



Republic of South Africa

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

CASE No: 6214/2010

In the matter between:

DIANA LIEBENBERG

Applicant

and

GERARD FRATER N O

First Respondent

YVETTE FRATER N O

Second Respondent

JACOBUS PETRUS ROSSOUW N O

Third Respondent

THE GERARD FRATER FAMILY TRUST

Fourth Respondent

DRAKENSTEIN MUNICIPALITY

Fifth Respondent

AND

CASE No: 19763/2010

DRAKENSTEIN MUNICIPALITY

Applicant

and

GERARD FRATER N O

First Respondent

YVETTE FRATER N O

Second Respondent

JACOBUS PETRUS ROSSOUW N O

Third Respondent

REASONS HANDED DOWN ON : 23 SEPTEMBER 2010

MOOSA, J:

1]I have two urgent applications before me for an interdict. Both applications revolve substantially around the same issues. For the sake of convenience, I shall refer to the first application as the Liebenberg application and the second application as the Drakenstein application. In the Liebenberg application, the applicant sought a final interdict whereas in the Drakenstein application, the applicant sought an interim interdict.

2]In the Liebenberg application, the applicant sought the following final relief:

- (a) that the fourth respondent be prohibited from carrying out any building operations on its property without approved building plans; and
- (b) that the fourth respondent be ordered to demolish all building work or buildings erected on its property in respect of which there is no approved building plans.

At the hearing of the applications, counsel for Liebenberg, and in my view correctly so, abandoned the relief sought in prayer (b) for the demolition of the unauthorised structure.

3]In the Drakenstein application, the applicant sought the following interim relief:

- (a) that first to third respondents (“the Trust”) be prohibited from performing any building or construction work on Erf 2681, Paarl, until such time as the requisite permission is obtained; and
- (b) that the Trust be prohibited from causing or permitting a restaurant to be conducted on Erf 2681, Paarl until such time as they may lawfully use the premises for such purpose.

4]Mr **Duminy** SC for Drakenstein submitted that as the issues in the two applications

are substantially the same, that I exercise my discretion to consolidate the two matters. There was no opposition from counsel for the other parties. I accordingly exercise my discretion, in terms of rule 10 of the Uniform Rules of Court, and consolidate the Drakenstein application with that of the Liebenberg application. I do so for the following reasons:

- 4.1 Many of the facts and the application of the law are common to both applications;
- 4.2 One of the grounds of relief sought namely, the interdicting and restraining of the ongoing building operation is common to both applications;
- 4.3. The unlawful use of the property is raised in both applications;
- 4.4 The consolidation of the two applications will avoid multiplicity of proceedings and attendant costs and will be convenient not only for the parties, but also for the court.

For the sake of convenience, the parties will henceforth be referred to as they are cited in the Liebenberg application, but when first to third respondents are referred to jointly, they will be cited as the “Trust”.

5]It is common cause that:

- (i) the Trust’s building plans submitted to the Municipality for approval in terms of the National Building Regulations and Building Standards Act 103 of 1977 (“the National Building Act”) have not been approved as required by section 4(1) of the National Building Act;
- (ii) the Trust’s application pursuant to section 42 of the Land Use Planning Ordinance 15 of 1985 (“the LUPO”) for the amendment of the applicable zoning conditions was only approved on 1 September 2010 and is subject to appeal and the use of that part of the building which is an extension to

the old building for the operation of a restaurant was rendered unlawful by section 39(2)(b) of LUPO at least prior to 1 September 2010;

- (iii) the Trust caused or permitted the occupation of the building from which the restaurant is operating without obtaining a certificate of occupancy in terms of section 14(1)(a) of the National Building Act, which constitutes criminal conduct in terms of section 14(4) of the said Act;
- (iv) the Trust caused or permitted the conduct of the restaurant business without an appropriate trading licence being issued in pursuance to section 2(3)(a) read with item 1 of Schedule 1 of the Business Act 71 of 1991 ("the Business Act"), which deals with the sale or supply of meals or perishable foodstuffs and which constitutes criminal conduct pursuant to section 5 of the said Act;
- (v) the Trust caused or permitted the conduct of the restaurant business in contravention of the Regulations governing General Hygiene Requirements for Food Premises and the Transport of (GN R918 of GN 20318, 30 July 1999 as amended) promulgated in terms of the Health Act, 63 Of 1977 (Health Regulations), which constitutes criminal conduct pursuant to section 16 of the Health Regulations; and
- (vi) the Trust caused or permitted the sale of liquor without a valid liquor licence as required by section 20 of the Liquor Act, 27 of 1989 (the "Liquor Act"), which constitutes criminal conduct in terms of section 154(1) of the Liquor Act.

