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

Case number: 2021/2022

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

SALOMON JACOBUS JACOBS

First Applicant

ANRA FABER

Second Applicant

CORIZE VAN RENSBURG

Third Applicant

DANIEL PIERRE HUGO

Fourth Applicant

And

KARL ERICH BUSCHOW

First Respondent

KAREN-LYNN BUSCHOW

Second Respondent

MARIGOLD PLACE

Third Respondent

MANGAUNG METROPOLITAN

Fourth Respondent

MUNICIPALITY

JUDGMENT BY: **MOLITSOANE, J**

HEARD ON: 11 AUGUST 2022

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII on 28 NOVEMBER 2022. The date and time for hand-down is deemed to be on 28 NOVEMBER 2022 at 12h00.

Introduction and relief sought

[1] The applicants seek an order to interdict and restrain the First, Second and Third Respondents from conducting or allowing any other person from conducting a business or utilizing erf [...], Bloemfontein Ext [...], Free State Province, currently being held in terms of Title Deed [...], commonly referred to as [...] L[...]Street, D[...], Bloemfontein (the property) for any purpose other than the zoning of the property, being '*Single Residential 2*'. The application is opposed by the First, Second and Third Respondents (the Respondents).

Facts

[2] The Applicants are all owners of properties situated at L[...]Street, D[...] Bloemfontein. The First and Second Respondents are the registered owners of the property which is the subject of this dispute.

[3] The applicant's properties are situated in close proximity to the property of the First and Second Respondents. The property of the First and Second Respondent is situated in a residential neighbourhood. The applicants contend that the First and Second Respondents allow the Third Respondent to conduct a business of frail care known as Marigold Place from their (First and Second Respondent) property in

contravention of the Bloemfontein Town Planning Scheme, No 1 of 1954. (the Scheme).

[4] The Applicants contend that the property is zoned as “Single Residential 2’ which reflects the current zoning and the allowed limitation of the use of the property as a ‘dwelling house’. The essence of the case of the applicants is that the property is used as a business contrary to the Scheme and such use will ultimately have a negative influence on the market value of the Applicants’ properties.

[5] The applicants move for a final interdict. A final interdict is an order based upon the final determination of the rights of the parties¹. The requirements for a final interdict are as follows:

- a) A clear right;
- b) An injury actually committed or reasonably apprehended;
- c) The absence of similar protection by any other remedy.

DISPUTES

[6] The Respondents oppose the application on the following grounds:

- a) Failure to join all the residents and/or inhabitants of the property as respondents;
 - b) Failure to join the entity known as The Tree Tops (Pty) Ltd as a respondent;
 - c) That the relief sought amounts to an eviction and that the Applicants ought to have complied with the provisions of Prevention of Illegal Eviction from Unlawful Occupation of Land Act, 19 of 1998;
 - d) That the Second and Third Applicants do not have locus standi;
 - e) That the Respondent does not conduct business from the property;
- That the First and Second Applicants have applied for the re-zoning of the property.

¹ Harms D. Civil Procedure in the Superior Courts(lexis Nexis , Durban 1990) Service Issue 45, April 2012 at A-37.

Non Joinder and applicability of Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998.

[7] The respondents' first ground of opposition is non-joinder of the other residents/inhabitants of the property as well the Tree Tops(Pty) Ltd. The contention of the respondents is that the said residents and Tree Tops have substantial interest in these proceedings. With reference to the residents, more so that the order sought, so it is submitted, has the effect of evicting them from the property. It is further submitted that the premises were utilized by the Third Respondent in conjunction with an entity, Tree Tops.

