Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case Number: 1549/2012

In the matter between:

STELLENBOSCH MUNICIPALITY	Applicant
and	
LONA VAN WYK	First Respondent
RUAN HAVENGA	Second Respondent
RICHARD JARVIS	Third Respondent
JASON GILBERTSON	Fourth Respondent
STEFAN WAGENAAR	Fifth Respondent
ELOISE KELLERMAN	Sixth Respondent
JEANDRE MARAIS	Seventh Respondent
CORNE VAN DER BERG	Eighth Respondent

JUDGMENT DELIVERED ON 8 FEBRUARY 2013

ZONDI, J:

INTRODUCTION

[1] The applicant, in whose area of jurisdiction the first respondent's property is located, seeks an order interdicting and restraining the first respondent from operating an accommodation establishment, more specifically student accommodation. The property in respect of which the interdict is sought is situated at erf 2208 Stellenbosch also known as 16 Simonsberg Street, Simonswyk, Stellenbosch, Western Cape ("the property").

[2] The second to eighth respondents are students studying at the Stellenbosch University. They occupy the property in terms of the lease agreement with the first respondent. The first, third and fifth respondents are opposing the application. The remaining respondents are not opposing the application.

[3] The applicant seeks an interdict on the grounds that the first respondent's use of the property for student accommodation is in contravention of the provisions of its Zoning Scheme established under the Land Use and Town Planning Ordinance 15 of 1985 (LUPO). The basis of the application is that in terms of a Zoning Certificate, which regulates the first respondent's use of the property, the first respondent's property has been zoned as single residential in terms of regulation 10.2.1 of the Stellenbosch Municipality Zoning Scheme Regulations.

[4] The first respondent opposes the application on the grounds that when she took transfer of the property, the property already had the rights to accommodate four additional persons other than her family members. The first respondent contends that these rights have never been withdrawn and the property has always been used by the previous owners in accordance with these rights.

[5] The third and fifth respondents oppose the application on the ground that they are entitled to occupy and remain on the property because they have concluded lease agreements with the first respondents, which lease agreements will only expire in January 2013. They contend that they have a right to housing and this right will be infringed if the order sought by the applicant is granted.

Admission of Further Affidavits

[6] At the commencement of the proceedings, the first respondent sought leave to introduce the affidavits deposed to by Mr Maree for the purposes of demonstrating that there is an acute shortage of student accommodation in Stellenbosch and how the granting of the final interdict will affect the third and fifth respondents. It is suggested by the first respondent that should she be interdicted from providing accommodation, she will have to terminate the lease agreements with the third and fifth respondents with the consequence that the latter will be without accommodation for some time as student accommodation in Stellenbosch is very scarce and this in turn will result in the disruption of their studies.

[7] Secondly, the purpose of Mr Maree's affidavits is to show that the applicant is inconsistent in the manner in which it enforces its regulations. In this regard the first respondent points out that there are other property owners in the same area who run student accommodation business in contravention of the relevant zoning scheme regulations but against whom the applicant has taken no action.

[8] Thirdly, the point is made in Mr Maree's affidavits that some of the people who objected to the first respondent's special development application are conflicted. They

sit on a committee which decides on special development applications.

[9] The applicant objected to the introduction of Maree's affidavits on the ground that they contain irrelevant and hearsay evidence.

[10] After hearing arguments I allowed the first respondent to introduce Mr Maree's affidavits on the ground that some of the issues they traverse are already foreshadowed in the answering affidavits. The applicant has fully responded to them. In these circumstances it is unlikely that their introduction will cause the applicant any significant prejudice.

The Facts

[11] It is common cause that the first respondent's property is zoned as single residential in terms of regulation 10.2.1 of the Stellenbosch Municipality Zoning Scheme Regulations (SM Zoning Scheme) which were promulgated pursuant to the provisions of the LUPO. The Scheme Regulations provide that the property may only be used for one dwelling house or a hot house of material acceptable to the Council. This dwelling house can only be occupied by a single person or a family.

[12] It is further common cause that the first respondent and her two daughters occupy the property as a family and that the second to eighth respondents (the students) also occupy the property in terms of the lease agreements they concluded with the first respondent.

[13] On or about 14 January 2010 the applicant's official visited the first

respondent's property to investigate a complaint by Mr and Mrs du Toit, the first respondent's neighbours, to the effect that the first respondent had converted the dwelling on the property for the purposes of running student accommodation business. Its investigation revealed that the building on the first respondent's property was being used for student accommodation in contravention of section 39 (2) of LUPO.

