IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 2843/2007

DATE: 19 FEBRUARY 2008

In the matter between:

THE NOORDHOEK ENVIRONMENTAL ACTION GROUP — Applicant

And

JEREMY J F WILEY — 1ST Respondent

JEREMY R WILDER

THE DEPARTMENT OF ENVIRONMENTAL AFFAIRS — 2ND Respondent

THE CITY OF CAPE TOWN — 3TH Respondent

J U D G M E N T

DAVIS, J:

Introduction

[1] The applicant has applied for a final interdict in which relief of a mandatory nature is sought. The essence of the relief is that first respondent should be ordered to restore erf 453 Noordhoek to the condition that it was

before the undertaking of a construction of a parking lot, as well as a large brick and mortar signpost so as to comply with title deed conditions pertaining to erf 453, as well as conditions pertaining to the subdivision of the mother erf and zoning of erf 453.

[2] It is trite law that in order to succeed in this application for a final interdict in motion proceedings, the applicant must establish a clear right, an injury actually committed or reasonably apprehended and the absence of any suitable alternative relief.

[3] In the context of this application, if the applicant establishes that the use right pertaining to erf 453 does not include the construction of a parking lot or the construction of a parking and a signpost is in conflict with the restrictive conditions of zoning, it must follow that first respondent's construction and use thereof as a parking lot and the erection of a signpost thereon would be unlawful and would constitute an injury actually committed. Accordingly, first respondent's opposition to this application has focused on the first and third of the requirements for a final interdict.

The factual matrix

[4] It would appear from the papers that a number of facts are not, in any substantive form, disputed between the parties. First respondent is a trust in whose name erf 453 (portion of erf 270) Chapman's Peak, Noordhoek (erf 453), is registered. Subject to what follows, first respondent was the registered owner of erf 270 Chapman's Peak in Noordhoek, the original mother erf which was subdivided pursuant to approval granted during 1993, into six erven with separate title. Prior to its subdivision, the rezoning of certain of the subdivided erven with formerly comprised erf 270, was zoned public open space in terms of the local authority's applicable zoning scheme.

[5] Although first respondent has noted that he objected to the original zoning of erf 270 at the time and the rezoning application of erf 270 Chapman's Peak, applicant brought no application to review or set aside either the original zoning of the mother erf or the zoning of erf 453 after the subdivision and the conditions pertaining to the subdivision of erf 270 and the current zoning of erf 453 are accordingly common cause.

[6] Approval was granted for the rezoning and subdivision of erf 270 by the relevant provincial authority in 1993, although it does appear from the papers that the process of subdivision may only have been completed in 1998; hence the averment of the date 1998 by first respondent in his answering affidavit. First respondent's application for rezoning and subdivision of erf 270 emphasised that a sketch plan indicating the proposed development and land use for the mother erf after the subdivision allowed for an open space of approximately 600m² which was identified as number 9 on the sketch plan. The sketch plan described the area which now comprises erf 453 as a paddock, although the proposal at that stage also included a community hall on the western side of the erf. In terms of the subdivision which was later granted, the site of the proposed community hall was later moved to the eastern side of erf 270 which became the subdivided erf 456.

[7] The application for rezoning and subdivision emphasised that the site was the most important under-developed site in the context of the developing environment of Noordhoek. The application also emphasised that the site was relatively flat with a fairly high water table and that the site was "buildable" but careful control had to be

exercised to ensure the retention of its many natural attributes. The application for subdivision or rezoning further proposed that:

1. All parking must be provided on site and in accordance with the requirements of the rezoning scheme.
2. A committee be established which would include members nominated by the local civic association which would be involved in the process of formulating an acceptable development plan and building design manual in respect of the land in question and which would ensure its satisfactory implementation. It was suggested that the community would remain involved in the process of the development of the site in that manner.
3. The open space area of approximately 6000m² should be ceded to the Council so as to give the community some of the public open space they sought.

An Annexure (F) to the application for rezoning and subdivision contained the following regarding the development:

"The proposed development leaves about 9000m² of private open space...divided into two spaces:

(1) A paddock of about 6000m²;

(2) village square of about 3000m²".

[8] Pursuant to the application for subdivision and rezoning, erf 270 was subdivided into six erven, one of which was erf 453. The subdivision and rezoning was approved by the provincial authority, *inter alia*, with the following conditions:

"1. That the ± 6000m² area indicated as "open space" be deducted from erf 270 and zoned "open space" in terms of the Scheme Regulations pertaining to this area;

2. that in terms of section 2(b) of the Scheme Regulations, the site be reserved as "open space for public use" and that no permanent structure be erected thereon without the Administrator's consent

3. That a title condition be imposed restricting the use of the land for open space purposes only".

The approval for rezoning of a portion of erf 270 Noordhoek from public open space to commercial, special residential, general residential and civic and community purposes was granted subject to the

conditions which are contained in the schedule. One of the conditions was condition 10 which stated:

> "All parking to be on site and in accordance with the requirements of the zoning scheme".

