IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A30/06

In the matter between:

RAYMOND PATRICK O'GRADY Appellant

And

FRANZ FISCHER 1st Respondent
THE MUNICIPALITY OF STELLENBOSCH 2nd Respondent
BOLAND DISTRICT MUNICIPALITY 3rd Respondent

JUDGMENT: 17/05/006

VAN REENEN, J:

1] This is an appeal against a judgment of the Magistrate of Stellenbosch in which he dismissed, with costs as between attorney and client, an application in which the appellant sought an order in the following terms against the first respondent on an ex parte and urgent basis:

"2.1 interdicting and restraining the first respondent with immediate effect from proceeding with the construction and paving of a parking lot on his property, farm 124/11, Banhoek, Stellenbosch;

2.2 ordering the first respondent to remove all paving that have been constructed already and to restore the property to its **status quo ante**;

2.3 ordering the first respondent to comply with all relevant laws, rules, prescriptions and conditions of the second respondent and of the third respondent prior to again embarking upon any construction and paving of a parking lot.

3 …

4 …

5. That the costs of this matter be paid by the first respondent.

6. Further and/or alternative relief."

2] The appeal is primarily directed at the learned magistrate's findings that the appellant failed to discharge the onus as regards certain requirements

for the granting of a final interdict; his finding as regards the meaning of the word 'building" in section 1(a) of the National Building Regulations and Building Standards Act, No 103 of 1977 (the Act); and the order directing the appellant to pay costs on an attorney and client scale.

3] The appellant is the registered owner of an immovable property namely, farm 124/400 Banhoek, Stellenbosch known as Hillcrest Berry Orchards, 18,7714 hectares in extent. The appellant not only resides on the property but also conducts a restaurant business thereon.

4] The respondent - who was the first respondent in the application in the court **a quo** - is the registered owner of two immovable properties one whereof is farm 1341, Stellenbosch Division, known as Riverside on which he operates an eight bedroom

guest house known as "De Kraal" Country Lodge. That property is adjacent to that of the appellant and is separated therefrom by the old Helshoogte Road.

5] The subject-matter of the interdict in the court **a quo** is a paved parking area of approximately 400 square metres constructed as from about 13 September 2005 by the first respondent on the said property with bricks imbedded in mortar.

6] The appellant's attorneys of record on 14 September 2005 addressed a letter to the respondent in which he was requested to desist from continuing with the construction of the paved parking area, failing which the court would be approached for relief. When the first respondent, during a telephone conversation with the appellant's attorney on 15 September 2005, adopted the stance that he had been advised by an official of the local authority concerned that no written

approval was required for the construction of the said paved parking area, the attorney, in a letter addressed to the respondent on the same date demanded an undertaking, by the close of business, that the construction would be terminated. When the undertaking failed to materialise the appellant launched the application on an **ex parte** basis and set it down for hearing at 12h30 on 16 September 2005. When the matter was called the magistrate insisted that the papers be served on the respondent as well as the two other respondents which had been cited as parties namely the Municipality of Stellenbosch (as second respondent) and the Boland District Municipality (as third respondent) and postponed the application to 7 October 2005.

7] The respondent opposed the application and filed an answering and supporting affidavit but the second and third respondents chose not join in the fray.

After the appellant had filed a replying affidavit the matter was argued on the date to which it had been postponed.

8] The thrust of the application was that –

8.1 the "parking-lot" would invade the appellant's privacy;

8.2 the appellant had not consented to the construction of the paved area nor had he been afforded an opportunity to comment and/or object thereto;

8.3 the second and third respondents had not approved the construction of the paved area; and

8.4 that the paved area when completed would infringe on the enjoyment of the appellant's privacy in that –

8.4.1 it would constitute a traffic hazard and impede upon amongst others his restaurant business;

8.4.2 constitute a deleterious visual impact directly opposite his personal residence; and

8.4.3 impact upon his personal privacy as the respondents establishment is frequented at all hours of the night

(paragraph 8 of the founding affidavit).

