

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No: 5042/2021

In the matter between:

ROELOF RAYMOND VISAGIE

1st Applicant

THERESE ELSIE IMMELMAN

2nd Applicant

and

KALEMA HOLDINGS (PTY) LTD

1st Respondent

MANGAUNG METROPOLITAN MUNICIPALITY

2nd Respondent

BEFORE: CHESIWE, J

HEARD ON: 17 FEBRUARY 2022

DELIVERED ON: 19 MAY 2022

[1] The Applicants approached court with an application to interdict and restrain the First Respondent from conducting business on a property that is zoned for residential purpose and use. The First Respondent opposed the application.

[2] The Applicants, both reside at [...]Champion Street, Lillyvale Bloemfontein.

[3] The First Respondent is Kalema Holdings (Pty) Ltd with registration number: 2011/143120/70 a private company duly registered company duly registered and incorporated in terms of the Statutes of RSA with business address at Plot 83 Mactin Road, Shannon, Bloemfontein.

[4] It is common cause that the title deed of the Applicants with Registered Title Number: [...] was registered in their names annexure “FA1” (page 30) of the founding affidavit and the First Respondent title deed with registered number T5388/2019. It is further common cause that the Applicants property and First Respondents property form part of a sectional title scheme known as Western Place, in that the Applicants property is situated adjacent to the First Respondent’s property.

[5] The court has to determine, whether the First Respondent’s conduct is justified in conducting business on land that was zoned for residential purposes and whether the Applicants have met the requisite for the granting of a final interdict, namely:

- a) a clear right on the part of the Applicant;
- b) an injury committed or reasonably apprehended;
- c) the absence of any other satisfactory remedy available to the Applicant;
- d) whether the Applicants have *locus standi*.

BACKGROUND

[6] The First Respondent purchased the property in dispute in 2019. The First Respondent used the property in contravention of zoning of property in terms of the Bainsvlei Town Planning Scheme (B.T. P. S), in that the property was used for purposes of operation as a guesthouse, functions venue, conference and/or as restaurant. The Applicants submitted a letter of complaint to the Mangaung Metropolitan Municipality that they did not consent to the amendment of usage of the property as a guesthouse (annexure RA1, RA2 and RA3). The Applicants discovered

that the previous owner of the property had lodged a letter in which the First Applicant's name was spelt incorrectly and the signature was forged. The Applicants denied that they gave the previous owner of the property consent to run it as a business.

[7] The Applicants under case number 5042/2021 brought an application on 29 October 2021. The matter did not proceed, but was postponed to 13 January 2022 and on this date, it was further postponed to 17 February 2022 and arguments proceeded before this court.

[8] Counsel on behalf of the First Respondent brought an application for condonation for the late filing of the answering affidavit. The First Respondent on the founding affidavit explained that there were documents that were needed by his legal representative in order to draft the answering affidavit, including to appoint a Town Planner to assist with the rezoning application. However, due to lack of funds, a Town Planner could not be appointed on time.

[9] The answering affidavit should have been delivered within 15 court days of the notice of intention to oppose. However, it was filed on 25 January 2022 (according to the court stamp) and the court order dated 13 January 2022.

[10] The First Respondent was ordered to file the condonation application on 21 January 2022.

CONDONATION

[11] When considering an application for condonation, factors to be weighed by the court include, the degree of non-compliance, the explanation thereof, the importance of the case and the avoidance of unnecessary delay in the administering of justice.

[12] In **Uitenhage Transitional Local Council v South African Revenue Service**¹, the court held as follows:

“Condonation is not to be had merely for the asking, a full, detailed and accurate account of the causes of the delay and their effect must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related then the date, and duration and extent of any obstacle on which reliance is placed, must be spelled out.”

[13] The First Respondent in the condonation application, the founding affidavit thereof explained that:

“On or about 10 January 2022 I consulted with my legal representative and provided the documents, however the he (sic) informed me that these are old documents and I had to request and provide the latest certificate. I requested the same, however I have not obtained all the relevant documents. My legal representative informed me that we will have to appoint a Town Planner to assist with a rezoning application, which at this time, I did not have the sufficient funds to pay.”

[14] Though the answering affidavit should have been filed within 15 court days after the intention to oppose was filed, it was filed on 18 January 2022, of which the 15 court days would have been on or about 12 December 2022. The filed answering affidavit was neither signed nor commissioned, however, a signed and commissioned copy was hand up in court.

[15] As this matter involves the interests of other litigants as well as continuous litigation, it is advisable and of absolute certainty that, the Applicants would want this matter to be resolved speedily. I see no reason not to accept the condonation application. The explanation in the First Respondent’s founding affidavit is clear and gave sufficient reasoning of the delay and as well as the degree of lateness.

¹ 2004 (1) SA 292 SCA at para 6

[16] In the **Minister of Agriculture and Land Affairs v CJ Rance (Pty) Ltd** ², Majiedt AJA stated as follows:

“...a court may grant condonation if it is satisfied that the three requirements set out therein have been met.”

