

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 44684/16

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES/NO

13.11.2018
Date:

E. Schryff
Signature:

In the matter between:

EKURHULENI METROPOLITAN MUNICIPALITY

APPLICANT

and

**M CHRISTENSEN
CH FULLER**

**1ST RESPONDENT
2ND RESPONDENT**

JUDGMENT

VAN DER SCHYFF, AJ

Introduction and background

- [1] This is an application for declaring the use of the property described as Erf 928, Boksburg to be in contravention with the Ekurhuleni Town Planning Scheme, 2014 and unlawful, and for ancillary relief.

[2]

The relief sought by the applicant in the notice of motion, is set out as follow:

- 1.1 Declaring that the respondent, and all other persons who hold possession of Erf. 928, situated at number 90, Eight Street, Boksburg, Gauteng (*"the Property"*), through or under the respondents be declared to be in contravening or engaging in activities in respect of the property that contravene and /or have the effect of contravening the erstwhile Boksburg Town Planning Scheme of 1991, which has since been replaced by a new town planning scheme, the latter of which replaced all other town planning schemes which applied in respect of each local town council all of which, were disestablished and replaced by the current municipality, the applicant in the present proceedings. This new town planning scheme is known as Ekurhuleni Town Planning Scheme, 2014 (*"the Scheme"*), read together with the Town Planning and Town[ship]¹ Ordinance No, 15 of 1986 (*"the Ordinance"*), for using the property as a boarding house, (*"hereinafter referred to as the business"*), instead of using the property for the purpose specifically defined and only consistent with the zoning certificate in terms of which the property is zoned *residential*.
- 1.2 Declaring that the respondent's conduct referred to above is without the applicant's prior consent in writing thereto and that such consent is required, therefore, that the respondent's conduct is unlawful for lack of such consent from the applicant.
- 1.3 That the respondent be interdicted from using the property as aforementioned.
- 1.4 That the respondents be ordered to restore the property to its original status which is compliant and consistent with the Zoning certificate as duly issued in terms of the scheme.

¹ My insertion.

1.5 That the relief sought in terms of prayers 1.1 to 1.4 above be given effect to within ninety (90) days from the date of the order, failing which, the Sheriff of the above honourable court or his deputy, be authorised to carry out any such order, and to do whatever is legal and reasonably necessary and take all reasonable and lawful steps to carry out and give effect to the court order.

1.6 Ordering the respondents to pay the costs of the application on the scale as between attorney and client.

[3] The application is opposed on a pure technical basis. The respondents contend that a perfunctory reading of the founding papers reveal that the relief sought is not supported by the necessary factual averments. Although several points of contention were raised in their written heads of argument, counsel for the respondents confined his argument to one main aspect, namely that the applicant did not set out its case properly on paper. Counsel on behalf of the respondents argued that the applicant attempts to introduce evidence that ought to have been contained in the affidavit through its heads of argument. The respondent's main contentions in this regard are that the application is fatally defective in that:

- i. The applicant does not appraise the respondents or the court as to which sections of the scheme and/or ordinance were allegedly contravened; and
- ii. The applicant failed to establish to what extent the undefined sections have been breached.

[4] It must be stated at the outset of the arguments discussion that both counsel were well prepared and referred the court to a host of applicable case law. The court is indebted to them.

[5] In order to decide on the outcome of this application the court needs to determine whether the applicant made out a proper case in its founding affidavit for the relief sought. In the event of the court finding that the applicant

made out a proper case in its founding papers the application must be considered in light of the well-known *Plascon Evans* - principle. Conversely, if the court cannot find that a proper case was made out in the founding papers the application must be dismissed.

Legal requirements: Founding affidavit

- [6] It is trite that an applicant must make out its case in the founding affidavit.² It is thus necessary to state (i) who the applicant is, and that the applicant has the necessary authority to bring the application; (ii) the applicant's interest in the matter and that he has the capacity to bring the proceedings; (iii) that the court has jurisdiction; and (iv) the grounds on which relief is claimed, or the cause of action.

The description of the applicant

- [7] The applicant is described as the

'Ekurhuleni Metropolitan Municipality, a municipality duly established in terms of the Government Gazette, No. 6768 of 2000, published in the Provincial Government Gazette Extraordinary Notice, No. 5215 of 2001, duly published on and dated 29 August 2001, with its head offices at the corner of Cross and Roses Streets, Germiston Gauteng'.

- [8] In their answering affidavit the respondents boldly deny any knowledge as to whether the applicant was duly established. It is evident from the description of the applicant in the founding affidavit that the applicant is the Ekurhuleni Metropolitan Municipality. I am of the view that the respondents would have known exactly who was instituting these motion proceedings against them. To dispute the identity of the applicant without providing any basis therefor is a red herring and a waste of time.

