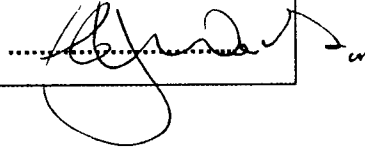


IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

20/02/2015
CASE NO.: 43706/14

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

20/02/2015



In the matter between:

RANDJESFONTEIN COUNTRY ESTATES
LIMITED

First applicant

PETER CLARK

Second applicant

JAMES HARVEY

Third applicant

BARRY RICHARDSON

Fourth applicant

LOUIS VAN DER MERWE

Fifth applicant

and

MASOOM TRADING SOLUTIONS (PTY) LTD

First respondent

FATHIMA AMOD

Second respondent

THE CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY

Third respondent

JUDGMENT

VAN DER WESTHUIZEN, A J

1. This an application for a declaratory and final prohibitory interdicting relief prohibiting the first and second respondents from continuing conducting a business in contravention of the relevant town planning scheme on portion 235 of the Farm Randjesfontein 405, Registration Division JR, Province Gauteng (portion 235), together with additional relief.

2. It is common cause that the land in question, portion 235, is zoned "*agricultural*" in terms of the Halfway House & Clayville Town Planning Scheme 1976 Part 1 (the Town Planning Scheme).
3. The Randjesfontein Country Estate was established during or about 1983, and subsequently developed with the intention of creating an equestrian estate where people could own property and reside and benefit from a country life style attributable to a pastoral, country setting. The Estate consists of 365 erven, comprising some 850 hectares of land, generally between one and two hectares in extent although some properties are considerably larger.
4. The Estate is an approved access controlled area, having been approved by resolution of the Midrand Town Council in 1999. The perimeter of the Estate is completely enclosed by a fence and security boom and manned huts are situated at entrances/exits.
5. The applicants fall into two categories: the first applicant is a non-profit company incorporated in terms of section 21 of the Companies Act, 1973, and is charged with the function of managing and administering the Estate. Property owners within the Estate bind themselves contractually to certain conditions and rules pertaining to the ownership and use of their respective properties; the second to fifth applicants are residents who live in close proximity to portion 235.
6. Amongst its other functions, the first applicant has established a set of policies and rules, as authorised to do so in terms of the Estates Articles of Association, which property owners are required to abide by and to that extent contractually bind themselves thereto when acquiring property within the Estate.
7. It is common cause that the second respondent had signed a document entitled Consent for Resale, which document is one of a

number that the first applicant requires to be signed by new owners of properties within the Estate.

8. It is further common cause that the document, Consent for Resale, contains reference *inter alia* to the following:
 - (a) Conditions included in the Deed of Sale between the first Applicant's predecessor, Randjesfontein Developments (Proprietary) Limited, and the original purchaser;
 - (b) Conditions contained in the respective Title Deeds of the properties;
 - (c) The Town Planning Scheme;
 - (d) Restraints;
 - (e) Title conditions;
 - (f) Randjesfontein specifications relating to buildings, fencing and walling;
 - (g) Randjesfontein Country Estates membership and levies.

9. Included in a bundle of documents that are handed to new owners of properties within the Estate, and which is also common cause that such were handed to the second respondent, are *inter alia* documents entitled respectively:
 - (a) Policies & Implementation Procedures;
 - (b) Randjesfontein Consent for Mortgage Bond;
 - (c) Building and Land Use Requirements in Randjesfontein;
 - (d) Country Estates Submission of Building Plans for Approval;
 - (e) Property Inspection.

10. It is not disputed that the aim of the aforementioned bundle of documents is to preserve the country life style of a pastoral, country setting.

11. The first respondent, being a company duly registered and incorporated in accordance with the laws of the Republic of South Africa, is a Clinical Research Organization and is the registered owner

of portion 235, Randjesfontein, having taken transfer of the property during 2013.

12. The second respondent is the sole director and shareholder of the first respondent. According to the company records, the second respondent's residential address is registered as 17 Singer Street, Unit 4, Forest Lea, Woodmead East, Sandton, 2128.
13. The third respondent is a municipality established in accordance with section 2 of the terms of Local Government: Municipal Systems Act, No. 32 of 2000. The third respondent was joined by virtue of the interest that it has in the present proceedings, although no relief is sought against it.
14. The application, and in particular the relief that is sought, is premised primarily upon the first and second respondents' use of the property situated on portion 235. The use being the use of a place of instruction as envisaged in the Town Planning Scheme.
15. Applicants alleged that the aforementioned use of portion 235 constitutes a contravention of the Town Planning Scheme read with the Town Planning & Townships Ordinance 56 of 1986.
16. Considering the provisions of the Town Planning Scheme that are relevant to the facts of this matter, the following is relevant.
17. Clause 2.18 defines a dwelling house meaning *a building designed for and/or used as a residence by one family together with such buildings as are reasonably accessory and/or necessary to and used in connection therewith*".

It follows that the use of such building relates to residence and not business.

