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**REPUBLIC OF SOUTH AFRICA**



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

**CASE NO: 82770/14**

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

DATE: 22/03/2019

In the matter between:

**THE RIETVLEIVIEW HOMEOWNERS ASSOCIATION**

**APPLICANT**

And

**MATSOBANE B.BAPELA**

**FIRST RESPONDENT**

**SECHABA R. BAPELA**

**SECOND RESPONDENT**

**CITY OF TSWANE LOCAL MUNICIPALITY**

**THIRD RESPONDENT**

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**JUDGMENT**

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## **COLLIS J:**

### **INTRODUCTION**

1. In the present application, the applicant seeks interdictory relief and a mandamus to compel the first and second respondents to comply with *inter alia* the title deed conditions binding on the immovable property owned by the respondents.<sup>1</sup> The relevant immovable property is known as Portion [...] (a portion of portion [...]) of the Farm [...], Registration Division J.R., Province of Gauteng, being an immovable property of one (1) hectare in extent (*the immovable property*), for any purpose other than for rural occupation purposes at a density of one (1) dwelling per hectare and it is situated within the estate.
2. The present application is opposed by the second respondent only.
3. The applicant is the homeowners association of the Rietvlei View Country Estate, *inter alia* tasked with the management of the Rietvlei View Country Estate for the benefit of the homeowners and to enforce compliance with the title deed conditions by each owner.
4. Homeowners that purchase immovable property in the Rietvlei View Country Estate do so in order to enjoy the benefits of rural country living whilst being close enough to town to be able to enjoy the benefits of city living. Homeowners, purchase properties to build homes and to enjoy this lifestyle.

5. The development is a rural type development and the title deed of each immovable property has certain conditions prescribed in the title deeds of such properties in order to maintain the essence of what the estate is, for the benefit of all such property owners and members of the Rietvlei View Country Estate.

## OWNERSHIP

6. On or about 31 October 2003, the first and second respondent became the registered owners of the immovable property in terms of a deed of transfer number T [...].<sup>2</sup> The ownership to the immovable property is not denied by the second respondent, albeit that she stipulates that the property was acquired by her when she was still married to the first respondent and is now divorced from him.<sup>3</sup>

## TITLE DEED CONDITIONS

7. The title deed registered in their names had certain conditions contained in it which the registered owners are by law required to comply with. The following are the material terms of the deed of transfer relevant to the present application:

7.1 The transfer was subject to the conditions imposed by the Directorate of Resource Conservation of the National Department of Agriculture and enforceable by the Kungwini Local Municipality (the predecessor of the

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<sup>1</sup> Notice of Motion pages 1-6

third respondent, which was incorporated as part of the third respondent on 1 July 2001).

7.1.1 The immovable property is to be used for rural occupation purposes at a density of 1 dwelling per hectare; (condition 1X (a))

7.2 The transfer was subject to the conditions and restrictions imposed by and enforceable by Towndev (Pty) Ltd, (condition X), its successors in title or assigns (the applicant being the successor in title and assign of Towndev (Pty) Ltd in terms of the cession and assignment of rights referred to already namely:

7.2.1 Building plans (including septic tanks and French drains or septic tanks and wetland system ("Reedbed system") must be submitted to the Local Authority, the third respondent, for approval before any buildings may be erected;

7.2.2. Sewerage shall be by septic tanks and French drains or septic tanks and wetland system ("Reedbed system") which the owners must install at their own cost and comply with all the specifications and requirements of the Local Authority, the third respondent:

7.2.3 The owners and any other persons shall not live on the property prior to completion of the main dwelling and the issuing of an occupation certificate by the Local Authority, the third respondent;

7.2.4 No iron, prefabricated, steel or wooden structures shall be erected

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<sup>2</sup> Founding affidavit para 18 p 12

on the property;

