

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

Case No.: 1441/2019

Date Heard: 20 August 2020

Date Delivered: 1 September 2020

In the matter between:

THE NELSON MANDELA BAY METROPOLITAN MUNICIPALITY Applicant

and

**MARIUS VAN ZYL (EXECUTOR IN THE ESTATE OF THE
LATE PAUL KRUGER POTGIETER)** Respondent

JUDGMENT

RONAASEN AJ:

Introduction

[1] The applicant, the Nelson Mandela Bay Metropolitan Municipality, launched an application during May 2019 against one Paul Kruger Potgieter in terms of which it sought the following relief against Mr Potgieter, namely that he be:

- 1.1. interdicted from using the immovable property described as erf 22582, Uitenhage and situated at 23 Sellick Street, Uitenhage (“the property”) for any purpose other than a use permitted in terms of section 8 of the Land Use Planning Ordinance, 15 of 1985, as amended; and
- 1.2. directed to pay the costs of the application.

[2] Prior to the hearing of this application Mr Potgieter passed away and he was substituted as respondent by the executor of his estate, Mr Marius van Zyl, in whom the property now vests.

[3] During October 2016 the applicant received a complaint from a member of the public that scrap metal was being dumped on the verge of the property, where a scrapyard business was being conducted under the name and style of Global Scrap Metal. That complaint was the precursor to a series of events which culminated in the launching of this application.

[4] It is not in dispute between the parties that the business of a scrapyard has at all relevant times been conducted on the property. At issue between the parties is whether the conduct of such business contravened the applicant’s zoning scheme regulations as they applied in Uitenhage.

[5] It is furthermore not in dispute that on 7 February 2017 the applicant issued a zoning certificate in respect of the property, in terms of which the applicant certified that the property was zoned “*Special Industrial*” in terms of the applicant’s zoning

scheme regulations for Uitenhage, Uitenhage falling within the area of jurisdiction of the applicant.

The events preceding the launching of this application

[6] On 2 November 2016 the applicant conducted an inspection of the property, which confirmed that the property was being used as a scrapyard. Photographs were taken to confirm this use of the property.

[7] On 3 November 2016 the applicant addressed correspondence to Mr Potgieter, informing him that he was contravening the Uitenhage zoning scheme by conducting a scrapyard business on property. In this letter it was recorded that the property was zoned “*Industrial*”, which zoning allowed for the primary use of the property as a location for industrial buildings, public garages and warehouses. The zoning allowed for various secondary uses of the property, which uses included scrapyards. The property could only be used for a secondary use, such as a scrapyard, with the special consent of the council of the applicant.

[8] The letter of 3 November 2016 was followed by meeting between Mr Potgieter and representatives of the applicant. According to the applicant’s founding affidavit Mr Potgieter, at that meeting, undertook to desist from encroaching on the road verge with scrap metal, to cease conducting the business of a scrapyard and to apply for special consent to the applicant’s council to enable him to operate a scrapyard business on the property. Mr Potgieter, in his opposing affidavit, disputed having undertaken to apply for special consent to use the property as a scrapyard

as, as far as he was concerned, he had already obtained such special consent from the applicant. He did, however, undertake to investigate the matter regarding the property's zoning, since he and the officials of the applicant present at the meeting had differing views in this regard.

[9] An investigation report produced by the applicant on 21 November 2016, with reference to the meeting referred to in the preceding paragraph, only records that at the meeting Mr Potgieter was informed to clean the verge of the property and to remove all unattended vehicles and trucks that were parked on the road reserve. It states, also that he was advised to comply with the zoning scheme regulations. Significantly no reference is made in the report to an undertaking by Mr Potgieter to cease conducting the business of a scrapyard on the property or to apply to the council of the applicant for special consent to operate a scrapyard on the property. To that extent it is at variance with the version put up by the applicant in its founding affidavit.

[10] On 24 November 2016 a further complaint from a member of the public was received by the applicant regarding the untidy nature of the property.

[11] Over the period December 2016 to January 2017 more inspections of the property were conducted, which confirmed that it was still being used as a scrapyard. The applicant, thereafter, resorted to instructing its attorneys in the matter who, on 15 May 2017, addressed a demand to Mr Potgieter, placing him on final terms to refrain from using the property in a manner which was contrary to the applicant's

zoning scheme on or before 31 May 2017. This letter, incorrectly so, records that the property is zoned for industrial purposes. This recordal is in conflict with the zoning certificate issued by the applicant in respect of the property, on 7 February 2017, confirming its zoning as “*Special Industrial*”.

[12] On 31 January 2019, what is described as a final inspection was conducted of the property. An inspection report confirmed the alleged continuation of unlawful activities being conducted on the property in the form of a scrapyard business. The report does not refer to the abovementioned zoning certificate or attempt to explain why, in the light of the certificate, the scrapyard business conducted on the property remained illegal.

[13] This application was launched in May 2019.

[14] No mention is made in the founding affidavit of what transpired in the period between 31 May 2017 and May 2019, when this application was brought. Mr Potgieter, also, in his opposing affidavit, is not enlightening as to what happened in the intervening period.

