



**THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 2015/14416

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: Yes
(3) REVISED.

.....**13 May 2016**.....
DATE

.....
SIGNATURE

In the matter between:

**MEYERSDAL VIEW HOMEOWNERS
ASSOCIATION NPC**

Applicant

And

GALANIS GEORGE

First Respondent

GALANIS DESPINA

Second Respondent

JUDGMENT

RATSHIBVUMO AJ:

1. **Introduction:** This is an application by a home owners association against one of their own, the Respondents, who are co-owners of an immovable property located within Meyersdale Nature Estate, Ext [....]. The applicant seeks an order,

1. “Declaring that the Respondents are registered owners of Erf [....], Meyersdal Nature Estate Ext [....], Ekurhuleni Metropolitan Municipality, Gauteng, are members of the applicant;
2. Declaring that the Respondents, as registered owners of Erf [....], Meyersdal Nature Estate Ext [....], Ekurhuleni Metropolitan Municipality, Gauteng, are bound by the Memorandum of Incorporation (hereafter referred to as “MOI”) of the Applicant;
3. Declaring that the Respondents, as registered owners of Erf [....], Meyersdal Nature Estate Ext [....], Ekurhuleni Metropolitan Municipality, Gauteng, are bound by the Architectural Design and Building Rules and Building Contractor Rules as adopted by the applicant;
4. Declaring that the Respondents are obliged to comply with the Architectural Design and Building Rules and Building Contractor Rules as adopted by the applicant;
5. Directing the Respondents to remove the black piping solar system installed at their property, situated at Erf [....], Meyersdal Nature Estate Ext [....], with physical address at 4 Squirrel Close, Meyersdal Nature Estate, Alberton, Gauteng;
6. Costs of this application;
7. Further and/or alternative relief.”

2. The first 4 prayers as per Notice of Motion are not opposed. It is the fifth prayer and obviously the prayer as to costs that are fiercely contested. The application is therefore on the opposed roll because of prayer 5. For this reason, costs should follow suit in respect of this prayer as opposed to other uncontested applications.

3. **Background:** It is common cause that the Respondents, being a husband and a wife became the co-owners of a property, ERF [...] at Meyersdale Nature Estate, Ext [...] in 2004. Following a request by the Second Respondent directed at the applicant in February 2008, the Respondents installed the black solar heating pipes or panels on the roof of their property, for swimming pool heating. It is again common cause that at that stage, there was no provision in the MOI regarding the installation of solar heating panels.

4. A provision regarding solar heating pipes was only added to the MOI following a Special General Meeting of home owners held on 27 August 2012. This meeting was attended by 17 home owners (including those who attended through proxies) and constituted a quorum – 25 % or more. The Respondents were not part of this meeting. Following this approval, the new rules in the MOI provided under Rule 8.1.1:

“[S]ubject to any restriction imposed or direction given at a general meeting of a company, the directors may from time to time, make, add to, amend, repeal or suspend rules regarding:

the design, building and aesthetic control of any improvement to be erected on the freehold residential erven and/or existing dwellings and/or the open spaces and/or any facilities which may exist on the property which are intended for the general use, enjoyment and amenity of the members...” [*own emphasis*]

5. Again, under Aesthetics, the following is provided for under 10.1.5,

“[N]o member may install television, radio aerials, satellite dishes or solar heating panels which are exposed to view from any building on the estate, without the prior written approval of the company.” [own emphasis]
6. Following the amended rules in MOI, the applicant wrote several letters to the Respondents demanding the dismantling of the solar panels on their property. In protest, the Respondents voiced a concern over the cost associated with dismantling them. The Second Respondent went further to remind the applicant of the oral approval given to her by the applicant’s chairperson, one Deon Coetzee (the Chairperson), some four years before the rules were passed or amended. It is not disputed that the Second Respondent approached the Chairperson and other directors in 2008, as they held an informal meeting asking if she could install the said panels. There is dispute on whether the chairperson granted her the approval. The Second Respondent alleges that she was granted the approval to install them whereas the chairperson of the applicant alleges that he informed her that the rules were yet to be developed in that regard.
7. **Issues for determination:** The court is called upon to decide if the disputed fact (i.e. whether approval was given to the Respondent or not) is relevant to the relief sought by the applicant and if the application can be decided on papers without oral evidence. Further to this, the court has to make a finding on whether the MOI rules apply retrospectively and/or, if they do, whether they are fair and reasonable. In essence the question is whether the demand of the Applicant that the Respondents dismantle the solar pipes, is based on proper interpretation of the rules? If not, is the said interpretation binding on the Respondents?