- 7.2.5 The owners shall at all times be obliged to maintain the pavement and sidewalk areas adjoining the property in a neat and tidy condition;
- 7.2.6 No prefabricated walling or prefabricated fencing is permitted;
- 7.2.7 The immovable property shall only be utilised for agricultural activities. No industrial, retail or wholesale activities of any nature whatsoever are permitted. No advertising sign boards are permitted;
- 7.2.8 No sheds or storerooms shall be erected prior to commencement of construction of main dwelling;
- 7.2.9 The owners shall comply with the regulations and requirements of the National Housing Board Registration Council and Act 95 of 1998; Housing Consumers and Protection Measures Act of 1998 and any other legislation which may affect building operations in the future;
- 7.2.10 The immovable property shall at all times be maintained in a neat and tidy condition by owners;
- 7.2.11 No tents or caravans are permitted to be occupied on the immovable property.<sup>4</sup>

## THE BREACH

- 8. The applicant alleges that the second respondent has repeatedly acted in

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<sup>3</sup> Answering affidavit para 5 & 14 p 194 & 205

breach of the title deed conditions and has acted unlawfully and despite repeated requests and demand the infringing owners have failed and or refused to remedy the situation.<sup>5</sup>

9. What follows is a brief overview of such infringements by the second respondent:

9.1 The infringing owners commence with construction prior to 2012 on the immovable property and the dwelling was partially constructed. Currently there exist no approved plans for the erected structures with the third respondents.

9.2 After 2012 the infringing owners expanded the original structure, with the purpose of starting a guesthouse operation. Construction continued without approval of any building plans. Albeit that plans were later submitted in reaction to a complaint received by the third respondent, such building plans to date have not been approved by the third respondent.

9.3 The infringing owners thereafter started conducting a business by renting rooms to numerous occupants. Around the same time the immovable property was also used for conducting church services over weekends which consequently attracted a number of persons on the property over weekends.

9.4 On 25 May 2012, the applicant's erstwhile attorneys De Villiers and Pheiffer directed a notice to the infringing owners to comply with the title

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<sup>4</sup> Founding affidavit para 19, Annexure "RV4" page 13

conditions and included a copy of the title conditions as part of such notice. Apart from signing for receipt of the letter the second respondent acknowledge receipt thereof and requested an extension of time within which to respond. As no further response was thereafter received from the infringing owners, a further correspondence was addressed to them by the newly appointed attorneys of record for the applicant. Respondent (mother of child) together with Elisa arrived in South Africa on 4 October 2018.

#### GROUNDS IN OPPOSITION

10. In response to the allegations of infringements the second respondent merely denies that she has not complied with the title deed conditions.
11. Furthermore, she asserts that the applicant only came into being during 2014 and denies that its members gave consent for the applicant to conclude a cession agreement with Towndev (Pty) Ltd, its previous successor-in-title.<sup>6</sup>
12. The applicant to the founding affidavit has attached the written cession agreement, which agreement was concluded on 30 July 2014 between the applicant and Towndev (Pty) Ltd. Furthermore, in its replying affidavit, the applicant sets out that at a general meeting held by its members on 28 November 2013 concerns were raised by homeowners regarding the role of Towndev in enforcing its tile deed conditions transgressions. Pursuant to such

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<sup>5</sup> Founding affidavit para 20 page 15

meeting the management committee met on 8 May 2014 and an executive decision was taken to approach the Sinovich group to obtain cession of their rights, which ultimately took place on 30 July 2014.

13. Having regard to the minutes of meetings filed of record and the cession agreement this Court is satisfied that the decision to conclude a cession agreement was validly taken and supported by members of the applicant.
14. In her answering affidavit, the second respondent sets out that during 2010 she had building plans drawn up which plans were submitted to the third respondent for approval and which were ultimately approved on 8 June 2011.<sup>7</sup> During the construction of the main house however some deviations to the main house was made from the original plan and a revised plan was thereafter submitted to the municipality for approval. To date she has not received an approval on her revised plans despite having made several enquires with the third respondent.<sup>8</sup> It should be noted that no proof is annexed to the answering affidavit as confirmation that the second respondent has submitted revised plans to the third respondent.
15. If one considers the title deed conditions it clearly stipulates, that no building may be commence without prior approval of plans by the third respondent. By the second respondents own admission therefore, she deviated from her original submitted plan without first obtaining prior approval on her revised plan from the third respondent prior to erecting her building in accordance with her

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<sup>6</sup> Answering affidavit para 15 page 206



revised plan.