At para 35, it is further highlighted that “the interests of justice play an important role.”

[17] In considering a condonation application, the court has the discretion to be exercised judicially upon consideration of all facts and in essence it is a question of fairness for both parties.

[18] The court cannot ignore the fact that the First Respondent’s was faced with the predicament of his financial situation in obtaining a Town Planner as well as the documents that were needed to draft the answering affidavit.

[19] In my view, the First Respondent has given a detailed explanation of the delay as the lateness is only about 30 court days. The First Respondent’s explanation is reasonable and acceptable. The relief sought by the First Respondent should therefore be granted. The Applicants will not be prejudiced by such relief.

DISPUTE

[20] I now turn to deal with the main issue in dispute, that is the application to restrain and interdict the First Respondent from using the property for business purposes.

[21] Counsel on behalf of the Applicants, Adv. van der Merwe in oral argument submitted that it is common cause that the First Respondent conducts events and functions at the guesthouse. Counsel submitted that the use of the property is illegal for that purpose as the property is zoned for residential purposes. Counsel made reference to several authorities that deal with such matters, including the 12 opposed

² 2010 (4) SA 109 SCA at para 33

matters in this Division which have dealt with businesses that are run from residential properties, especially in the form of guesthouses. Counsel concluded that the Applicants have made out a case for the relief sought and the court should grant the Applicants a final interdict.

[22] Counsel on behalf of the First Respondent, Adv. Lubbe submitted in oral argument that the Applicants approached court, not with clean hands as the property was purchased in 2014 and was previously conducting business as a guesthouse. He mentioned that the Applicants are also running a business from their property. The photos submitted as annexures “**LT2**” and “**LT3**” (pages 80 to 84), all depict that the Applicants also run a guesthouse from their premises. Counsel submitted that instead of a final interdict, the court should grant an interim interdict, suspended for a reasonable time to allow the First Respondent time to apply for the rezoning of the property.

[23] The principles governing the requirement for a final interdict have been settled in **Hotz and Others v University of Cape Town**³ as follows:

“An applicant for such an order must show a clear right, an injury actually committed or reasonably apprehended, and the absence of a similar protection by any other ordinary remedy.”

[24] The First Respondent in opposing this application, indicates that it wishes to apply to the Second Respondent for the rezoning of the property. The First Respondent claims that it was not aware that the property had not been rezoned for use as a business. The First Respondent contends that when it bought the property it was already conducting business as a guesthouse. The First Respondent further contends that there are numerous businesses which are conducting business in the same area, more especially in Ray Champion Street including the Applicants who also conduct a business from their property.

[25] The First Respondent purchased the property in terms of the Deed of Transfer dated 30 April 2019. Clause (b)(ii) states that

³2017 (2) SA 485 SCA at para 29

“the said unit is subject to or shall benefit by any alterations to the building or buildings or to a section or to the common property shown on the said sectional plan.”⁴

[26] The Town Planning Scheme according to annexure “**FA4**” on page 40 states as follows:

“ZONING AND PERMISSIBLE USES: PORTION 1 OF THE FARM
WESTERN SPITSKOP 1399, BLOEMFONTEIN

In terms of the approved Bainsvlei Town Planning Scheme (B.T.P.S), the above-mentioned property is zoned ‘Holdings’ and may only be used for the following purposes:

Dwelling houses and agricultural purposes.”

[27] The First Respondent could not have been ignorant to such conditions, clearly set out as in the Bainsvlei Town Planning Scheme. For the First Respondent to oppose on the grounds that the property was bought already a guesthouse at that stage, is a growing concern. The whole transaction at that stage was wrong and the saying that two wrongs don’t make it right runs through here.

[28] The municipality in inserting such conditions as well as the title deed, is to avoid people taking the law into their own hands and doing as they please. These conditions are in place for a purpose and must be respected and abided with, for compliance with the local authority’s rules, regulations and legislations.

[29] The First Respondent is fully aware that the Applicants complained about the alleged letter of consent which was submitted to the municipality. The Applicants denied that such a letter was submitted. They further raised an allegation that the letter, annexure “**RA1**” (page 17) was forged. According to the First Applicant, he denies writing the letter nor signing it. That conduct in itself already indicated that

⁴ Page 44 of the Founding Affidavit.

things were done illegally. The Applicants in their papers showed that they have on several occasions alerted the municipality about the alleged and fraudulent letter.

[30] The following was noted in the correspondence from the municipality addressed to Messrs Maarten Potgieter Surveyors annexure “**RA3**” (page 119), dated 01 September 2014 which reads as follows:

“APPLICATION FOR THE REZONING OF PORTION 1 OF THE FARM WESTERN SPITSKOP 1399, CORNER OF LUCAS STEYN STREET AND RAY CHAMPION STREET, RAYTON, BAINSVLEI, BLOEMFONTEIN

You are hereby informed that the above mentioned application cannot be considered at this stage due to the fact that the application is incomplete. There is a sectional title scheme registered against this property therefore you must submit consent from the co-owner.