[14] The applicant's official thereupon served the first respondent with a notice by handing a copy thereof to a student renting a room on the property. The notice read thus:

> "***CONTRAVENTION OF THE ZONING SCHEME: ERF 2208, 16 SIMONSBERG STREET, STELLENBOSCH.***
>
> *It has been established that you are utilizing the aforementioned property for Student Accommodation, which does not comply with the Zoning Scheme Regulations.*
>
> *Your attention is invited to the fact that Erf 2208 is zoned for Single Residential purposes and that the conducting of the said activity constitutes a contravention of the provisions of the relevant Zoning Scheme Regulations.*
>
> *In terms of the provisions of Section 46 of the Land Use Planning Ordinance, any person who contravenes or fails to comply with the provisions of the approved Zoning Scheme, shall be guilty of an offence and shall on conviction, be liable to a fine not exceeding R10 000.00 (in terms of the Adjustment of Fines Act) or to imprisonment for a period not exceeding five (5) years or to both such a fine and imprisonment. Therefore you are called upon to rectify/ cease the illegal use of the property within thirty (30) days from date hereof.*
>
> *You are required to arrange with the Property Inspector, for a final inspection of the property after the 30 days period has lapsed in order to confirm the*

rectification /cessation of the illegal use of the premises."

[15] Thereafter on 18 January 2010 and in an attempt to regularise the use of the property, the first respondent submitted to the applicant an application for special development in terms of regulations 10.2.2 of the applicant's Zoning Scheme Regulations to allow for the accommodation of four additional persons, and to utilise the property for the accommodation of students for reward.

[16] Service on the first respondent of a notice to warn her that her use of the property was unlawful, did not deter the first respondent. She continued to utilise the property for student accommodation. This prompted the applicant to serve another notice on the first respondent again informing her that her use of the property for student accommodation was in contravention of the Zoning Scheme Regulations and warning her of the consequences of her conduct.

[17] The applicant received a number of objections from the first respondent's neighbours objecting to the first respondent's application for special development. The applicant in turn referred these objections to the first respondent for the response. It is common cause that when the applicant brought the present application in March 2012, the applicant had not decided on the first respondent's application. It would seem that the applicant's committee finally took a decision on the first respondent's application in about June 2012 because by a letter dated 18 June 2012 the applicant informed the first respondent that her application for a special development had been turned down. The first respondent lodged an appeal against the applicant's decision but the applicant rejected the appeal *inter alia* on the ground that it was late. Thereafter the first respondent lodged an appeal in terms of section 44 (1) (a) of LUPO.

Discussion

[18] The question is whether the applicant has established the necessary requirements for a final interdict, namely a clear right, an injury actually committed or reasonably apprehended and the absence of a suitable alternative remedy (*Setlogelo v Setlogelo 1914 AD 221*) and if so, whether there are exceptional circumstances justifying the suspension of operation of the interdict. (*United Technical Equipment (Pty) Ltd v Johannesburg City Council* 1987 (4) SA 343 (T).

[19] Mr **Papier,** who appeared for the applicant, submitted that the accommodation of the second to eighth respondents by the first respondent on her property, for reward, in contravention of the LUPO provisions read with the applicant's Zoning Scheme Regulations, is unlawful. Referring to a Zoning Certificate relating to the first respondent's property he argued that the first respondent's property has been zoned as single residential in terms of regulation 10.2.1 of the applicant's Zoning Scheme Regulations. In developing his argument he pointed out that regulation 10.2.1 of the applicant's Zoning Scheme Regulations dealing with normal development, the category in which the first respondent's property falls, provides for one dwelling house or a hothouse of material acceptable to the Council while regulation 10.2.2, which deals with special development, makes provisions *inter alia* for an additional dwelling unit and the accommodation of additional persons, whether for reward or otherwise, in the case of a dwelling house occupied by a family, not more than four additional persons who are not members of such family[1].

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[1] *"Regulation 10.2.2 SD (Special Development) provides as follows:*
(a) An additional dwelling unit
(b) Day-care centre limited to 15 or less children
(c) Guest house
(d) Breeding of dogs
(e) The use of a minor portion of a dwelling house by a permanent resident thereof for any social, religious or occupational

[20] He submitted that the first respondent's use of the property in terms of which she accommodates seven additional persons, is in clear contravention of the applicant's Zoning Scheme Regulations read with section 39 (2) of LUPO[2].