It would appear that the word "site" referred to the portion of erf 270 which fell to be rezoned as described in the top of the condition relating to the rezoning of the remainder of the subdivided erven, excluding erven 453 and 454.

[9] The conditions were incorporated as title deed restrictions in the certificate of registered title in respect of the subdivided erven. During 1995, first respondent applied to the then relevant local authority for an extension of the said rezoning approval for a further period of two years and for approval of its development plan and design manual for the six erven. The design manual indicated that the development of erven 493, 455 and 457 would occur in three phases. The design manual made no reference to the utilisation of erf 453 for parking and specified that the area comprising erf 453 would be used as "farmland/open space". The manual also positively asserted that "this area will be retained as open space and used for grazing or growing produce".

[10] On 26 June 1995 the local authority's executive committee granted the extension of the rezoning approval and approval of the development plan and design manual on the basis that:

> "The required open space (4770m² located at the western corner and 1435m² located in the north-east corner) is to be subdivided. No parking is to be permitted on the open space.
>
> It further required that the design manual be amended to indicate that the open space site be reserved for public use and not solely for grazing and growing produce for the farm stall and restaurant".

[11] First respondent later applied for a further rezoning of erf 455 from "civic and community" to "general residential" to enable first respondent to consolidate erven 455 and 457 for the purposes of the construction of a 31-room hotel on the erven. Although this application was later withdrawn by first respondent, the issue of parking now came to a head. Construction of the brick and mortar structure for the signage on erf 453, which is set out in photographs annexed to the founding and replying affidavits, occurred during early 2005. It appears to be common cause that the local authority approved the

structure, provincial authority (being second respondent), had not.

[12] At this point it is perhaps appropriate to note that neither second nor third respondent have entered any form of appearance, nor provided this Court with any argument in relation to this. As Mr Bridgman, who appeared on behalf of first respondent correctly noted, this is regrettable and, in my view, somewhat of an abrogation of their public duty towards the environment and development within this area. I say no more in this regard. During September 2006, first respondent caused erf 453 to be graded, tarred and kerbstone to be built thereon, again reflected in photographs which are annexed to the founding affidavit. So much therefore for the factual matrix underpinning the dispute.

Material Disputes

[13] I now turn to the material issues in dispute. It would appear that by the time this matter was argued before me, the material issue had crystalised into a dispute about the condition pertaining to the subdivision and rezoning of erf 453, namely that erf 453 was reserved in terms of section 2(b) of the Scheme Regulations as

"open space for public use" and whether this included the use by the public for parking their vehicles on such open space.

[14] First respondent contends that erf 453 has been utilised for parking for more than 11 years and averrs that the construction of the parking lot to which the applicant has objected is merely an extension of an existing use of the erf. The question therefore which needs to be determined is whether first respondent contravened the restrictive title conditions of erf 453 and the conditions of approval of subdivision and rezoning pertaining to erf 453 by constructing a tar and kerbstone parking lot thereon and thereby restricting the greater part of the erf to the use of parking only and by the construction of the brick and mortar signpost on erf 453. This concerns an interpretation of both the title deed conditions and the conditions of approval for subdivision and rezoning.

[15] Mr van der Merwe, who appeared on behalf of the applicant, submitted that "an open space" zoning is irreconcilable with the limitation and the use of a substantial part of the erf for the parking of motor vehicles. In his view, this contention is supported by the following:

1. Section 2(b) of the applicable Zoning Scheme Regulations make separate provision for land use restricted to "open space" as opposed to land use restricted to "public parking purposes".

2. First respondent's application for subdivision and rezoning clearly indicated that erf 453 would be retained as "open space" in the sense that it would be a paddock.

3. The provincial authorities' conditions of approval and rezoning also indicated that the parking would be limited to the sites to be rezoned "special residential", "community and civil", "commercial" and "residential hotel only" which would comprise subdivided erven 494, 493, 456 and 457.

4. The limitation was confirmed in express terms by the third respondent's predecessor in title in granting of approval for an extension of the rezoning and subdivision. This confirmation did not constitute a deviation of the existing restrictive conditions, but a confirmation thereof.

Mr van der Merwe also submitted that the conditions of subdivision and rezoning not only limited the use of the

site to "open space for public use" but also limited the use of the site to the extent that no permanent structure should be erected thereon without the consent of the Administrator. He submitted that it was common cause that the second respondent's consent had not been obtained for the construction of a parking lot or the construction of a brick and mortar signpost.