6]The Trust raised various defences: firstly, it alleged that the matter is not urgent; secondly, it alleged that the applicant has no *locus standi*; thirdly, it alleged that applicant has not come to court with clean hands in that she, in the past, has erected a

carport without approved buildings plans and in contravention of the building line restrictions; fourthly, it is denied that the patrons of the additional restaurant will make such noise that her guests will cease to patronise her guesthouse; fifthly, the fifth respondent inordinately delayed the launch of the Drakenstein application, allowing the building works to be almost completed in respect of the new restaurant and the rest of the building and sixthly, to allow the restaurant to appoint staff, commence business and start building up clientele.

7]The overwhelming and undisputed evidence is that the Trust with impunity and in scant disregard for the rule of law carried on its unlawful building operations. It started building operations towards the latter part of 2009 without approved building plans. The applicant repeatedly complained to the fifth respondent about the unauthorised building operation. The fifth respondent asked the Trust to desist from such conduct. Despite giving undertakings to fifth respondent that it will cease building operations, it reneged on such undertakings and continued the building operations. At the time the applicant launched her application, the unauthorised structure was roof height and the renovations to the loft of the existing building had been completed.

8]I am of the view that the applicant took reasonable steps to get fifth respondent, that was the responsible authority to administer the particular statute in question, to take the necessary action. It was only when fifth respondent failed to get any meaningful response from the Trust that applicant launched the application. In my view, the delay in bringing this application by the applicant was occasioned by the parties concerned trying to get the Trust to voluntarily agree to cease the unlawful building operations, but when they did not succeed, the applicant brought the urgent application, which was subsequently followed by the application of the fifth respondent. The unlawful conduct

on the part of the Trust constitutes a continuing infringement of applicant's rights. The delay in bringing the application, in my view, does not detract from the urgency of the matter and in the circumstances I condone the non-compliance with the rules in both the Liebenberg and the Drakenstein applications.

9]The defence that the applicant lacks *locus standi* applies to the relief sought by the applicant for an interdict restraining the Trust from performing building operations without approved building plans and an order for the demolition of the unauthorised structure. For the applicant to have *locus standi* in respect of the interdictory relief, the applicant must not only be able to show that she has a direct interest in the matter, but must also be able to vindicate a right which she possesses in her own right and not merely that which all citizens possess (**Roodepoort-Maraisburg Town Council v Eastern Properties (Pty) Ltd** 1933 AD 87 at 101 and **Glass v Glass** 1980 (3) SA 263 (W) at 266H).

10]The Trust alleged that the applicant herself has not come to court with clean hands as she herself has contravened the Building Regulations. Two wrongs do not make a right. The wrong committed by the applicant is minor in relation to the wrong committed by the Trust. It also appears that the Trust acquiesced in the wrong committed by the applicant and only raised the objection against the unauthorised conduct of the applicant because she brought the application for an interdict against the Trust. In any case, she has indicated that she is in the process of rectifying her unlawful conduct. However, in the present applications, I am not called upon to adjudicate on her unlawful conduct. The "clean hands" doctrine which is of English origin, is very much similar to the Roman-Dutch law maxim "*in pari delicto potior est condition possidentis vel defendentis*" (**Klokow v Sullivan** 2006 (1) SA 259 (SCA) at 265G).

11]The *pari delicto* rule has been set out in **Afrisure CC and Another v Watson NO and Another** 2009 (2) SA 127 (SCA) at para [39] by **Brand JA** as follows:

*“The principle underlying the par delictum rule is that, because the law discourages illegality, it would be contrary to public policy to render assistance to those who defy the law. Prior to the judgment in **Jajbhay v Cassim** 1939 AD 537, the pari delictum rule found strict and consistent application in our courts (see eg **Brandt v Bergstedt** 1917 CPD 344). But in **Jajbhay** this court – while affirming the considerations of public policy underlying the rule - decided that it should be relaxed, as **Stratford CJ** put it (at 544), in those instances where ‘public policy should properly be taken into account the doing of simple justice man and man’.”*

12]In the light of all the circumstances and the extent of the unlawful conduct of the Trust as set out above, I do not think that, on the facts of this case, that she should be barred from protecting her interest, despite the fact that she might not be regarded as coming to court “with clean hands”. In any case the relief sought by her is subsumed by the relief sought in the Drakenstein application. I am satisfied that the applicant has the *locus standi* to bring the Liebenberg application.