[8] The question of non-joinder has been dealt with In *JSC v Cape Bar Council*:²

“[12] It has by now become settled law that the joinder of a party is only required as a matter of necessity – as opposed to a matter of convenience – if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned (see eg Bowring NO v Vrededorp Properties CC 2007 (5) SA 391 (SCA) para 21). The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The right of a party to validly raise the objection that other parties should have been joined to the proceedings, has thus been held to be a limited one (see eg Burger v Rand Water Board 2007 (1) SA 30 (SCA) para 7; Andries Charl Cilliers, Cheryl Loots and Hendrik Christoffel Nel Herbstein & Van Winsen The Civil Practice of the High Courts of South Africa 5 ed vol 1 at 239 and the cases there cited.)”

[9] At the heart of this application is an order to restrain the respondents from unlawfully utilising a residential property for business purposes. At no stage do the applicants seek that any inhabitants of the property be evicted. The Notice of Motion bears testimony to this. The applicants do not seek relief for the eviction of the

² 2013(1) SA 170 (SCA)

residents residing on the property. What the applicants seek is only a restraining order prohibiting unlawful use for business purposes. Act 19 of 1998 does not find application in these proceedings. It is true that the residents may have an interest in the outcome of these proceedings but that on its own does not entitle them to be joined. Insistence on the joinder of the residents, is misplaced.

[10] Tree Tops(Pty) Ltd is an entity with the registered address which is the same with the address of the property in issue. The First and Second Respondents admit that they are the owners of the property in dispute. The Second Respondent is listed on Annexure MAR4 attached to the First Respondent's affidavit as the Director of Tree Tops. It is undisputed that the Second Respondent was properly served with this application. As a sole Director of Tree Tops, she became aware of this application. Had she deemed it fit to involve Tree Tops in these proceedings, she would have done the necessary as a Director and approached this court to allow its intervention. I am of the considered view that Tree Tops is aware of these proceedings and its joinder is not necessary. The defence of non-joinder stands to be dismissed.

Locus Standi

[11] It is common cause that the Second and Third Applicants are not the sole owners of their properties. This however does not preclude them from protecting their proprietary rights by seeking to enforce statutorily conferred rights emanating from the zoning restrictions. In my view the relief the applicants seek, does not prejudicially affect any person who might own the properties jointly with the- Second and Third Applicants. On the contrary the relief sought will benefit the joint owners.

[12] A land owner has locus standi to protect his/ her proprietary rights. In *Walele v City of Cape Town and Others*³ the court said the following:

“ The result of a zoning scheme is thus to restrict the rights of all owners in an area. Yet zoning schemes also confer rights on owners, because owners are entitled to require that neighbouring owners comply with applicable

³ 2008(6) SA 129 cc at para 130.

zoning scheme. Where an owner seeks to depart from the scheme, the rights of neighbouring owners are affected and they are entitled to be heard on the departure. Owners in the area are also entitled to be heard when land is re-zoned. A zoning scheme is therefore a regulated system of give and take: it both limits the rights of ownership but also confers rights to owners to expect compliance by neighbours with the terms of the mutually applicable scheme. The result is that where an owner seek to use his property within the terms of the zoning scheme, it cannot be said that the rights of surrounding owners are affected materially or adversely.”

I am unable to find that the Applicants in this case cannot institute interdictory proceedings against the Respondents without joining the co-owners.

Pending application for re-zoning by First and Second Respondents

[13] The Respondents place reliance on the fact that the First and Second Respondents have applied for the re-zoning of the property. In my view this assertion can be disposed of by posing this question: *Can a person who has applied for a licence to possess a firearm carry it before the approval of the licence.* The simple answer is no. The same applies in this case. The Scheme restricts the use of a dwelling house for the purpose of the business. The fact that the application for re-zoning has been lodged does not exempt the applicants from complying with what the law requires. It is in fact irrelevant. The fact that an application for re-zoning has been lodged does nothing to the illegality sought to be prevented. That the law is being breached allows the applicants to move for final interdictory relief. The application for re-zoning has not been granted and consequently the use of the property other than as a dwelling is unlawful.

The Third Respondent does not conduct a business from the property per se as it is a non-profit organisation.