9] The appellant's articulation of the consequences of the respondent's alleged unlawful and illegal conduct is that it –

"a. is in clear breach of statutory provisions in that no building plans have been submitted for the proposed activity, nor has approval of the relevant road authority, the third respondent been obtained, and consequently the activity is in breach of, amongst others, section 4(1) of the National Building Regulation and Standards Act, act 103 of 1977;

b. constitutes a breach of my rights of privacy;

c. constitutes a severe infringement of my rights of enjoyment of my property, including my right to a safe and free flow of traffic, my rights to protect the visual integrity of my premises which include a restaurant business and my right to privacy, particularly at night time."

(paragraph 14 of the founding affidavit).

10] The Respondent denied the averment in paragraphs 8 and 9 above and there is no basis on which it could be found that such disputes were not real, genuine or **bona fide.** As the relief sought was final of nature, it could have been granted only if the facts averred in the appellant's papers and admitted by the respondent, together with the facts averred by the respondent, justified the granting thereof (See: **Plascon Evans Paints v Van Riebeek Paints** 1984(3) SA 623 at 634 H – I). The appellant, faced with the prospect of being denied any relief, in his

replying affidavit amplified the grounds on which he sought relief in that he annexed thereto a letter dated 28 July 2004 from the Stellenbosch Municipality, Annexure "G", from which it appeared that the rezoning of the respondent's property had been granted subject to certain conditions one whereof was

> "(x) that parking for at least 88 vehicles be provided on the property. A parking lay-out plan must be submitted to the Director: Planning and Economic Development Services for evaluation and approval before the owner can act on the approval."

coupled with an allegation that the approval referred to therein had not be obtained.

11] The magistrate in his judgment studiously refrained from making any reference to annexure "G" or any factual averments that had been made on the basis thereof. The reason therefor transpired from Advocate Vismer's heads of argument namely, that it

had been held to be inadmissible after he had objected to the appellant amplifying his case in reply. Advocate Fagan who argued the appeal on behalf of the appellant but - unlike Mr Vismer, had not appeared at the trial in the court **a quo** - accepted the correctness of his colleague's version despite the fact that the ruling did not form part of the record of the proceedings placed before us. In the absence of the exact terms of the ruling the reasons for its disallowance must be sought in principle. An applicant must make out his/her/its case in the founding affidavit and is not permitted to supplement it in the replying affidavit - the purpose whereof is to deal with the averments made in the answering affidavit - and more so, not to make out a new case in reply (See: **Bayat and Others v Hansa and Others** 1954(3) SA 547 (N) at 553 D – E). That, however, is not an absolute rule as a court has a discretion to allow new matter in a replying affidavit

eg where new facts previously unknown to a deponent have come to light or where the existence of a further ground of relief appears from the answering affidavits. Although it would appear that the contents of annexure RPO 2 annexed to the respondent's answering affidavit could have been the catalyst for the location of and the reference to annexure "G", and explains its introduction in the replying affidavit, there is no reason to believe that the magistrate failed to properly exercise his discretion in having disallowed the amplification of the applicant's case in reply. The appellant's remedy, had he been dissatisfied with the magistrate's ruling, was to have raised it as a separate ground of appeal (See: **Dickensen v Fisher's Executors** 1914 AD 424). As the appellant failed to do so this appeal has to be decided on the basis that annexure "G" and the references thereto in the replying affidavit have been properly disallowed.

12] The requirements for a final interdict are a clear right; an injury actually committed or reasonably apprehended; and the absence of an alternative remedy (See: **Lawsa,** Volume 11, paragraph 309). On my understanding of the magistrate's judgment he appears to have found that the appellant failed to prove one or more of such requirements on a balance of probabilities, despite the fact that he appears to have informed himself at the outset that the outcome of the application was dependant upon whether the respondent was in law required to obtain the approval of the Municipality of Stellenbosch before constructing the paved parking area on his property.

