

FORM A

FILING SHEET FOR SOUTH EASTERN CAPE LOCAL DIVISION JUDGMENT

PARTIES: NMBMM v Mark Edward Harlech-Jones

Case Number: 2243/08

High Court: Eastern Cape Division

DATE HEARD: 26/11/2009

DATE DELIVERED: 28/01/2010

JUDGE(S): Roberson J

LEGAL REPRESENTATIVES –

Appearances:

for the Applicant(s): Adv G Goosen

for the Respondent(s): Adv van der Linde

Instructing attorneys:

for the Applicant(s): Rushmere & Noach Inc

for the Respondent(s): John B Scott attorneys

CASE INFORMATION –

Nature of proceedings.

Topic:

Key Words:

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, PORT ELIZABETH)

CASE NO. 2243/08

In the matter between

NELSON MANDELA BAY METROPOLITAN

MUNICIPALITY

APPLICANT

and

MARK EDWARD HARLECH-JONES N.O.

FIRST RESPONDENT

JOHN MICHAEL MERRICK N.O.

SECOND RESPONDENT

WANDA HERSELMAN t/a ROME RESTAURANT

PIZZERIA AND GUESHOUSE

THIRD RESPONDENT

BLUE SANDS TRADING 888 CC

FOURTH RESPONDENT

JUDGMENT

ROBERSON J

[1] This application eventually resolved into one for an order interdicting the third and fourth respondents from utilising the property known as erf 71 Fernglen, Port Elizabeth ('the property'), for any purpose other than that envisaged in the restrictive condition of title contained in the title deed of the property ('the restrictive condition'), which provides that the property 'shall be used only for the purpose of erecting thereon one dwelling together with such outbuildings as are ordinarily required to be used therewith.' The third respondent is the sole member of the fourth respondent, which is the owner of a restaurant business known as 'Rome Restaurant Pizzeria and Guesthouse' ('the restaurant'), which business is conducted on the property. The applicant maintains that the operation of the restaurant on the property is in breach of the restrictive condition.

[2] It is necessary to refer to the history of the application. The application started out as one for an order against the first, second and third respondents, interdicting them from utilising the property for any purpose or use other than for Residential 1 use, as provided for in the Port Elizabeth Zoning Scheme Regulations, promulgated in terms of Section 8

of the Land Use Planning Ordinance, 15 of 1985 ('LUPO'). The first and second respondents are the trustees of the 356 Cape Road Trust, which was the former owner of the property. Shortly before the application was brought, unknown to the applicant, the property was transferred into the name of the third respondent. The application was subsequently withdrawn against the first and second respondents. When I use the term 'respondents' in this judgment I am referring to the third and fourth respondents.

[3] The restaurant has been run on the property since 26 December 2006. The property was zoned as Residential 1, and the operation of the restaurant was in breach of the zoning regulations. An application by the third respondent in terms of LUPO made on 12 February 2007, for the rezoning of the property to Special Purposes (Guest House and Restaurant) was refused by the Mayoral Committee of the applicant on 1 October 2008. (The application for rezoning made specific reference to the restrictive condition.) The restaurant continued to operate and this application was then brought on 24 October 2008. The bulk of the application was taken up by the breach of the zoning regulations but there was mention of the restrictive condition in the affidavits, and in the applicant's heads of argument, a wider order than that framed in the notice of motion was sought, to include the interdict referred to in paragraph [1] above. On 10 November 2008 the third respondent appealed in terms of LUPO to the Member of the Executive Council for Local Government and Traditional Affairs, Eastern Cape Province ('the MEC'), against the refusal of the rezoning application. The appeal was heard on 4 August 2009, and on 20 November 2009, six days before the hearing of this application, the MEC upheld the

appeal. The application for rezoning of the property from Residential 1 to Special Purposes to permit a guesthouse and restaurant was approved. The dispute therefore fell to be decided on a much narrower basis than that originally contemplated.

[4] The respondents' resistance to the order as presently sought, was two-fold: firstly that the restrictive condition did not prohibit the operation of the restaurant and secondly that in upholding the appeal the MEC also removed the restrictive condition.