13]Applicant’s property abuts that on which the Trust has erected the unauthorised structure. She is conducting a guesthouse from such property and has complained that the additional restaurant on the neighbouring property will attract such noise that the applicant’s guests will cease to patronise her guesthouse. These fears are premature. Once permission is granted to the Trust to erect an additional restaurant consistent with

the zoning regulations on the site and the building plans comply with the legal requirements, it will be hard-pressed for the applicant to oppose the erection of a second restaurant. Once the restaurant is erected and operative and should the noise level in future exceed the permissible level, the remedy of the applicant would be to complaint to the Municipality of the impermissible noise level or seek an interdict if she can show that the breach has caused her harm or is likely to do so (**Lakey and Another v Showzone CC and Others** 2007 (2) SA 48 (C) at para [18]).

14]The Trust blames the fifth respondent for the inordinate delay in taking action against it. It submitted that it was because of such delay that the building work in respect of the restaurant and the rest of the building was completed. Such default also allowed the restaurant to appoint staff, commence business and build up a clientele. In my view, the Trust is trying to pass the buck for its own unlawful conduct. The evidence is that fifth respondent repeatedly requested the Trust to stop its illegal building operation, but it carried on regardless, well knowing that it is a flagrant violation of the law and despite giving undertakings that it will cease to do so. The blame for almost completing the unauthorised structure and for causing or permitting the commencement of the restaurant business must, in my view, be laid squarely at the door of the Trust.

15]Before dealing with the question of whether the applicant and fifth respondent have made out a case for an interdict, I have to mention that it is settled law that conduct which is tantamount to criminal conduct cannot be condoned by our courts. As the enforcer of the law it is against the conviction of the community and public policy. The vexed question arises: can an interdict conditionally be suspended? There are conflicting decisions in this and other jurisdictions. In the case of **Bitou Local Municipality v Timber Two Processors** 2009(5) SA 618 **Fourie J**, found that the court

in the case of a final interdict has no discretion to suspend the order whereas in the case of **410 Voortrekker Road Property Holdings CC v Minister of Homes and Others**, Case No 26841/09, **Binns-Ward J** disagreed with **Fourie J** and found that in the case of a final interdict, the court has a discretion to suspend a final order. What the position is in the case of an interim interdict is an open question.

16]It is generally accepted by our courts that they have a discretionary power to suspend the operation of a final order in exceptional circumstances where it would be just and equitable to do so or to prevent an injustice. In this matter certain innocent employees of the restaurant would be adversely affected. The evidence is that there are presently 44 persons employed by the restaurant of which about 41 are family breadwinners. They are not a party to these proceedings nor is the Company which employs them. They need to be given an opportunity firstly, to approach the court and make representation as to why the order should not be made final and /or secondly, find alternative employment. I am of the view that the interest of the employees constitute exceptional circumstances and that it will be just and equitable that I do grant the interim relief pending the return day in respect of clauses 3.1 and 3.3.2, but not in respect of clauses 3.2 and 3.3.1.

17]**Grosskopf JA in Knox D'Arcy Ltd and Others v Jamieson and Others** 1996 (4) SA 348 (A) at 362B-C said that the court possesses a general and overriding discretion whether or not to grant an application for interim relief and went on to say:

"The courts have not defined the considerations which may be taken into account in exercising the so-called discretion, save for mentioning the obvious examples such as the strength or weakness of the applicant's right, the balance of convenience , the nature of the

prejudice which may be suffered by the applicant and the availability of other remedies”.

18]I am satisfied that the fifth respondent, by virtue of the fact that it administers the zoning schemes in its area in terms of section 39(1) of LUPO and the National Building Regulations, and as such has a *prima facie* right to enforce them against the Trust. The applicant has a *prima facie* right as the owner of a neighbouring property to enforce compliance therewith through the fifth respondent. I am satisfied further that the balance of convenience, on the facts of this case, favours the granting of the interim relief sought. I am of the view that the applicant and fifth respondent do not have any other satisfactory remedy. In the circumstances the attached order was made.



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