² *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and others* 1974 (4) SA 362 (T) 368B-369A.

The applicant's *locus standi*

- [9] The applicant's *locus standi* is entrenched in the statutory provisions in terms of which it was established. To deny the applicant's *locus standi* without setting out a reason underpinning the denial does not take the respondents' opposition of the application any further.

Jurisdiction

- [10] The jurisdiction of this court to hear the matter is dealt with in paragraph 11 of the founding affidavit. It is common cause that the property that forms the subject matter of this application is situated within the jurisdiction of this court.

The grounds upon which relief is claimed

- [11] In application proceedings the affidavits filed by the respective parties constitute not only the pleadings, but also the evidence. As a result, the affidavits must set out all the evidence that would have been led in a trial.³ It was stated clearly by Miller J in *Hart v Pinetown Drive-in Cinema (Pty) Ltd*:⁴

'Where proceedings are brought by way of application, the petition is not the equivalent of the declaration in proceedings by way of action. What might be sufficient in a declaration to foil an exception, would not necessarily, in a petition, be sufficient to resist an objection that a case has not been adequately made out. The petition takes the place not only of the declaration but also of the essential evidence which would be led at a trial and if there are absent from the petition such facts as would be necessary for determination of the issue in the petitioner's favour, an objection that that it does not support the relief claim is sound'.

³ *Transnet Ltd v Rubenstein* 2006 1 SA 591 (SCA); *ABSA Bank Ltd v Kernsig 17 (Pty) Ltd* 2011 4 All SA 113 (SCA) par 23; *Louw v Nel* 2011 2 All SA 495 (SCA) par 17; *Quartermark Investments (Pty) Ltd v Mkhwanazi* 2014 1 All SA 22 (SCA); *Democratic Alliance v Kouga Municipality* 2014 1 All SA 281 (SCA).

⁴ 1972 (1) SA 464 (D) 469C-E.

- [12] To determine whether an application meets the test set out by Miller J, the founding affidavit is to be considered on its own and the allegations therein presumed to be correct. If the allegations contained therein are sufficient to warrant a finding in favour of the applicant, a cause of action is properly constituted therein.⁵ It lies in the discretion of the court while considering the facts of the specific case before it, to decide whether the applicant's founding affidavit contains sufficient allegations to establish a proper case. In exercising its discretion as to whether the founding affidavit establishes a cause of action, a court must consider the nature of the relief sought by the applicant.

The applicant's founding affidavit

- [13] The applicant explains in its founding affidavit that it is a metropolitan municipality with the authority to regulate land use. In order to execute the regulatory functions, the Ekurhuleni Town Planning Scheme, 2014, hereafter "the 2014-scheme", has been established. Although a copy of the 2014-scheme was not attached to the founding affidavit it is stated in paragraph 16 of the founding affidavit that a copy of the scheme is available on request.
- [14] It is then stated that the property concerned is zoned as "residential 1" and a copy of the zoning certificate is attached to the founding affidavit. The zoning certificate attached to the founding affidavit is dated 2 August 2013 and it is stated that the property is zoned as "Residential 1" in terms of the Boksburg Town Planning Scheme, 1991. Reference to the property being zoned in terms of the Boksburg Town Planning Scheme of 1991 would have created confusion if it was not for the content of paragraph 12.1 of the founding affidavit where the applicant clearly and unequivocally states that the Boksburg Town Planning Scheme of 1991 has since been replaced by "a new town planning scheme... This new town planning scheme is known as the Ekurhuleni Town Planning Scheme, 2014."

⁵ *Bowman v De Souza Roldao* 1988 4 SA 326 (T); *Commissioner of Customs & Excise v Bank of Lisbon International Ltd* 1994 1 SA 205 (N) 225–226.

- [15] The applicant states that the respondents are carrying out business activities on the property which business activities constitute a boarding house. Such activities are not permitted in terms of the zoning certificate. No consent has been sought by the respondents or obtained from the applicants to conduct a boarding house on the property.
- [16] The respondents aver that the applicant does not make out a case that the property is being used as a boarding house because the applicant relies firstly on a report by one SA Malatji wherein it is stated that the respondent was contravening the National Building Regulations and Buildings Standards Act and that continued to contravene the same despite a notice being issued on 10 May 2013 in which the transgression was explained and the owner of the property stand requested to rectify the matter. Certain photographs that were taken by Malatji indicating the nature of the structures erected were attached to the founding affidavit. [A confirmatory affidavit by Malatji was not attached to the founding affidavit but one was filed on 4 October 2018].
- [17] The respondent's counsel argued that there is no link between the contravention of building regulations referred to by Malatji and the current application that the respondent is acting in contravention of the zoning certificate. However, the respondent lost sight of the fact that annexure EMM 7 is a copy of an affidavit attested to by the City Planner on 1 August 2013 that an inspection revealed that a boarding house was being operated from the property. In a follow-up report dated 2 December 2015 it is once again confirmed that a Boarding House was conducted on the property that is in contravention of the 2014-scheme. [No confirmatory affidavit by the author of this report was attached to the founding affidavit, however a confirmatory affidavit was filed on 4 October 2018].
- [18] When the founding affidavit is analysed it is evident that the applicant makes the following averments:
- i. The applicant is a local authority authorised to regulate the land use in its area of jurisdiction;