18. The Town Planning Scheme in clause 16 provides for the purpose for which buildings may be erected and used in respect of the relevant zoning of the property and refers in that regard to Table F in the said scheme. It is provided that where property has been zoned “*agricultural*”, the buildings erected thereon may in the normal course be erected and used only for dwelling houses and agricultural buildings. Table F further provides that with the special consent of the local authority, the buildings erected and used could then *inter alia* be used for places of instruction.
19. It is common cause that the third respondent has not granted special consent as intended in clause 16 read with Table F in respect of portion 235.
20. However, the Town Planning Scheme provides an exception to the general prohibition of use of property zoned “*agricultural*” and that exception is to be found in clause 20 thereof.
21. Clause 20 of the Town Planning Scheme reads as follows:

“Without prejudice to any powers of the local authority derived from any law, or to the remainder of the Scheme, nothing in the foregoing provisions of this part of the Scheme shall be construed as prohibiting or restricting or enabling the local authority to prohibit or restrict:

 - 20.1 *the letting, subject to the by-laws relating to lodging and boarding houses, by any occupant of a dwelling house or any part of the house otherwise than as a separate tenement;*
 - 20.2 *the occasional use of a place of public worship, place of instruction or institution, as a place of amusement or social hall;*
 - 20.3 *the practice, subject to the compliance with the by-laws by any occupant of a dwelling house or residential*

building of a profession or occupation, which does not involve either:

- 20.3.1 the use of the building as an industrial building or noxious industrial building; or*
- 20.3.2 the public display of goods whether in a window or otherwise;*
- 20.3.3 the exhibition of any notice or sign other than a notice or sign ordinarily exhibited on a dwelling house to indicate the name and profession or occupation of the occupant; or*
- 20.3.4 an interference with the amenities of the neighbourhood.”*

22. The applicants further alleged that the first and second respondents, due to the business that is being conducted on the premises, are in breach of the provisions of the Consent for Resale (which document includes the Town Planning Scheme) signed by the second respondent, in that such conduct interferes with the peace and quiet of the neighbourhood, has materially and adversely affected the character of the suburb (directly impacting on the residents in the area), created an undue and untoward increase in traffic (both as to motor vehicles and persons entering and leaving the Estate), has made it more difficult to monitor and control the influx of traffic and people.
23. The defences raised by the first and second respondents in their answering affidavit were: a reliance on the provisions of clause 20 of the Town Planning Scheme and specifically clause 20.3 thereof (i.e. a reliance on the exception to the prohibited use); the Consent for Resale document is only of application when portion 235 is sold by respondents; the first respondent is running a small “home business” and its activities do not disturb the amenity of the suburb in any way; the first applicant is not acting impartially because other businesses are being conducted in the area by various residents apparently with

the blessing of the first applicant and the first and second respondents should also be so allowed.

24. The primary defence by the first and second respondents was a reliance on the exception provided in clause 20.3 of the Town Planning Scheme. The provisions of that clause are set out above. The defence being a reliance on an exception, the first and second respondents bear the onus.

25. In this regard, the defence was that in terms of clause 20.3 of the Town Planning Scheme, the first and second respondents as “occupants” of the property were entitled to practise a profession or occupation, contrary to the permitted use of the relevant zoning (in this matter that of “agriculture”), provided that such practise did not constitute an interference with the amenities of the neighbourhood.

26. The word “occupant” is not defined in the Town Planning Scheme, however the word “occupier” is defined as:

“2.39 Occupier in relation to any building, structure or land means and included any person in actual occupation of or legally entitled to occupy such building, structure or land without regard to title under which he occupies, or any person having the charge or management thereof, and includes the agent of any such person absent from the area, or whose whereabouts is known.”

This definition merely creates “categories” of occupiers.

27. The Town Planning Scheme is silent on the meaning to be ascribed to the word “occupy” as it appears in clause 20.3 and hence the word must be given its ordinary grammatical meaning, purposively interpreted in the context that it appears.

28. In this regard, the word “occupy” is defined in the Shorter Oxford English Dictionary, the two volume edition, as:

“4. verb trans. Hold (a position or office): live in, tenant, (a place)”

29. Applying the aforesaid definition of the Shorter Oxford English Dictionary to the word “occupy” as appearing in clause 20.3 in the context of clause 20 and interpreting it purposively, imputes a condition of physical presence that has permanency as opposed to occasional. This is supported by the condition imposed in clause 20.3.4 that the conduct permitted does not interfere with the amenities of the neighbourhood. In this regard I find further support in the exception provided in clause 20.2 of the Town Planning Scheme that provides for the “occasional use” of a place of public worship, place of instruction or institution, as a place of amusement or social hall.
30. First respondent, being the registered owner of the property, is not required to occupy the property. The first respondent’s ownership of the property does not constitute occupancy of the property as intended in clause 20 of the Town Planning Scheme. There is no physical presence. The first respondent primarily conducts a business, it does not practise a profession or occupation as contemplated in clause 20.3 of the Town Planning Scheme.
31. Second respondent on her own version only occasionally stays over at the property, her time, dictated by circumstances, being spread among three properties; portion 235, a property situated in Woodmead and most weekends in a flat in Durban. It is clear on second respondent’s version, that her “occupancy” of portion 235 is infrequent, haphazard and occasional. The company records of the first respondent stated her residential address to be in Woodmead.
32. The first respondent is described by the second respondent as a “SETA accredited training provider which operates under the name ‘Masoom Training Solutions’. It is an exempted micro-enterprise BBEEE level 1 level 1 provider (sic) specialising in e-learning

programmes which provide distance learning." The second respondent further stated that trainees are obliged to work for eleven months and receive one month's lectures, however the one month-lectures were spread over a year.