[21] On the other hand Mr **Newton,** who appeared for the third and fifth respondents, and with whose arguments Mr **Combrink**, who appeared for the first respondent associated himself, conceded that the applicant has a *locus standi* to seek the interdictory relief in terms of section 39 (1) of LUPO[3]. But he submitted firstly, that the relief sought by the applicant in paragraph 2 of the notice of motion is unreasonably wide to the extent that it seeks to prevent the first respondent from accommodating four more persons which, Mr **Newton** argued, the first respondent was entitled to. I find it unnecessary to decide on this point as it is common cause that the number of persons accommodated by the first respondent far exceeds the number of persons the first respondent is permitted to keep on her property in terms of regulation 10.2.2. She accommodates seven more persons instead of four more persons. Secondly, he submitted that it was not correct, as the applicant seeks to suggest, that the Zoning Certificate, upon which the applicant relies, is the only

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purposes or for a home enterprise

(f) The accommodation of additional persons, whether for reward or otherwise, as described in each case:

(i) in the case of a dwelling house occupied by a family, not more than four additional persons who are not members of such family; or

(ii) in the case of a dwelling house occupied by a single person, not more than four additional persons who are not related to such single person; provided that such single person shall be the registered owner, or a direct blood relation of the registered owner, of the dwelling house concerned."

[2] *"No person shall –*

(a) Contravene or fail to comply with –

(i) the provisions incorporated in a zoning scheme in terms of this Ordinance; or

(ii) conditions imposed in terms of this ordinance or in terms of Township Ordinance 33 of 1934.

except in accordance with the intention of a plan or a building as approved and to the extent that such plan has been implemented, or

(b) utilise any land for a purpose or in a manner other than that intended by a plan for a building as approved and to the extent that such plan has been implemented."

[3] *"39(1) Every local authority shall comply and enforce compliance with:*

(a) the provisions of this Ordinance or, in so far as they may apply in terms of this Ordinance, the provisions of the Township Ordinance, 1934 (Ordinance 33 of 1934);

(b) provisions incorporated in a zoning scheme in terms of this Ordinance; or

(c) conditions imposed in terms of this Ordinance or in terms of the Townships Ordinance, 1934 and shall not do anything, the effect of which is in conflict with the intention of this subsection."

document which confers the Zoning rights in respect of the property.

[22] He argued that although the Zoning Certificate clearly indicates that the first respondent's property is zoned "*single residential*", there is, however, no indication whatsoever, on the face of it that it is intended to be a certificate incorporating only regulation 10.2.1 of the applicant's Zoning Scheme Regulations. He argued that on a proper interpretation the certificate is intended to incorporate both regulations 10.2.1 ND (Normal Development) and 10.2.2 SD (Special Development). He contended that his construction of the certificate is fortified by the provisions of both regulations 10.2.1 and 10.2.2, which he said, are explicitly reproduced in the table appearing on the certificate in summarised form in an identical fashion and without any indication whatsoever that one regulation is intended to be preferred above the other.

[23] In support of his contention he referred to the applicant's "*Student Accommodation Policy*" of June 2009 and the letter dated 13 December 1988 (Annexure "*LVW6*" to the first respondent's opposing affidavit) from the applicant to Mr Schumani, the previous owner of the first respondent's property, which letter, he said, was proof that the right to accommodation four students in two rooms attached to the property as long ago as 1988.

[24] Annexure "*LVW6*" is a letter dated 13 December 1988 addressed to Mr C A W Schumani by the applicant's town clerk. For the sake of completeness I will quote its contents in full. It reads thus:

> "***VERHUUR VAN KAMERS AAN STUDENTE : ERF 2208, SIMONSBERGSTRAAT 16***
>
> *Ek erken met dant ontvangs van u brief gedateer 29 November 1988.*

Die bewoning van die eiendom deur 'n gesin en vier studente is ingevolge my Raad se soneringskemaregulasies toelaatbaar.

U aandag word egter weereens daarop gevestig dat die Lisensie Ordonnansie, 1981 bepaal dat slegs twee kamers verhuur mage word sonder die uitreiking van 'n lisensie. Indien u dus meer as twee kamers aan die vier student verhuur, moet u om die uitreiking van 'n lisensie aansoek doen. Geliewe met mnr J H van Niekerk van die Gesondheidsdepartement (telefoon 2111 uitbreiding 320) in hierdie verband te skakel."