- ii. In order to regulate the land use, the 2014- scheme was developed;
- iii. This 2014-scheme replaced the erstwhile Boksburg Town Planning Scheme of 1991;
- iv. The respondents are the registered owners of the property that forms the subject-matter of this application;
- v. The property is situated within the applicant- and the court's area of jurisdiction;
- vi. The property is zoned as "residential 1";
- vii. The respondent contravenes the 2014-scheme by conducting a boarding house on the property in that a boarding house cannot be conducted on property zoned "residential 1" without the written permission of the applicant;
- viii. The respondents never sought, and never obtained the applicant's written permission to conduct a boarding house on the property.

[19] The question that must be answered is whether the fact that the applicant did not specifically state that the respondents are in breach of clauses xx.x⁶ of the 2014-scheme, and did not specifically set out the grounds on which it is alleged that the property is being used to conduct a boarding house, e.g. by stating that x number of people are living on the property, and only relied on reports from 2013 and 2015, and photographs taken in 2013, means that no cause of action has been made out.

[20] If a founding affidavit is considered as consisting of two components, namely a pleading component and an evidence component, *albeit* interlinked and overlapping, I am of the view that the application pass muster on the pleading component as far as prayers 1, 2 and 3 contained in the notice of motion, are

⁶ "xx.x" represents any specific clause or clauses that could be relevant.

concerned. The applicant makes the necessary averments from which the conclusion can be drawn that the 2014-scheme applies, and that the applicant is a properly established municipality with the responsibility and authority to regulate land-use in its area of jurisdiction. The necessary factual averments are also made that would have enabled the respondents to determine the exact extent of their alleged breach if they bothered to consult the 2014-scheme.

[21] The application was instituted in 2016 with the founding affidavit deposed to on 9 December 2016. The "Follow Up Inspection Report" attached to the founding affidavit is dated 2 December 2015. I am accordingly of the view that the applicant also provided the court with the necessary evidentiary proof that the property is used in contravention of the 2014-scheme, in that the use of the property can be construed as that of a boarding house. I am subsequently of the view that the applicant made out a proper case in its founding affidavit that substantiates the relief sought in prayers 1.1-1.3 of the notice of motion against the respondents cited in the founding affidavit.

[22] It then becomes necessary to refer to the content of paragraphs 41-44 of the respondents' answering affidavit, where it is stated:

'We deny that the Applicant has established a clear right whatsoever. The Applicant has failed to explain what the effect of "residential 1" zoning actually is. In addition the **Applicant has failed to show why it has the right to prevent or stop the First Respondent and myself from letting the property out to people who live there in peaceful, clean, sanitary and contented circumstances...** The Applicant has failed to show in what respect our conduct constitutes a contravention of the scheme and the ordinance. The Applicant has not even referred to the relevant terms or sections of the purported scheme and ordinance... The Applicant has failed to show why the Respondent should have obtained prior consent in the first place... the Applicant has not shown how the First Respondent and myself committed an offence or breached the terms of Section 42(5) of the ordinance, whatever such term might be...'

(My emphasis).

[23] In paragraphs 20.2 and 29.1 of the answering affidavit the respondents admit that the property is being let out to "certain select tenants". The respondents' denial that they are conducting a boarding house, as set out in paragraph 29.2 of the affidavit, loses sight of the definition of a boarding house as contained in the 2014-scheme. The applicant's averment that the property is used as a boarding house must be considered in light of the definition of a boarding house as contained in the 2014-scheme, and the reports and photographs attached to the founding affidavit. Although the photographs were taken in 2013 they provide substance to the reports. In this context the respondents' admission that the property is being let out to 'out to people who live there in peaceful, clean, sanitary and contented circumstances' supports the applicant's case that the property is used as a boarding house.