16. It therefore cannot be contended by her, that she at the very least is not in contravention of this condition contained in her title deed.
17. The second respondent further concedes to having erected a borehole on her property during 2013. This she embarked upon on realising that other owners also had boreholes erected on their properties and more specifically white owners and in this regard she contends that the applicant applies selective enforcement of its conditions. With reference to the borehole, the applicant alleges, that the drilling on the property of the second respondent is unlawful as it poses a significant risk to the area of the estate. In this regard the applicant attached to its founding affidavit annexure "RV1 8 " which is a letter received from the third respondent stipulating that unless prior written approval from the municipality is obtained no owner or tenant of the applicant shall sink any wells or boreholes thereon as same is prohibited in terms of the Peri-Urban Town Areas Town Planning Scheme (1975).
18. The second respondent in her answering affidavit is silent as to whether prior to her erection of the borehole, she had obtained written approval from the third respondent. Her assertion that she erected a borehole as other homeowners had also erected boreholes and that no steps were taken against them is simply devoid of any merit. You cannot argue because others are in contravention of a law and no consequences is visited upon them, that it

therefore gives you permission to proceed to be in contravention of the very same law.

19. The applicant further alleges that second respondent is utilising the immovable structure for commercial purposes by renting out rooms to approximately 20(twenty) other people. This is in breach of the title conditions which provides that the immovable property shall only be utilised for agricultural activities. Furthermore, the 5<sup>th</sup> September 2014, the Welbekend South African Police Service carried out a raid on the immovable property and 18 (eighteen) illegal immigrants were arrested on the property.<sup>9</sup>
20. In this regard the second respondent in her answering affidavit denies that she is renting out rooms on her immovable property but significantly, she does not deny the raids and arrest having been carried out by the Welbekend South African Police Service.<sup>10</sup>
21. If such a high number of persons were found on her property during the raid carried out by the police, the only inference to be drawn is that indeed these persons were found to be staying there at her premises. Therefore she was in contravention of a condition of her title deed, which only permits her to utilise the property for agricultural activities.
22. The applicant also contends that the second respondent has breached and continues to breach the title deed conditions that provides that the immovable

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<sup>8</sup> Answering affidavit para 5.14 page 196

property shall at all times be maintained in a neat and tidy conditions by the owners.<sup>11</sup> In her answering affidavit the second respondent merely denies the breached complained of and puts the applicant to proof thereof.

## THE LAW ON INTERDICTS

23. Interdicts are orders of court which normally prohibit (prohibitory interdicts) or compel (mandatory interdicts) the doing of a particular act to avoid injustice or hardship.<sup>12</sup> A mandatory interdict is also available to remedy the effects of unlawful action already taken.

24. In order to succeed in obtaining a final interdict, the applicant must establish:

24.1 a clear right;

24.2 an injury actually committed or reasonably apprehended; and

24.3 the absence of similar or adequate protection by any other ordinary remedy.<sup>13</sup>

### *The clear right*

25. In order to establish a clear right, the applicant must prove on a balance of

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<sup>9</sup> Founding affidavit para 38.1 and 38.2 page 21

<sup>10</sup> Answering affidavit para 23 page 210

<sup>11</sup> Founding affidavit para 45 page 27

<sup>12</sup> *Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Road, Durban* 1986 (2) SA 663 (A) at 676