8. **Dispute of fact:** The Respondents aver that oral approval for them to install the solar panels was granted by the Chairperson. The Chairperson confirms that the Second Respondent approached them in 2008 as they held a meeting, requesting an approval to install the Greek satellite dish and solar panels on the roof. He alleges that he advised her that in respect of the solar panels, the rules were yet to be formulated and that she should wait until such formulation so she could bring the application in writing.¹ This dispute of fact was made known to the applicant before issuing the Notice of Motion on 17 April 2015.²
9. The mere fact that there is a dispute of fact does not necessarily mean that the matter should be referred for oral evidence or that the application should be dismissed. The approach to disputed facts in applications is well established. In *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd*³, Van Wyk J (writing for the full bench) held, "... where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the Respondents together with the admitted facts in the applicant's affidavits justify such an order... Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted."
10. This approach found approval by the Appellate Division as it then was in *Plascon-Evans Paints LTD v Van Rebeeck Paints (PTY) LTD*⁴ when Corbett JA held,

"It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form

¹ See paragraph 10 to 13 of the applicant's founding affidavit.

² See Annexure L, being an e-mail from the Second Respondent to a member of the applicant dated 16 July 2014 in which she alleges "...we were originally given a go-ahead with no other notion that there might be a change."

³ 1957 (4) SA 234 (C) at 235E – G.

⁴ 1984 (3) SA 623 (A) at p. 634 para H.

of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the Respondent, together with the facts alleged by the Respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by Respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact.”

This rule has been applied over the years and was recently applied in *South African Airways SOC v BDFM Publishers (PTY) LTD and others*⁵ when Sutherland J held in favour of the Respondents when there was a dispute of fact.

11. Counsel for the applicant must have had this in mind when she submitted that ‘it does not matter whether the Respondents were or were not given oral permission to install the solar heating panels...’ As the applicant seeks final relief by way of motion proceedings, disputes of fact on the papers must be determined if the facts stated by the First Respondent together with the admitted facts in the applicant’s affidavits, justify the order sought unless the Respondents’ version can be rejected on the papers.’⁶ The application of the Plascon-Evans test to this application entails that viewed in its totality; the applicant would be entitled to the relief sought despite the dispute raised by the Respondent. The applicant submits that this is the case. The court holds a different view in that once it is presumed that the Respondents were granted the approval – albeit oral, it cannot just follow automatically that such approval can just be revoked without any basis or a consideration on its fairness.

12. Administrative action by the applicant. It follows from the above that it should instead be considered on whether revoking the approval is an

⁵ 2016 (2) SA 561 (GJ) at para 28

⁶ See para 25 & 28 of the applicant’s heads of argument.

administrative act which in terms of section 33 of the Constitution of the Republic of South Africa, Act 108 of 1996 (the Constitution) should be lawful, reasonable and procedurally fair.⁷ The Promotion of Administrative Justice Act defines administrative action as

“any decision taken, or any failure to take a decision, by –

(a) An organ of state when –

- (i) Exercising a power in terms of the Constitution or a provincial constitution; or
- (ii) Exercising a public power or performing a public function in terms of any legislation; or

(b) A natural or *juristic person other than an organ of state when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person* and which has a direct, external legal effect...” [own emphasis]

13. The Constitutional Court held in *Walele v City of Cape Town and Others*⁸, that “There can be no doubt that when approving building plans, a local authority or its delegate exercises a public function constituting administrative action ...” In *South African Jewish Board of Deputies v Sutherland NO and others*, it was equally held that the First Respondent’s decision in terms of para 1.16 of the Complaints Procedures (the Complaints and Adjudication Procedures determined by the Broadcasting Monitory and Complaints Committee (BMCC) pursuant to the powers contained in it by s 63(5) of the Independent Broadcasting Authority Act 153 of 1993, and published under Government Notice 779 of 2002 in Government Gazette 23444 of 22 May 2002) to refuse to convene a formal hearing to consider the complaint amounted to ‘administrative action’ for the purposes of s 33 of the Constitution.

⁷ Sec 33 of the Constitution provides,

“ (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
 (2) Everyone whose rights have been adversely affected by administrative action has a right to be given written reasons.
 (3) National legislation must be enacted to give effect to these rights, and must-
 (a) provide for the review of administrative action by a court of law or, where appropriate, an independent and impartial tribunal;
 (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); AND
 (b) promote an efficient administration.

⁸ 2008 (6) SA 129 (CC) para 27.

14. The applicant does not address the fairness of this administrative action it took in revoking the approval that the Respondents claim they were granted. It is however submitted that whether the same was given or not, once the decision was taken to have the rules requiring the home owners not to install solar panels without written approval, the Respondents are bound to remove theirs. The fairness of this administrative act is challenged by the Respondents in that they were not consulted when such a decision was taken. They are further concerned that while the rules were approved by 17 home owners who are alleged to make over 25 %, he has a petition signed by 40 home owners who say yes to solar panels, which is way more than double the 17 who approved the rules.⁹ It is common cause that other than being informed of the Special General Meeting, no written reasons have been furnished to the Respondents for taking this administrative action which is a drastic measure, given the costs for dismantling and the possible damages. As demonstrated hereunder, this application also has to fail because it is based on a wrong interpretation of the rules.