[24] Although the 2014-scheme was not attached to the founding affidavit, the applicant did extend an invitation to the respondents in the founding affidavit to obtain a copy thereof if required. In addition the 2014-scheme is a public document. Every aspect of uncertainty which the respondents might have had, would have been extinguished if the respondents took up the invitation and requested a copy of the scheme. It is undeniable that the applicant's case would have been clearer if it was stated in the founding affidavit that the respondents are contravening the 2014 scheme by the letting of the units erected on the property to more than 4 other persons. However, I am not convinced that the general reference to the property being used as a boarding house, with reference to the document wherein the term is defined, causes the applicant's founding affidavit to be vague to the extent that it does not establish a cause of action, or to be so vague that the respondents do not know which case they need to meet.

[25] However, as far as prayer 1.4 is concerned, the applicant does not provide any basis on which the court is able to find what the "original status" of the property was that was compliant and consistent with the zoning certificate, to which the property must be restored. It can be assumed or deduced that the applicant actually wants to pray that the respondents must be ordered to remove any structures from the property that causes the property not to

adhere to the directives contained in the current zoning certificate. The prayer as it is currently phrased, is however in itself vague.

- [26] In light of the fact that I find that a proper case has been made out on paper to establish a cause of action sustaining prayers 1.1-1.3, and in light of the fact that both parties submitted extensive heads of argument, and in light of the fact that final relief is sought by the applicant, I applied the well-known *Plascon Evans* – principle in considering the application. Once I found that the applicant's case is not lacking in substance, the bare denials contained in the respondents answering affidavit are not enough to avoid relief being granted against them.
- [27] Zoning has been described as “the glue that binds spatial planning, land use management and land development management”.⁷ Ownership entitlements are restricted by the imposition of the provisions of a zoning scheme, and it constitutes a legitimate deprivation of property if it is done in terms of law of general application and in a manner that is not arbitrary.⁸ In an adversarial legal system a court is bound to decide any dispute before it within the cadre and scope of the evidence placed before it by the parties. Despite the importance of land use regulation as part of the ‘power of government to protect health, safety, welfare and morals’, an applicant must make out a proper case on the papers if it seeks an order enforcing the town planning scheme devised to regulate land use in its area of jurisdiction.
- [28] As indicated above, I am of the view that the applicant made out a case for the relief sought in prayers 1.1-1.3 of the notice of motion as far as it pertains to the respondents cited in the application, although the court order is phrased somewhat different from the orders sought in these prayers. As a result costs would normally follow the event.
- [29] The one aspect which the respondents raised in their written heads of argument, but which was not argued before me because the respondent's

⁷ J Van Wyk *Planning Law* 2nd ed, JUTA, 247.

⁸ Van Wyk, *supra*, 249.

counsel elected to argue his case solely on the basis that the applicant does not make out a case on paper, is however the fact that on the applicant's own case, there is a number of unknown people currently occupying the property. In light of the fact that these people will adversely be affected by an order which may result in the demolition of the structures wherein they are currently accommodated, and in light of the fact that I am of the view that prayer 1.4 contained in the notice of motion is vague and unclear, I am not currently inclined to grant an order in terms of prayer 1.4. It would be prudent for the parties to endeavour to settle the dispute and for the respondents to apply for the necessary consent to utilise the property in a manner that provides for the "letting the property out to people who live there in peaceful, clean, sanitary and contented circumstances" and for the applicants to consider such an application.

[30] ORDER

In the result the following order is made:

1. It is declared that the respondents' use of the property known as Erf 928, Boksburg North (the property), as a boarding house, is in contravention of the 'residential 1' zoning provisions, applicable in terms of the Ekurhuleni Town Planning Scheme, 2014 (the zoning provisions), and is accordingly unlawful.
2. The respondents are interdicted and restrained from continuing with any use of the property, which is not authorised by the zoning provisions.
3. The respondents are given leave to duly apply to the applicant for the necessary consent to use the property as a boarding house, within one month of the date of this order.
4. Pending the finalisation of the application referred to in para 3 above, if duly made, the *status quo ante* in regard to the respondents' use of the property remains.

5. In the event of the respondents failing to submit an application as referred to in para 3 above, or such application being dismissed, the applicant is given leave to approach this court, on due notice to the respondents, on the same papers, duly amplified where necessary, for further relief for the implementation of the interdict granted in para 2 above.
6. The respondents are ordered to pay the costs of the application.



E VAN DER SCHYFF

ACTING JUDGE OF THE HIGH COURT

Counsel for applicant:

Adv MC Edwards

Applicant's attorneys:

Tshiqi Zebediela Inc

Counsel for respondent:

Adv JC Viljoens

Respondent's attorneys:

JJR Botha Attorneys

Date of hearing:

11 October 2018

Date of judgment:

16 November 2018