[15] What clearly did occur in the intervening period was that the applicant, on 7 February 2017, issued a zoning certificate in respect of the property in terms of which it was certified that the property was zoned as “*Special Industrial*” in terms of the Uitenhage Zoning Scheme. Unfortunately neither the applicant nor Mr Potgieter furnished any information in their respective affidavits as to the circumstances in

which the zoning certificate was issued. The only logical conclusion is that as result of the pressure exerted by the applicant, Mr Potgieter applied for the property to be zoned as “*Special Industrial*” as opposed to its hitherto existing zoning of “*Industrial*” and that such application was approved by the applicant, as is confirmed by the zoning certificate.

Discussion

[16] At the hearing of the application I had to request the legal representatives of the applicant to provide me with a copy of the applicant’s zoning scheme regulations, applicable to Uitenhage. Though the applicant clearly relied on the provisions of the regulations to support the relief it sought in the application, it did not see fit to place the terms of the regulations before me, either in the body of the founding affidavit or by way of an annexure to the founding affidavit. Practitioners should be reminded of the salutary rule of practice that when a party relies on subordinate legislation, which may not be readily available to the court it should place such legislation before the court to enable it to decide on matters where the provisions of such legislation are relevant.

[17] In terms of the zoning scheme regulations made available to me subsequent to argument, the terms “industrial zone” and “special industrial zone” are not defined. The regulations contain a reference to “industrial” and “special industrial zone” but are not really helpful regarding the dispute I am required to determine other than to confirm that there is a distinction, for various purposes, between the two zoning

categories. For instance it is contemplated the special industrial buildings will require a larger floor space, with more loading bays.

[18] As stated, it is common cause that the property is zoned “*Special Industrial*”. In this regard the applicant states as follows in paragraph 10.1.3 of its replying affidavit:

“The Respondent is zoned as a Special Industrial, in terms of the Uitenhage Zoning Scheme. Thus, in order for the Respondent to use the property as a scrapyard he would have to apply for Special Consent from the council and that is why the last column on the table is written ‘consent use’. The term denotes that an individual would have to obtain consent in order to use the property for that use and primary use denotes that the property is primarily zoned for any of the uses listed therein.”

[19] The abovementioned statement is made with reference to to a table described by the applicant in its replying affidavit as “an extract from the zoning scheme regulation table which sets out the applicable zoning categories and usages” (“the table”). The table was annexed to Mr Potgieter’s opposing affidavit. In terms thereof, in respect of Uitenhage:

19.1. properties zoned “*Industrial*” may be primarily used to house industrial buildings, public garages and warehouses. The special consent of the council of the applicant is required to use such properties for the housing of business premises, shops, scrapyards, noxious industrial buildings and special buildings; and

19.2. with regard to properties zoned “*Special Industrial*” no primary use is described and there is only provision for the use of the property with the consent of the applicant’s council for use of the property to house industrial buildings (excluding noxious industrial buildings), warehouses, public garages, business premises, shops, scrapyards and special buildings.

[20] The zoning scheme regulations clearly allow for and distinguish between two categories of zoning, namely “*Industrial*” and “*Special Industrial*”.

[21] In argument before me the respondent’s attorney contended that in view of the description of “*Special Industrial*” zoning in the table, which did not envisage a primary use for property so zoned and only envisaged consent use of property so zoned, an application for a zoning of “*Special Industrial*” of necessity entailed an application to the applicant’s council to use the property for one of the consent uses envisaged in the table. I find this contention to be compelling.

[22] Clearly an application for “*Special Industrial*” zoning of the property amounts to an application to use the property for one of the consent uses envisaged in the table. In order to qualify for such a zoning an applicant would have to satisfy all the criteria necessary to obtain consent use approval from the applicant’s council. To suggest that after such a zoning has been granted to an applicant, that such applicant would have to apply again, on the basis of the same criteria, for special consent from the council of the applicant to use the property in one of the manners

envisaged in the table would render the distinction made in the regulations and in the table between the “*Industrial*” and “*Special Industrial*” zoning categories meaningless.

[23] The applicant placed the zoning certificate confirming a zoning of “*Special Industrial*” before me in its founding affidavit. It did not enlighten me as to the circumstances in which it was issued to Mr Potgieter, where it obviously was in a position to do so from its records.. It simply contended that, in effect, there was no difference between the two classes of zoning and in either event the special consent of the applicant’s council would have to be obtained for the consent uses set out in the table. This argument ignores the distinction between the two classes of zoning and, if sustained would render the distinction meaningless. If the zoning scheme regulations and the table are interpreted purposively an application for a “*Special Industrial*” zoning must be construed as being an application to the applicant’s council to use the property for one of the consent uses contemplated in the table.

[24] It would place an unnecessary administrative burden on both the applicant and applicants for “*Special Industrial*” zoning if two applications for consent had to be made, as contended by the applicant, for effectively the same thing. Such a process, again, would render the distinction between the two zoning categories meaningless.

Conclusion and order

[25] Thus, the applicant’s argument cannot be sustained.

[26] In the result the application is dismissed with costs.

O H RONAASEN

ACTING JUDGE OF THE HIGH COURT

Appearances:

For Applicant: Adv Desi instructed by Karsans Inc, Port Elizabeth

For Respondent: Mr Huisamen instructed by Schaefer Inc, Port
Elizabeth