Interpretation of the restrictive condition

[5] Clause B4 of the conditions contained in the deed of transfer of the property is as follows:

- ‘4. This erf shall be subject to the following further conditions, provided especially that where, in the opinion of the Administrator after consultation with the Townships Board and the local authority, it is expedient that the restriction in any such condition should at any time be suspended or relaxed, he may authorise the necessary suspension or relaxation subject to compliance with such conditions as he may impose:
- (a) it shall not be subdivided.
 - (b) it shall be used only for the purpose of erecting thereon one dwelling together with such outbuildings as are ordinarily required to be used therewith;
 - (c) not more than half the area thereof shall be built upon;
 - (d) no building or structure or any portion thereof, except boundary walls and fences, shall be erected nearer than 7,87 metres to the street line which forms a boundary of this erf, nor within 3,15 metres of the rear of 1,57 metres of the lateral boundary common to any adjoining erf, provided that with the consent of the local authority, an outbuilding not exceeding 3,05 metres in height measured from the floor to the wall plate and no portion of which will be used for human habitation, may be erected within the above prescribed rear space.

On consolidation of any two or more erven, this condition shall apply to the consolidated area as one erf.'

As already mentioned, the restrictive condition on which the applicant relies is clause B4 (b).

[6] Mr. Goosen, who appeared for the applicant, submitted that the restrictive condition restricts use of the property to residential purposes, and that the word 'dwelling' should be given its ordinary meaning. According to the Shorter Oxford English Dictionary 3rd edition, 'dwelling' means 'a place of residence; a dwelling-place, habitation, house.' The meaning of 'dwelling-place' is given as 'a place of abode'. In line with that meaning the use of the property was therefore restricted to residential use and the operation of a business was a breach of the restrictive condition.

[7] Mr. van der Linde, who appeared for the respondents, submitted that clause 4 of the conditions as a whole deals with subdivision of the property and the erection of buildings on the property. If the Administrator had intended to restrict the use of the property to residential purposes, he would have expressly said so. A comparison was made between this restrictive condition and one contained in another deed of transfer which was annexed to the respondents' answering affidavit by way of example. That condition provided 'that this erf shall be for residential purposes only.'

[8] I do not think the comparison is of assistance in interpreting the restrictive condition. There is no prescribed wording for restrictive conditions relating to residential use. What is significant is that not only is the word 'dwelling' contained in the restrictive condition but also the word 'used'. This relates to use of the property. It is the only reference to use of the property in the conditions contained in the deed of transfer. If one looks at examples of restrictive conditions in title deeds, some reference is usually made to the purpose for which the particular property may be used, eg. for residential purposes, for shop purposes, for a garage service site, for industrial purposes, etc. The word 'used' in conjunction with the word 'dwelling' contained in the restrictive condition therefore, in my view, leads to an interpretation that the property was to be used for residential purposes, and the operation of the restaurant is therefore a breach of the restrictive condition.

Removal of the restrictive condition by the MEC

[9] The decision of the MEC in upholding the appeal was communicated to the respondents by letter which read as follows:

‘APPEAL: REZONING OF ERF 71 FERNGLEN, PORT ELIZABETH

Kindly note that the MEC for the Department of Local Government & Traditional Affairs resolved on 20 November 2009 to uphold the appeal against the refusal of the rezoning of Erf 71 Fernglen, Port Elizabeth from Residential 1 to Special Purposes by the Nelson Mandela Bay Municipality to permit a guesthouse and a restaurant thereon in terms of the Land Use Planning Ordinance, 1985 (Ord. 15 of

1985), subject to any reasonable conditions imposed by Council. The reasons to uphold the appeal are as follow (sic):

- The proposed rezoning is in accordance with the policy of the Council to allow restaurants abutting residential areas;
- The amenity of the area has already been compromised and will not be further affected by the proposed rezoning; and
- The area is suitable for a transitional use type and for potential development in accordance with the principles of the Development Facilitation Act, No. 67 of 1995.

The granting of the application for rezoning of the property from Residential 1 to Special Purposes to permit a guesthouse and restaurant is hereby approved.'

[10] S 44 of LUPO deals, *inter alia*, with appeals against the refusal of a rezoning application. In terms of s 44 (3) of LUPO, if the MEC upholds such an appeal, the result is that the application for rezoning is deemed to have been granted by the council of the municipality. Zoning Scheme Regulation 1.6.5 however provides that:

'Nothing in these regulations shall be construed as permitting any person to do anything which is in conflict with the conditions registered against the title deed of the land.'

