clarify the roof aspect and whether or not the Applicants are permitted to install a flat concrete roof. However should the interdict not be granted the damage to the Applicants materials and being left without a home would be irreversible. The Applicants will suffer prejudice if the interim interdict is not granted to which I am satisfied that there is no alternate remedy.

[20] **Accordingly, the following order is made:**

1. The non-compliance with this honourable Court's rules relating to the set down of urgent applications is hereby condoned;

2. That the non-compliance with the rules relating to service and time periods is hereby condoned and that this matter be heard as urgent;

3. That the 1st Respondent is forthwith directed to allow contractors appointed by the Applicants entry into Thorn Field Estate to finish up construction activities on Erf 8[...], M[...] Extension 6, in relation to all other outstanding building works other than the roof. [The other aspects being installation of cupboards, tiles and all other works outstanding for completion of the construction].

4. That the Respondents are interdicted from interfering with Applicants' attempts to finish up all other outstanding building works other than the roof.

5. That paragraphs 3-4 above shall serve as an interim interdict pending the finalisation of an application by the Applicants to review and set aside the

1st Respondent's refusal to approve Applicant's roof plans.

6. The Respondents are ordered to pay the costs of this on an attorney and client scale.

SARDIWALLA J

Appearances:

For the Applicant: Adv LJ Madiba
Instructed by: Ahmed T Shabangu Incorporated

For the Respondent:
Instructed by: KirkCaldy Pereira Inc