The co-owner must take note of the following:

1. With the Sectional Title Scheme being registered on this property, the proposed rezoning will have an effect on the municipal property rates and he will be affected;
2. Should it happen that he or his successors want to pursue business in future, a permission will not be granted.”

[31] Already in September 2014, the Municipality indicated that the application could not be considered, due to incomplete documents. It still remained a legal duty of the First Respondent when it bought the property to ensure that the paper work was above board, including confirming with the previous owner whether the guesthouse was managed within the confines of the law.

[32] The Applicants disputed that there is a business being conducted from their property. The First Applicant in his founding affidavit explained that he is a broker and attends to clients at their homes. The First Applicant further explained that the

boards on the gate of the property are for purposes of marketing and advertising and that they do not run any functions, events, conferences from their property

[33] As correctly stated by Counsel on behalf of the Applicants, there has been in the past months in this Division, inundated applications similar to this one before this court. Counsel submitted authorities of this Division of which, about six matters were granted in favour of the Applicants. This issue is indeed becoming prevalent and the court needs to come to the assistance of litigants where the other party is not complying with local authority legislation.

[34] In **Cornelia F de Wenaar & 2 others v Mark Semple & 2 Others** Case number 2825/2019, Jordaan, J emphasised the legal position that breach of zoning provisions constituted a sufficient injury to qualify as sufficient harm to justify the granting of a final interdict.

[35] It is trite that the granting of a final interdict is more stringent than those for the interim interdict, because of the far-reaching consequences of such an order. Therefore, the requirements for a final interdict are accepted in our courts as a clear right, injury committed or reasonable apprehended and no suitable or alternative remedy. (**Hotz supra**)

[36] I will not deal with these requirements individually. The First Respondent in zoning the property without consent of the Applicants nor of the municipality in itself constitutes an injury as the Applicants obviously purchased the property with the expectation of a peaceful neighbourhood. The Applicants are therefore entitled to take legal steps to ensure that their property and its value is not diminished unlawfully.

[37] The Applicants have shown they are the owners of their property in terms of the Title Deed attached as annexure “**FA1**” (page 28). The Applicants have a clear recognisable interest as owners of the property as well as the enforcement of the provisions of the Bloemfontein Town Planning Scheme. Therefore, the *locus standi*

of the Applicants has been proven in terms of the title deed. In **BEF (Pty) Ltd v Cape Town Municipality & Others** ⁵, the court said the following:

“Since a town-planning scheme is intended to operate, not in the general public interest, but in the interest of the inhabitants of the area covered by the scheme, or at any rate those inhabitants who would be affected by a particular provision, an owner of the land in the area has *locus standi*.”

[38] In this instance, the municipality informed the parties that the rezoning will have an effect on the municipality rates and they will be affected. In any event, the Applicants made it clear that an application for rezoning will not be supported.

[39] It is therefore clear that the First Respondent in failing to adhere to the provisions of the Town Planning Scheme, continues to conduct the business on the mentioned property unlawfully. The court cannot condone nor ignore that the conduct of the First Respondent is illegal, thus undermining the rule of law.

[40] The issue that the order be suspended temporarily would not remedy the situation as the court would therefore be encouraging the First Respondent to proceed in its unlawful conduct nor is there a counter-application for the relief sought.

[41] The Applicants have indeed met the requirements for a final interdict. Having also taken into consideration authorities from this Division in matters of this nature, which have indeed become prevalent, the Applicants ought to be granted the relief sought.

[42] With regard to costs, it is appropriate that costs follow the successful party.

[43] Accordingly, I order as follows:

1. The First Respondent is restrained and interdicted from using or allowing any other person to use the subject property for any use other than

⁵ 1983 (2) SA 387 (C) at 457 E

that authorised by the zoning of the property, being **Holdings (Dwelling Houses and agricultural purposes)** in terms of the Bainsvlei Town Planning Scheme, the subject property being: "Section No. 3 as shown and more fully described on Sectional Plan No. SS 181/2005 in the scheme known as WESTERN PLACE in respect of the land and buildings or buildings situated at PORTION 1 OF THE FARM WESTERN SPITSKOP 1399, DISTRICT BLOEMFOTEIN, PROVINCE FREE STATE."

2. The First Respondent is ordered to forthwith remove any and all signage referring to any business, consultancy, office or use contrary to the zoning of the property, being **Holdings (Dwelling Houses and agricultural purposes)** in terms of the Bainsvlei Town Planning Scheme.

3. The First Respondent is ordered to pay the costs of this application on a party and party scale.

CHESIWE, J

On behalf of the Applicants:

Adv. R van der Merwe

Instructed by:

Blair Attorneys.

BLOEMFONTEIN

On behalf of the First

Respondent:

Adv. EG Lubbe

Instructed by:

McHardy & Herbst Inc.

BLOEMFONTEIN