In upholding the appeal did the MEC also remove the restrictive condition? Mr. Goosen submitted not. The restrictive condition is a praedial servitude imposed for the benefit of other erf holders and before the MEC removes such a restrictive condition from a title deed, he is obliged to act in terms of the Removal of Restrictions Act 84 of 1967, which provides *inter alia*, for publication of the proposed removal in the Provincial Gazette, notice to the local authority, and notice in the Provincial Gazette calling for objections

from land owners whose rights may be affected by the removal. In submitting that the restrictive condition was praedial in nature, Mr. Goosen referred to the judgments in *Malan and another v Ardconnel Investments (Pty) Ltd* 1988 (2) SA 12 (A) and the unreported case of *Wilma Emmerentia van Rensburg N.O. and another v Equus Training and Consulting CC and others*, case number 1440/07 SECLD, judgment delivered 29 March 2008.

[11] Mr. van der Linde submitted that the restrictive condition was not a praedial servitude, that the Removal of Restrictions Act did not apply, and that the MEC could *mero motu* remove the restrictive condition. He referred to the retention by the Administrator, in clause B4 of the title deed conditions, of the right to suspend or relax the restrictive conditions. In support of his argument he referred to the following cases: *Rossmaur Mansions (Pty) Ltd v Briley Court (Pty) Ltd* 1945 AD 217, *Garden Cities v Registrar of Deeds* 1950 (3) SA 239 (C), and *Ex Parte Fitzpatrick* 1962 (2) SA 1 (E). In *Rossmaur* it was held that if restrictive conditions were not framed in terms rendering them subject to future cancellation or variation, they had to be regarded as conferring rights of a permanent nature which could not be cancelled or varied by a Townships Board or any other authority, by virtue of powers of administration exerciseable over a township. In *Garden Cities*, which concerned a township established in terms of Township Ordinance 33 of 1934, restrictive conditions which were subject to alteration and amendment by the Administrator in terms of s 18 (3) of the Ordinance, were held not to confer rights to consultation or objection on other owners of erven in the township. In

Fitzpatrick it was held that a restrictive condition imposed generally but with the right of the Administrator to vary individually, could not be enforced against another lot-owner.

[12] On the strength of these cases the restrictive condition appears not to be praedial in nature. In addition, in determining whether or not a registered condition of title is personal or praedial in nature, the court must rely on the available evidence. According to the deed of transfer Fernglen Township was approved by the Administrator in terms of Township Ordinance 33 of 1934. There was no evidence of an express intention that the restrictive condition was imposed for the benefit of other erf owners. There was no evidence that the Administrator had imposed similar restrictive conditions on the other erven in the township, or that the restrictive condition in question was consistent with the general scheme of the township in order to preserve its character. These latter factors are indications that a restrictive condition was imposed for the benefit of owners of other erven in the township. (See Silberberg and Schoeman *The Law of Property* fifth edition, at 347, referring to the guidelines laid down in the case *Elliston v Reacher* (1908) 2 Ch 374, which guidelines have been followed by South African courts.) In *Malan* and *van Rensburg* (*supra*) conditions had been imposed on all or some of the other erven in the respective townships. In *Malan* there was evidence of the history of the establishment of the township and the conditions imposed by the Administrator on the various erven, and in *van Rensburg* there was no dispute between the parties that the restrictive condition was praedial in nature. I therefore am unable to conclude that the restrictive condition in

question is a praedial servitude and that other erf owners in the township would be entitled to notice if it was to be removed.

[13] In any event, I do not think that this dispute about the nature of the restrictive condition is relevant to my decision. The nature of the servitude determines whether or not other person's rights will be affected by its removal and how it may be removed. The Removal of Restrictions Act may be applicable, or the Administrator (Premier) can purport to act in terms of clause B4 of the title deed conditions or in terms of Section 18 (3) of the Township Ordinance 33 of 1934, as submitted by the respondents. (Section 18 (3) of Ordinance 33 of 1934 provided that the Administrator could alter or amend conditions with the consent of the owner). There is no evidence of compliance with any of these procedures. For example, if the MEC acted *mero motu* in terms of the Administrator's powers contained in the restrictive conditions, he would first have to consult with the Township Board and the Local Authority. He would not be allowed to act in terms of Section 18(3) of Ordinance 33 of 1934 because that section does not empower him to remove a restrictive condition for the benefit of the owner of the erf. (See *Ronnie's Motors (Pty) Ltd and others v Van der Walt and others* 1962 (4) SA 660 (A)). In my view the question is not did the MEC act irregularly in removing the restrictive condition but did he remove it at all? In my view he did not remove the restrictive condition.