33. The second respondent stated that the courses she conducted are done on behalf of the first respondent. In that sense, the second respondent is merely an employee of the first respondent; second respondent is merely the medium through which the first respondent conducts its business. The second respondent does not practise a profession or occupation, but conducts the business of the first respondent on its behalf.
34. As dealt with above, clause 20.3 permits the occupant of a dwelling house or residential building to practise his or her profession or occupation subject to qualifications in contravention of the general prohibition against such use of property zoned "*agricultural*".
35. It is clear from the second respondent that she does not practise her profession or occupation on portion 235, but merely furthers the first respondent's business.
36. It follows that the second respondent's infrequent and haphazard occupancy of portion 235 does not fall under the exception provided in clause 20.3 of the Town Planning Scheme.
37. In the absence of special consent by the third respondent to use portion 235 contrary to the use "*agricultural*", the said use by the first and second respondents of the property for a place of instruction is unlawful.
38. There remains the issue of the alleged breach of the Consent to Resale. It is common cause that a contractual relationship exists in that regard.

39. The first and second respondents alleged that the contractual relationship in terms of the Consent for Resale only applied when the property is sold. There is no merit in that defence. It is clear from the document that the contractual relationship came into operation on the date of signing thereof by the second respondent and endures until the property is re-sold in future.
40. The first and second respondents are contractually bound to comply with the obligations imposed by that document; use of the property in conformity with the Town Planning Scheme, submission of plans to first applicant for approval, obtaining consent of the first applicant for building works prior to the commencement thereof, to join as member of the first applicant, permit inspection of the property by the first applicant in respect of the plans submitted for approval.
41. The applicants alleged that the first and second respondents had breached a number of the obligations (apart from the contravention of the permitted use dealt with above), *inter alia* they failed to submit building plans for building works undertaken on the property and failure to permit the first applicant to inspect the building works that were undertaken.
42. Building operations undertaken on the property were observed by some of the applicants, the precise detail of which was not possible to determine and hence the first respondent attempted to inspect the property. The second defendant states that the building works that were undertaken only comprised walling up of the garage door and aesthetic changes to the interior of the garage for the purpose of converting it into a lecture room.
43. There is a dispute as to the extent of the building works undertaken on the property. The second respondent alleged that the aforementioned admitted building works did not require the submitting

of building plans for approval and that the inspector of the third respondent had inspected the building works and had stated that no building plans were required. On the other hand the applicants have merely stated that building works had been undertaken and hence were entitled to inspect the building works. It alleged that the first applicant derived that right from the Consent for Resale document. The latter merely requires that building plans were to be submitted for consent prior to commencement with the building works. In their replying affidavit in response to the aforementioned statement by the second respondent, the applicants submitted that the right to inspect building works were ancillary and necessary as part of the enforcement of clause 4(c) of the Consent for Resale, the latter relating to the submitting of building plans.

44. It is trite that where there is a dispute of fact that cannot be decided on the papers before court, the version of the respondent is to be accepted, unless the applicant seeks an order for the referral of that dispute for the hearing of oral evidence. The applicants did not so apply. Accordingly the applicants have not discharged their onus in this regard.
45. It follows that the applicants are not entitled to final relief in respect of the inspection of the alleged building operations undertaken on portion 235.
46. In the result, the applicants are entitled to the relief relating to the contravention of the Town Planning Scheme in respect of the unauthorised use of portion 235.
47. I grant the following order:
 - (a) The conduct of training seminars on portion 235 of the Farm Randjesfontein 405, Registration Division JR, Province Gauteng, (29 Willow Crescent, Randjesfontein) by the first and

second respondents is declared to be in contravention of the Halfway House & Clayville Town Planning Scheme 1976 Part 1;

(b) The first and second respondents are interdicted, restrained and prohibited from:

1.1 utilising the property and improvements situated thereon in any way whatsoever as a "place of instruction" as contemplated and described in paragraph 2.46 of the Halfway House & Clayville Town Planning Scheme 1976 Part 1;

1.2 conducting and/or holding and/or facilitating lectures and/or workshops and/or classes and/or seminars on the aforesaid property or in the improvements situated thereon.

(c) The first and second respondents are ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved.


C J VAN DER WESTHUIZEN
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION

On behalf of Applicant:
Instructed by:

S Kuny
Norton Lambrianos (SA) Inc

On behalf of Respondents:
Instructed by:

S D Mitchell
Kuilman Mundell & Arlow