[25] I disagree with Mr **Newton's** contention. His reliance on annexure "*LVW6*" and the applicant's "*Student Accommodation Policy*" is misplaced and these documents provide no support for the contention he seeks to advance. First, as regards annexure "*LVW6*" it is not clear to me if one can attach any evidential weight to it in the absence of Mr Schumani's evidence to contextualise the purpose for which it was written.

[26] The construction of the letter contended for by the first respondent is not the only plausible construction. It is capable of more than one construction. The applicant's version regarding the purpose for which this letter was written is that it was intended to inform Mr Schumani that there was a provision in its Zoning Scheme Regulations in terms of which Mr Schumani could apply for permission to the applicant's Council if he wished to use his property to accommodate his family and four more persons. It was not intended, so the applicant argued, to confer rights contended for by the first respondent. The applicant's version regarding the interpretation of the letter is not so far-fetched that it can be dismissed out of hand. The fact that there is no documentary evidence in the applicant's files relating to the first respondent's property to confirm that Mr Schumani was ever granted permission

to use his property to accommodate four more persons, supports the applicant's version.

[27] The probability that the first respondent's property was never granted rights to accommodate four more persons is overwhelmingly in favour of the applicant if regard is had to the fact, firstly, that when the first respondent submitted her application for special development on 18 January 2010 she never disclosed that her property is permitted to accommodate four more persons and secondly, the lack of evidence in the applicant's file to support the first respondent's assertion.

[28] As regards the first respondent's reliance on the applicant's "*student accommodation policy*" it does not, in my view, support the first respondent's case. Paragraph 1.2 of the "*final adopted version*" of the applicant's "*student accommodation policy*" dated June 2009 provides as follows:

> "***Need for Policy***
>
> *Student accommodation in Single Residential and General Residential zoned properties within the Stellenbosch area is regulated through the provisions of the Stellenbosch Zoning Scheme Regulations. Whereas the General Residential zoning does allow the erection of buildings that can be utilized for student accommodation as of right, the single dwelling zone does not make provision for the utilization of dwelling houses for student accommodation as of right. However, up to a maximum of four students can be accommodated on properties zoned single dwelling, only with the consent of Council, subject to a family or a person related by blood to the registered property owner staying with the students."*

[29] It is clear from the provisions of the "*student accommodation policy*" that the consent of the applicant is required before a maximum of four students can be accommodated on properties zoned single dwelling. The first respondent's property is zoned single dwelling. There is no proof that the first respondent is authorised to accommodate four more students let alone seven students which she currently accommodates on the property.

[30] For these reasons I find that the use of the property by the first respondent in terms of which she accommodates seven more persons on a property zoned single dwelling is unlawful and in contravention of the LUPO provisions. Not only does the applicant have a right to enforce the provisions of its Zoning Scheme Regulations but has an obligation to do so. (*Minister of Health v Drums and Pails Reconditioning CC t/a Village Drums & Pails* 1997 (3) SA 867 (N) at 872 D). I am therefore satisfied that the applicant, who is charged with the responsibility of ensuring that the provisions of its Zoning Scheme Regulations are complied with, has established a clear right to prevent their contraventions.

[31] In the alternative it was submitted on behalf of the respondents that should I find that the Zoning Certificate indeed precludes the accommodation of students on the property, I should in the exercise of my discretion refuse to grant a final interdict or suspend its operation pending the finalisation of the first respondent's appeal and/or review. Various grounds were advanced by the respondents upon which their alternative submission was predicated.

[32] In *Bitou Local Municipality v Timber Two Processors CC & Another* 2009 (5) SA 618 (C) Fourie J after a thorough review of authorities regarding the jurisdiction of the

court to suspend operation of a final interdict concluded at 625 H of the judgment that a court does "*have the discretionary jurisdiction, in exceptional circumstances where it would be just and equitable, to suspend the operation of a final interdict*".

[33] At para 32 of the judgment the learned judge pointed out, however, that "*in the event of a Court finding that a respondent is guilty of criminal conduct*" the court should not exercise its discretion to suspend the operation a final interdict in favour of the respondent as to do so would be tantamount to a court abrogating its duty as an enforcer of the law and in support of that proposition referred to *United Technical Equipment Co. (Pty) Ltd* supra and *Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC & Others* 2004 (2) SA 81 (SE).