[14] In the third respondent's submissions on appeal to the MEC, which were annexed to her answering affidavit in this application, she made no request for the removal of the restrictive condition. What was before the MEC was an appeal in terms of LUPO against the refusal of the rezoning application. This is a statutorily prescribed procedure. The MEC's decision in upholding the appeal was deemed to be a decision of the applicant and what was communicated to the respondents was an approval of the rezoning application.

If the MEC had decided to remove the restrictive condition, it is highly unlikely he would not have expressly communicated such decision. The applicant's submissions in the appeal were annexed to the third respondent's supplementary affidavit in this application and express reference was made to the restrictive condition and its meaning. A decision to remove a restrictive condition of title has important implications, involving as it does a real right and an alteration to title deed conditions which would have to be communicated to the Registrar of Deeds. This sort of decision cannot simply be implied, merely because the existence of the restrictive condition would be in conflict with the rezoning. Mr. van der Linde submitted that the MEC would not have acted irrationally in allowing the appeal and leaving the restrictive condition in place. The point is that the two decisions are separate, with their own requirements and consequences.

[15] Mr. van der Linde also submitted that in allowing the appeal the MEC interpreted the restrictive condition as not preventing the operation of a restaurant. There is no evidence that that was his interpretation and even if there was, I would not be bound by

such interpretation, and, as submitted by Mr. Goosen, such an interpretation does not amount to a suspension or relaxation of the restrictive condition. I have in any event reached a different conclusion on the meaning of the restrictive condition.

[16] I must conclude therefore, as submitted by Mr. Goosen, that the MEC acted in good faith and only decided the appeal before him and did not summarily ignore the proper procedures to be followed in removing the restrictive condition. The restrictive condition therefore remains in force. As Froneman J said in *van Rensburg* at paragraph [13]:

‘Both by operation of law and the express wording of the zoning regulations the title deed conditions take precedence over town planning schemes.’

The operation of the restaurant is therefore in breach of the restrictive condition and the interdict prayed for must be granted.

[17] Mr. van der Linde finally submitted that if the interdict was granted, its operation should be suspended pending an application for the removal of the restrictive condition, which application he said would be made the same day this application was heard. A court does not have a general discretion to suspend the operation of an interdict and may only do so if exceptional circumstances exist. (*United Technical Equipment Co. v Johannesburg City Council* 1987 (4) SA 343 TPD at 347 F-G and *Strathsomers Estate Company Limited v Ehlers*, unreported, ECD case no. 670/08 paragraph [3].)

[18] In my view, exceptional circumstances do not exist. When the application for rezoning was made, the respondents were aware of the restrictive condition. When this application was brought, the breach of the restrictive condition was expressly referred to in the founding affidavit. The respondents' answer was that the restrictive condition should be otherwise interpreted. The respondents were therefore aware at that stage that there was a dispute about the meaning of the restrictive condition but did not apply for its removal. Even when this application was argued, the respondents' approach seems to have been one of speculation about the intention of the MEC with regard to the restrictive condition when he allowed the appeal. This is somewhat inert conduct. Most importantly, at the time this application was heard, no such application for removal had been brought. In both *United Technical Equipment* and *Strathsomers Estate (supra)* applications for removal of restrictive conditions were pending, and in both cases a suspension of an interdict was refused. In the answering affidavit the third respondent said that if the restaurant closed she would suffer financially and her employees would lose employment, but I do not think that this consideration outweighs the other factors I have mentioned. The respondents chose to continue operating the restaurant in spite of the restrictive condition. Such conduct has been found in my judgment to be unlawful and the applicant is entitled to enforce compliance with the restrictive condition.

[19] I make the following order:

19.1 The respondents are interdicted from utilising the property erf 71 Fernglen, Port Elizabeth, for any purpose other than that envisaged in the restrictive condition of title contained in clause B4(b) of the title deed of such property.

19.2 The respondents are ordered to pay the costs of the application, jointly and severally, the one paying the other to be absolved.

J.M. ROBERSON
JUDGE OF THE HIGH COURT

Apearances:

Applicant: Mr. G. Goosen SC, instructed by Rushmere & Noach Inc, Port Elizabeth

Respondents: Mr. H. van der Linde SC, instructed by John B. Scott Attorneys, Port Elizabeth.