[16] The question arises whether the present construction is to be regarded as a "structure" and whether it is "permanent". In an answering affidavit deposed to by Mr Wiley on behalf of first respondent, there is a suggestion that neither the tar and kerbstone parking lot nor the signpost was a construction, nor permanent. Mr van der Merwe countered that this was an untenable suggestion. In his view, it was "bizarre" to suggest that the construction of the kerbstone and the laying of the tar were neither constructions nor permanent. Similarly, it was incorrect to suggest that the large mortar and brick signage was not a construction of a permanent nature. Accordingly, he contended that the conduct of first respondent constituted a contravention of the restrictive title conditions pertaining to erf 453 and the conditions of subdivision and rezoning by the relevant respondents.

The conduct, in his view, of first respondent was therefore unlawful.

[17] Mr Bridgman, who appeared on behalf of first respondent, submitted that the public had a right to park on land zoned "public open space" in terms of section 24(2) of the Cape Town Zoning Scheme. He contended that it is "ridiculous" to assert, as the applicant appeared to assert, that first respondent may not park on its own private land zoned open space within a designated special area. There was nothing in his view to suggest that in the old Divisional Council Zoning Scheme which applied to erf 270, parking was not permitted on land zoned open space. Precisely the opposite was the more reasonable interpretation in his view, namely that the public may park on land zoned open space.

[18] In addition, first respondent had averred that the use of erf 453 as an area for parking had been officially and formally recognised by the relevant authorities (insofar as formal approval was in fact necessary) starting with the Administrator in the 1993 rezoning in terms of the various development plans which have been approved.

[19] A letter dated 21 November 2003 was, in his view, decisive. On behalf of the Provincial Department of Transport and Public Works the Deputy Director-General:Road Infrastructure accepted the traffic impact statement which agreed with the proposed parking arrangements and required that "sufficient open spaces shall be retained for on-site parking in accordance with this branch's Road Access Guidelines. In addition, Mr Bridgman sought to read the permission of 27 May 1993 to be flexible in that as economic context changed, so should the reading of the permission insofar as development was concerned. To the applicant's argument that aerial photographs taken from 1996 onwards revealed little in the way of permanent parking, Mr Bridgman contended that the aerial photographs of 2004 and 2005 clearly showed cars parked on erf 453. Obviously cars are not at all times parked on erf 453 but at peak time, such as the Noordhoek County Fair on the nearby Noordhoek Avondrust common or when the Noordhoek Farm Village was busy when the public parked their cars on erf 453. There was no indication on the aerial photographs submitted by the applicant as to the day of the week or month in which the photographs were taken.

[20] In his answering affidavit, Mr Wiley stated that the public had parked on erf 453 for more than 11 years. In Mr Bridgman's view, this version could not simply be discarded on the basis of roughly dated and unclear aerial photographs.

Evaluation

[21] Unfortunately there is no definition of open space that can determine this dispute with any measure of precision. Although not decisive (there is nothing equivalent in the applicable Divisional Council Zoning Scheme), the Zoning Scheme Regulations (revised December 1973) define open space as follows:

> "Public open space or public place means any land used or reserved in the Scheme for use by the public as an open space, park, garden, playground, recreation ground and ancillary facilities".

In O'Grady v Fisher & Others 2007(2) SA 380 (C) at 386-387, Van Reenen, J determined that a paved parking area intended to be used by guests fell within the definition of a building. Of relevance to the present dispute is the following passage from the judgment:

> "Although the concept of "structure" includes a building, it is a concept of much wider import...and,

in its wide sense, means anything which is constructed or put together, articles put together to form one whole form of structure...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 not together or built together". 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 discernible pattern on levelled and (presumably compacted) ground and embedded in the mortar.

In my view, the said paved area clearly falls within the everyday dictionary meaning of "structure"."

[22] An aerial photograph of 2007 luminously reveals the extent of the permanent nature of the parking so constructed which occupies a huge central portion of the relevant erf. Whatever parking took place prior to the construction was clearly of a temporary and informal kind as is revealed by the aerial photograph attached to the papers between 1996 and 2005. Even in the design manual submitted by first respondent in 1995 in support of an extension of the rezoning approval, it is common cause that no reference was made in respect of the

utilisation of erf 453 for parking. Mr Wiley's answer is itself extremely instructive:

> "I point out that the development plan and design manual are guideline documents and are not intended to be definitive or overly prescriptive. It is by no means intended to cast the development in stone but rather to evolve over time to meet the reasonable practical needs of a growing local community in accordance with sound urban design, architectural town planning and traffic management principles".