[34] The respondents advanced various reasons why in this particular case it would be appropriate to suspend the interdict. Firstly, they contend that there is an acute shortage of student accommodation in Stellenbosch. The answer to this contention is simple. The fact that there is a shortage of student accommodation in the Stellenbosch area does not entitle the first respondent to provide accommodation in breach of the law regulating the land use and providing for the mechanism to deal with student accommodation. It is not suggested by the respondents that the legal mechanism in place is ineffective or is incapable of implementation. Nor is it suggested by any of the respondents that the students who are accommodated by the first respondent have no prospects at all of finding alternative accommodation within Stellenbosch.

[35] Secondly, the first respondent contends that the applicant conducted itself in a manner prejudicial to her, namely by failing to bring and prosecute the present application expeditiously and by approving her building plans for the additions and

alterations to the property in circumstances where it should have been clear to the applicant that the building plans were intended for the accommodation of additional persons. The first respondent accordingly submits that by reason of the applicant's aforementioned conduct, the operation of the interdict should be suspended. These facts, either individually or cumulatively do not, in my view, constitute a sufficient basis for the suspension of a final interdict and there is nothing in the applicant's conduct which demonstrates that the applicant in bringing these proceedings acted with malice.

[36] The conduct, which is sought to be interdicted in these proceedings, is in breach of a statute which breach is visited by a criminal sanction in terms of section 46 (2) of LUPO. Not only does the applicant have a statutory duty but also a moral duty to uphold the law and to ensure compliance with the Zoning Scheme. Its capacity to enforce compliance would be severely compromised if an interdict, by which it is intended to prevent an unlawful conduct, were to be suspended. As Harms J put it in *United Technical Equipment Co.* supra at 348 I – J :

> *"A lenient approach could be an open invitation to members of the public to follow the course adopted by the appellant, namely to use land illegally with a hope that the use will be legalised in due course and that pending finalisation the illegal use will be protected indirectly by suspension of an interdict."*

[37] The course adopted by the first respondent in the present case is similar to the one which the Court in *United Technical Equipment Co.* supra sought to discourage by refusing to grant the suspension of an interdict. The first respondent brought the application for special development only after she was warned of her unlawful conduct. Before then the first respondent did not take steps to ensure that the use of her property complied with the applicant's Zoning Scheme Regulations.

[38] Although the first respondent contends that she first brought the application for special development in 1999 and that the one which she brought in January 2010 was not the first one, I was, however, unable to find any evidence on the papers to substantiate her claims.

[39] On these facts, I am unable to exercise my discretion in favour of the respondents as in my view to do so would amount to the condonation of criminal behaviour. The nature of the objections lodged by the first respondent's neighbours' evidences serious infringement of their property rights which is still continuing.

[40] Finally, the fact that the first respondent has taken the matter further on appeal in terms of section 44 of LUPO does not constitute a sufficient basis for the Court's exercise of its discretion in favour of the respondents. The first respondent currently accommodates seven more persons on her single dwelling house. Her application for special development was, however, to allow her four more persons. In these circumstances I am not satisfied that the first respondent's appeal and/or review has reasonable prospects of success. (*CD OF Birnam (Suburban) (Pty) Ltd and Others v Falcon Investments Ltd* 1973 (3) SA 838 (W).

[41] With regards to costs I have been urged by the applicant to award costs in its favour should I grant the final interdict. On the other hand the respondents who opposed the application requested that the matter be dismissed or operation of an interdict be suspended with costs including costs which were reserved on 15 March 2012, 10 May 2012, 7 August 2012 and 10 October 2012.

[42] In the light of the conclusion I have reached there is no reason to depart from

the normal rule, namely that costs follow the result. In the circumstances the applicant is awarded costs including costs which were reserved.

Order

1. The first respondent is interdicted and restrained from using the property namely erf 2208 Stellenbosch also known as 16 Simonsberg Street, Simonswyk, Stellenbosch, Western Cape by providing accommodation to the second to eighth respondents in contravention of regulations 10.2.1 and 10.2.2 of the Stellenbosch Municipality Zoning Scheme Regulations read with section 39 (2) of LUPO.

2. The first respondent is ordered to give the second to eighth respondents thirty (30) days notice terminating the lease agreements.

3. The first, third and fifth respondents are ordered to pay the applicant's costs jointly and severally the one paying the other to be absolved.

D H ZONDI
HIGH COURT JUDGE