15. **Retrospective application of the rules.** The Respondents are vehemently opposed to the retrospective application of the MOI rules. Understandably so, these rules were passed 4 years after the installation of the panels on her roof. In *Bellairs v Hodnet and Another*¹⁰ the appeal court held

“There is a general presumption against a statute being construed as having retroactive effect and even where a statutory provision is expressly stated to be retrospective in its operation it is an accepted rule that, in the absence of contrary intention appearing from the statute, it is not treated as affecting completed

⁹ See p. 207 of the bundle. Actually 41 home owners signed the petition but one of them wrote both “yes” and “no” instead of choosing one.

¹⁰ 1978 (1) SA 1109 (A) at p. 1148 para F-G

transactions and matters which are the subject of pending litigation (*Bell v Voorsitter van die Raskalssifikasieraad en Andere* 1968 (2) SA 678 (AD); *Pinkey v Race Classification Board and Another* 1968 (4) SA 628 (AD); Steyn, *Uitleg van Wette*, 4th ed., pp. 86-92).”

Again in *National Iranian Tanker Co v MV Pericles GC*¹¹, it was held,

“There is at common law a *prima facie* rule of construction that a statute (including a particular provision in a statute) should not be interpreted as having retrospective effect unless there is an express provision to that effect or that result is unavoidable on the language used. A statute is retrospective in its effect if it takes away or impairs a vested right acquired under existing laws or creates a new obligation or imposes a new duty or attaches a new disability in regard to events already past.”

16. The Applicant argues that even if the Respondents were allowed to install the panels as they allege, they remain bound by the new rules to the extent that the new rules revoke the earlier approval. Counsel for the Applicant aligns this submission with the decision of this Court in *Bushwillow Park Home Owners v Paulode Olioviera Fernandes* (unreported case by Sutherland J, case no. 2014/31526, Gauteng Local Division – Johannesburg, 23 October 2015). In that judgment, the Applicant sought for an order forcing the Respondents to repaint their house, which was granted by the court. Reference is made to the fact that in the *Bushwillow* case, the rules were amended after a dispute between the parties, following the Respondent’s offensive colours; before the application was launched which unequivocally demanded that the Respondents submit their painting colours to the Applicant for approval.

17. It is now argued that the court accepted that the changed rules were binding even though they were changed after the unwanted colour painting. But this argument ignores the finding of the court (*Bushwillow Park Home Owners v*

¹¹ 1995 (1) SA 475 (A) at 483H-I

Paulode Olioviera Fernandes at para 3) where the court held that the amendment to the rules was a mere amplification of what already existed and that it was necessitated by the dispute with the Respondent. The Court found that the rules binding the Respondent to alter their colours existed before the amendment and it was based on the initial rules that the order was allowed. This is unlike this case where it is common cause that no rule governing the installation of panels existed, until four years after the Respondents had installed theirs. The *Bushwillow* case is further distinguishable in that in the present case, there is dispute on whether the Respondents were given oral approval to install them, which given the Plascon-Evans test detailed above, the court finds in favour of the Respondents.

18. Moreover, upon closer observation of the MOI rules as per paragraphs 3 and 4 above, I am satisfied that the same were not formulated to apply retrospectively. It would appear that those who formulated the rules were more concerned about the future installation of the solar panels than with those who had already installed them. This is apparent in the language used that impacts the future installation of panels and is silent on persons such as the Respondents. Even if hypothetically speaking it was presumed that the rules were articulated to cover the past installations of solar panels, it would be a wrong interpretation to conclude that they provide for the dismantling of the panels already installed as demanded by the applicant. In my view the least the applicant could have called on the Respondents to do is to submit their application for approval since it is not the installation that is prohibited, but doing so without a written approval.

19. I am of the view that it would be impossible for the Respondents to comply with the order even if they wished because it is practically impossible to get a pre-installation written approval of what they already installed some four

years before the rule was passed. The applicant should have passed a rule that recognised that there are persons who already had the solar panels installed so as to cater for them. One cannot exclude the possibility that those who passed the rules may have had no issues with persons such as the respondents who already had the panels installed, hence the quietness of the rules pertaining to them. That could explain why for 4 years lapsed after the installation and another 2, before the Respondents were sent the first letter by the Applicant. The court holds a view that the rules as they stand were not properly interpreted.

20. For the reasons stated above, the following order is made:

20.1 The application is granted in respect of prayers 1, 2, 3 and 4 of the Notice of Motion (see para 1 above); which are unopposed by the Respondents.

20.2 The application is dismissed with costs in respect of prayer 5.

T.V. RATSHIBVUMO
ACTING JUDGE OF THE HIGH COURT

Date Heard: 04 May 2016

Judgment Delivered: 13 May 2016

For the Applicant: Adv. C Humphries
Instructed by: AJ Van Rensburg Incorporated
Johannesburg

**For the Respondent:
Instructed by:**

**Adv. WB Boonzaier
Zwiegers Attorneys
Johannesburg**