[23] Although much was made of the letter of the DDG of Road Infrastructure of 21 November 2003 which, read together with the traffic impact statement of September 2003 as supporting first respondent's case regarding permission for parking on erf 453, it appears that the letter refers to erf 270 as a whole and not in any specific fashion to erf 453 and therefore the right to park on that erf. The very basis of this case turns on whether the protection of the open space on the subdivided erf 453 has been breached. If erf 453 was to be regarded as part of erf 270, what was the point of the specific condition pertaining to 'open space' on erf 453?

[24] There was considerable debate as to the plan that was finally accepted in 1997. Ms Fleischer, attorney for first respondent, contended that the development plan of 17 October 1997 approved parking on the erf. However, applicant produced a letter from the South Peninsula Municipality dated 17 October 2003 which read together with the attached plans which clearly superseded the earlier version proffered by first respondent, indicated an absence of parking on that erf 453. An examination of the development plans proferred by first respondent indicates the intention to have open space in the area which is now erf 453. Only on 14 September 2006 did a parking layout plan emerge which was supported by the City Engineers. For these reasons the papers did not reveal a dispute of fact sufficient to conclude that no finding can be made that no permission was ever granted for a permanent parking lot on erf 453.

[25] As to the interpretation of the permission which was granted in terms of legislation regulations to the extent that if there is any doubt about the permission granted, the concept "open space" should, in my view, be interpreted so as to support the constitutional commitment to the environment as contained in section

24 of the Republic of South Africa Constitution Act, 108 of 1996.

[26] I accept that I am not interpreting legislation *per se*, in which case the Constitution is directly applicable in terms of section 39(2) of the Constitution. It does appear to me, however, that the constitution provides a recourse for interpretation of ambiguous phrases and that a court should take seriously constitutional commitments to the protection of the environment when determining the meaning of a phrase as hotly contested as open space was during the course of the hearing.

No alternative remedy

[27] First respondent contends that insofar as applicant had lodged a complaint with third respondent and referred the matter to the provincial authorities and that as the administrative process had not yet reached finality, this application should not be adjudicated before such administrative process has been completed. The requirement for a final interdict that respondent should have no alternative remedy requires:

1. That the alternative remedy should be adequate in the circumstances;

2. that it should grant similar protection to the relief sought.

(See in this particular regard Cape Town Municipality v Abdullah 1974(4) SA 428 (C) at 440) The alternative remedy clearly must be effective or appropriate in the circumstances. The facts demonstrate that the administrative process did not provide an effective remedy. Although second respondent had taken the approach that the use of erf 453 was unlawful and that an application should be lodged by first respondent in terms of the Removal of Restrictions Act 84 of 1967, both respondents decided to abide the decision of this Court. As to their attitude I have already made my views clear.

[28] After applicant had filed a complaint with third respondent, several months past during which the application received no response thereto. Applicant was advised of a site visit by second respondent during November 2006 and no further steps were taken by either respondent, nor was applicant advised that any steps would be taken in future. Only after the present application was launched did a copy of a communication by second respondent to third respondent become available to the applicant. The communication assumed that no development had taken place and described no

timeframe within which any legal steps would be taken. In my view, this is no basis for a contention that there was a satisfactory alternative remedy available.

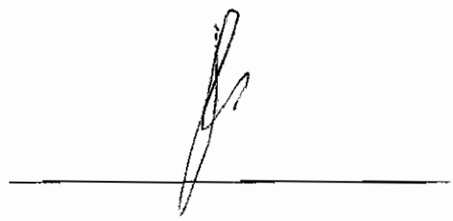
[29] In my view, there is no effective alternative remedy providing similar relief to the relief sought in this application which is the restoration of erf 453 to the condition that it was before first respondent undertook the permanent structures of which I have already described.

[30] For there reasons, therefore, the following order is made:

1. First respondent is prohibited and interdicted from erecting any permanent structures on erf 453 (portion of erf 270) Chapman's Peak.
2. First respondent is interdicted and prohibited from using erf 453 (portion of erf 270) Chapman's Peak in any manner other than in accordance with the zoning in terms of the third respondent's Zoning Scheme Regulations as "open space for public use" in accordance with the title deed conditions registered in respect of the said erf and in accordance with the first respondent's development plan in respect of erf 270 Chapman's Peak approved by the

transitional Metropolitan Substructure for Fish Hoek, Kommetjie and Noordhoek on 26 June 1995.

3. First respondent is interdicted and prohibited from using erf 453 (portion of erf 270) Chapman's Peak or any portion thereof as a permanent parking area for vehicles.
4. First respondent is directed to demolish and remove all permanent structures on erf 453 (portion of erf 270) Chapman's Peak, including all tar, asphalt surfacing, kerbside constructions and construction of a signpost currently situate on the erf.
5. First respondent is directed to restore erf 453 to the condition prior to the construction of the structures referred to in 4 above.
6. First respondent is ordered to pay the costs of this application.



DAVIS, J