[14] The Respondents deny that the property is used as a business. The Respondents, however, admit that a frail care facility/hospice/ old age home/old age

patient care facility under the name and style of Marigold Place, which primarily provides accommodation to a number of mainly elderly members of society is operated from the property. The Third Respondent as a principal operator, in conjunction with The Tree Tops operates the facility.

[15] The involvement of The Tree Tops in the facility has not been explained at all by the Respondents. I agree with Counsel for the Applicants in its Heads of Argument where the following is said:

“ [71] It must be accepted that the proprietors of the Third Respondent draw salaries from operations of the Third Respondent and that the Third Respondent employs staff to attend to the functions of the Third Respondents staff which members are paid salaries.

[72] Although The Third Respondent as an entity may not in the strict sense of the word be conducting business ‘for profit’, it none the less has all the attributes of a business and effectively conducts business from the property....”

[16] The Respondents downplay the actual business conducted on the premises. So many questions remain unanswered. The involvement of The Tree Tops. Who and how many employees the Third Respondent and Tree Tops have. What the working relationship between the Third Respondent and The Tree Tops is. Where the salaries of both entities come from. The fact that the Respondents insisted that The Tree Tops be joined as failure, according to the version of the Respondents, to *“join, the joint operating entity of the frail care facility/hospice/ old age home/ old age patient care facility* clearly demonstrate that the operations by the Third Respondent and The Tree Tops constitute operating a business. On their own version, business is being conducted on the premises.

[17] It is trite that the Scheme and the restrictive conditions of such a scheme inure for the benefit of the surrounding inhabitants in the area. The owner of the property cannot perform activities on his own property in contravention of the Scheme. The Scheme is in the interests of the class of persons of which the

applicants are members. The court in *Intercape Ferreira Mainliner vs. Minister of Home Affairs*⁴ said:

“The immediate neighbours have a special interest, as an affected class in upholding the zoning scheme”.

Non-compliance with the scheme constitutes an attack on the protected interests of property owners which constitute injury worthy of granting a final interdict. I am of the view that by conducting the above mentioned facility on the property infringes the clear rights of the applicants. There is no alternative remedy or protection available to them.

[18] The Respondents request that this court should consider suspending the order for 6 to 10 months should it be inclined to grant the interdict. The Supreme Court of Appeal in *Emilel Investments(Pty) Ltd v Silvestry and Others*⁵ after confirming the illegal use of the property upon considering whether the interdict should be suspended observed as follows:

“Nor can the outcome of such application be predicted with any confidence. Suspending any order would merely prolong the appellant’s illegal conduct.”

[19] Our courts have consistently refused to suspend orders where the suspension would tend to perpetuate any illegality. In my view each case must be viewed on its own merits. The fact that the Respondents have applied for the re-zoning of the property plays little role in my decision whether to exercise my discretion or not. The reason is that there is no evidence before me indicating the time frame it would take for the finalisation of the application. I further take note that there are objections lodged against the said re-zoning application. The end result is that the application may take a long time to finalise. I however take note that the facility is used for the vulnerable elderly citizens of our country. It behoves this court to bear that in mind in granting the order. There defences raised have no merit and the applicants as successful parties are entitled to their costs.

⁴ 2010 (5) SA 367 (WCC) at 401 B

⁵ (080/2012)[2012] ZASCA 181.

Order

[20] The following order is made: -

1. The First, Second and Third Respondents are interdicted and restrained from conducting or allowing any other person to conduct a business from or use erf [...], [...] L[...]Street, D[...], Bloemfontein, for any use than the zoning of the property, being "Single Residential 2";
2. The First, Second and Third Respondent are ordered to pay the costs of this application, jointly and severally, the one to pay and the others to be absolved;
3. The implementation of the order in paragraph 1 above is suspended until 12 December 2022.

P.E. MOLITSOANE, J

On behalf of the Applicants:

Adv. R. Van der Merwe

Instructed by:

Blair Attorneys

Bloemfontein

On behalf of the Respondents:

Adv. C. Snyman

Instructed by:

McIntyre & Van der Post

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