13] As the magistrate disallowed evidence of the fact of and the contents of the conditions on which the respondent's rezoning application had been approved, the outcome of that enquiry depended on

his view of the true meaning of the definition of the word "building" in section 1(a) of the Act. The magistrate after an analysis of the said definition concluded that the concepts "erection" and "erected" used therein informed the meaning of "building", rather than the concept "structure", which he considered "carry the ordinary meaning". Although the magistrate on the basis of that perception of the definition of "building" appears to have shared the view expressed in annexure RPO 2 namely, that "… a parking lot is not regarded as a building construction interms (sic) of the above mentioned legislation" and that conclusion should have put an end to the enquiry, he paradoxically found:

> "5 That approval is necessary prior to construction of a parking lot"

14] The definition of "building" in section 1(a) of the Act is as follows:

" "building" includes –

(a) any other structure, whether of a temporary or permanent nature and irrespective of the materials used in the erection thereof, erected or used for or in connection with –

(i) the accommodation or convenience of human beings or animals;

(ii) the manufacture, processing, storage, display or sale of any goods;

[Sub-para. (ii) substituted by s. 1 (b) of Act No. 62 of 1989.]

(iii) the rendering of any service;

(iv) the destruction or treatment of refuse or other waste materials;

(v) the cultivation or growing of any plant or crop;

(b) any wall, swimming bath, swimming pool, reservoir or bridge or any other structure connected therewith;

(c) any fuel pump or any tank used in connection therewith;

(d) any part of a building, including a building as defined in paragraph (a), (b) or (c);

(e) any facilities or system, or part or portion thereof, within or outside but incidental to a building, for the provision of a water supply, drainage, sewerage, stormwater disposal,

electricity supply or other similar service in respect of the building; “

15] In my opinion the use of the word “includes” (the equivalent whereof in the Afrikaans text of the Act is “ook” which according to HAT means “bowendien”) in conjunction with “building” - if viewed against the nature of the various other structures enumerated therein - signifies an intention on the part of the legislature to have extended or enlarged the ordinary meaning thereof (See: **Jones & Co v Commissioner for Inland Revenue** 1925 CPD 1 at 5). That such an extended meaning was intended is apparent from the fact that it not only encompasses “any other structure … erected or <u>used</u> for or in connection with (i) the accommodation or <u>convenience</u> of human beings …” (the underlinings are my own) but also the nature of the structures enumerated in the definition of “minor building work”

in the regulations promulgated in **Government Gazette 12780** of 12 October 1990 in terms of section 17(3)(b) of the Act eg. a freestanding wall constructed of masonry, concrete or timber or any wire fence with such wall or fence not exceeding 1,8 meters of height and also a pergola.

As the concept structure has not been defined it must similarly be given its ordinary everyday dictionary meaning which is "a building or other object constructed from several parts" (**The Concise Oxford English Dictionary**); "the arrangement and inter-relationship of parts in a construction, such as a building" (**Collier's English Dictionary**); "manner of building or construction; the way in which an edifice, machine etc is made or put together" (**The Shorter Oxford English Dictionary on Historical Principles**); and "something built or constructed, as a building, bridge, dam etc" (**The Random House**

Dictionary of the English Language). Although the concept "structure" includes a building it is a concept of much wider import (See: **Ko-operatieve Wynbouwers Vereniging van ZA Bpk v Industrial Council for the Building Industry and Others** 1949(2) SA 600 (AD) at 611) and in its wide sense means anything which is constructed or put together, articles put together to form one whole form of structure (See: **Mhleko v Germiston City Council** 1959(3) SA 447 (T) at 447 H or "… anything which is constructed; and it involves the notion of something which is put together consisting of a number of different things which are so put together or built together" (per Humphreys J in **Hobday v Nicol** 1944(1) All ER 302 at 303 quoted with approval by Holmes JA in **Mohr v Divisional Council, Cape** 1976(2) SA 905 (AD) at 918 F).

It is apparent from the photographs of the paved area annexed to the papers that it consists of building bricks of unequal size placed in a discernable pattern on levelled (and presumably compacted) ground and embedded in mortar. In my view the said paved area clearly falls within the every-day dictionary meaning of "structure". It is apparent from the contents of annexure RPO2, as well as the averments in the respondent's answering affidavit, that the said area is intended for the use of guests frequenting the respondent's guest house. It, on the facts, to me appears to be axiomatic that the paved area is intended to be used for or "in connection with" - a term devoid of a precise meaning but capable of covering the whole spectrum of relationships from a close and direct one to a remote and indirect one (See: **Administrator Transvaal and Another v J van Streepen Ltd** 1990(4) SA 644 (A) at 656 G – I) - the accommodation or the convenience of human

beings. I accordingly incline to the view that, on the facts of the instant case, the paved brick area that formed the subject-matter of the interdict in the court **a quo** falls within the definition of building in section 1(a) of the Act.