<sup>13</sup> *Setlogelo v Setlogelo* 1914 AD 221

probability, that it is legally entitled to prohibit the respondent.<sup>14</sup> Whether the applicant has a right is a matter of substantive law, which *onus* the applicant carries. The right which the applicant must prove is also a right which can be protected and it is one which exists only in law be it at common law or statutory law.<sup>15</sup> This Court in paragraph 13 *supra* had concluded that a valid cession agreement was concluded between the applicant and Towndev (Pty) Ltd. By virtue of the second respondents' ownership in the applicant, she became a member of the applicant, which is obliged to enforce the relevant title deed conditions as the representative body of its members.<sup>16</sup>

### *The injury*

26. The word 'injury' must be understood in the wide sense to include any prejudice suffered by an applicant as a result of an infringement of his rights.<sup>17</sup> The injury does not have to be capable of pecuniary evaluation. When the wrongful act giving rise to the infringement has already occurred, it must be of a continuing nature or there must be a reasonable apprehension that it will be repeated. The test for apprehension is an objective one.<sup>18</sup> This means that, on the facts presented to it, the Court must decide whether there is any basis for the entertainment of a reasonable apprehension by the applicant.<sup>19</sup>

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<sup>14</sup> Starke NO v Schreiber [2001] 1 ALL SA 167 (C) at 174

<sup>15</sup> Per Friedman AJP in Minister of Law and Order v Committee of the Church Summit 1994 (3) SA 89 (B) at 98 and the authorities there cited.

<sup>16</sup> Founding affidavit para 50 & 51 page 38

<sup>17</sup> Minister of Law and Order; Bophuthatswana v Committee of the Church Summit of Bophuthatswana 1994 (3) SA 89 (B) at 98H-I

<sup>18</sup> Ex Parte Lipschitz 1913 CPD 737

<sup>19</sup> Janit v Motor Industry Fund Administrators (Pty) Ltd 1995 (4) SA 293 (A) at 304 H-J

27. On the objective facts presented this Court is satisfied, that the applicant has established on a balance of probabilities, that an injury has been committed and that there are reasonable apprehension for further injury. By way of example to date no approved building plans were issued for the structure presently erected on the immovable property and as such a further apprehension exists.

*No other adequate remedy*

28. An applicant for an interdict must establish that there is no other alternative remedy available. The general rule is that the courts will not grant an interdict, if the applicant can be adequately compensated for the injury complained of by an award of damages. Damages however will not be considered to be an adequate remedy when there is a continuing violation of the applicant's rights.<sup>20</sup> It has been found that when the respondent is a man of straw and the applicant is less likely to recover damages from the respondent then our courts are more likely to grant an interdict.<sup>21</sup> As mentioned previously, the applicant upon noticing a violation of a title deed condition, at various intervals had made several and repeated demands to the second respondent to remedy such breach. Despite the demands the second respondent persist with her unlawful conduct. Having regard to what is set out in the various affidavits, in this regard, this Court is satisfied that the applicant has no other adequate remedy available to it.

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<sup>20</sup> Rivas v Premier (Transvaal) Diamond Mining Co Ltd 1929 WLD 1

## ORDER

29. In the result the following order is made:

29.1 The application is granted as per prayers 1, 2, 3, 4, 5, 6, 7, 8 and 9 of the Notice of Motion.

29.2 The second respondent is further ordered to pay the costs of the application on an Attorney and Client scale.



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**COLLIS J**  
**JUDGE OF THE HIGH COURT OF**  
**SOUTH AFRICA**

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<sup>21</sup> Aetiology Today CC t/a Somerset Schools v Van Aswegen 1992 (1) SA 807 (W) at 815G-H

**Appearances:**

Appearing on behalf of for the Applicant : Mr. S. Mafuyeka

Attorney for the Applicant : Mafuyeka & Associates Inc.

Appearing on behalf of the Second Respondent : Adv. D. Mosoma

Attorney for the Second Respondent : Mohlolo Mashego Attorneys

Dates of Judgment : 22 March 2019