16] Section 4(1) of the Act provides as follows:

> "No person shall without the prior approval in writing of the local authority in question, erect any building in respect of which plans and specifications are to be drawn and submitted in terms of this Act."

17] It is apparent from that sub-section that the written approval of a local authority is required only for "buildings in respect of which plans and specifications are to be drawn and submitted <u>in terms of this Act</u>" (the underlining is my own). Neither the Act nor the regulations promulgated thereunder specify the buildings in respect whereof plans and specifications must be drawn and submitted, but it

would appear from a perusal of the provisions of that Act that such plans and specifications need not be submitted in respect of all buildings. The Minister of Economic Affairs and Technology may in terms of subsection 2(2) of the Act, by notice in the Gazette and on such conditions as he may think fit, exempt specified areas within local authorities from the application thereof; in terms of subsections 2(4); (5) and (6) of the Act buildings erected by the State may be exempted; in terms of section 13 of the Act a building control officer may in respect of "minor building works" as defined in the regulations, inter alia, exempt an owner from the obligation to submit a plan in terms of the Act; and in terms of section 18 of the Act a local authority or a council as defined in section 1 of the Standards Act, No 30 of 1982, may at the request in writing of an owner, permit a deviation for grant an exemption from any applicable national building regulation, except as regards the

strength and stability of buildings. What in particular is of significance is that in terms of paragraph (g) of the definition of "minor building work" a building control officer may categorise the erection of any building as such, and in terms of section 13 of the Act, exempt an owner from submitting plans or approval where

> "the nature of the erection is such that in the opinion of the building control officer it is not necessary for the applicant to submit with his application plans prepared in full conformity with the regulations"

18] Other than that it is clear that the State was not involved in the construction of the paved area, not even an iota of evidence has been advanced by the appellant to exclude the possibility that any of the aforementioned provisions find application. In the absence of any averments to that effect it, on the facts before the magistrate, could not have been found that the paved area in question constituted a

building in respect of which approval had to be obtained in terms of the Act. In that regard it needs to be accentuated that the **onus** to have shown an entitlement to an order, on a balance of probabilities, rested on the appellant and that there was no onus whatsoever on the respondent to have established facts that negated the appellant's entitlement to relief (See: **Free State Gold Areas Ltd v Merriespruit (OFS) Gold Mining Co Ltd** 1961(2) SA 505 (W) at 524).

18] In the circumstances I have come to the conclusion that the appellant failed to show that the respondent was in law required to have obtained approval from the Stellenbosch Municipality prior to commencing with the construction of the paved parking area and that the magistrate correctly refused the application, but for different reasons.

19] Adv Vismer conceded that the magistrate had misdirected himself as regards the basis upon which he awarded costs against the appellant on an attorney and client scale but nevertheless urged us to reinstate it as the respondent was compelled to answer an inappropriate and procedurally misconceived application; had to deal with it on short notice; and was obliged to do so in order to protect his interests. He relied heavily on the submission that the appellant had failed to include material facts in his founding affidavit namely, that he had approached the Stellenbosch Municipality for relief and had not yet received a reply by the time he launched the application. The alleged material information pertains to the letters referred to in the first paragraph of Annexure RPO 2. As those letters have not been placed before the court by the respondent either and their contents are not known there is no basis upon which this court could arrive at

adverse conclusions as regards the propriety or otherwise of the appellant's alleged conduct. In the circumstances I incline to the view that no basis has been shown for reinstating the magistrate's costs order.

20] In the circumstances the appeal against -

20.1 the refusal of the application is dismissed;

20.2 the order directing the appellant to pay the respondent's costs on an attorney and client scale succeeds.

Accordingly the magistrate's costs order is deleted and substituted with the following order:

> "the applicant is ordered to pay the first respondent's costs on an party and party basis."

20.3 As the appeal was successful in part only it is ordered that each of the parties shall be liable for the payment of his own costs on appeal.

D. VAN REENEN

YEKISO, J:

I agree.

N.J. YEKISO