

**IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA**

CASE NO: 2155/2013

In the matter between:

MAS CORPORATION (PTY) LTD t/a MASCOR

First Applicant

**MECHANISED AGRICULTURAL
SUPPLIES (PTY) LTD**

Second Applicant

versus

**THE UMVOTI MUNICIPALITY
155 YORK STREET CC**

First Respondent

Second Respondent

JUDGMENT

Delivered: 12 April 2013

MBATHA J

[1] The First Applicant in this matter is MAS Corporation (PTY) LTD trading as MASCOR, a company with Limited Liability duly registered and incorporated in accordance with the Company Laws of the Republic of South Africa, which has its registered office and its principal place of business at 116 Voortrekker Street, Greytown, KwaZulu-Natal.

[2] The Second Applicant is Mechanised Agricultural Supplies (PTY) LTD, a company with limited liability duly registered and incorporated in accordance with the Company Laws of the Republic of South Africa, which has its registered offices at 116 Boortrekker Street, Greytown, KwaZulu-Natal.

[3] The First Respondent is The Umvoti Municipality, a Municipality duly established in terms of the Local Government Municipal Structures Act, Act No.117 of 1998, of 1998 Voortrekker Street, Greytown, KwaZulu-Natal.

[4] The Second Respondent is 155 York Street CC, a Close Corporation duly registered and incorporated in accordance with the Close Corporation Act No.69 of 1984, which has its registered office and principal place of business at 40 Tenna Terrance, Reservoir Hills, KwaZulu-Natal and conducts business at 117 Voortrekker Street, Greytown.

[5](a) The Applicants seek an interim order pending a review of the decision of the First Respondent to approve certain building plans in respect of renovations and alterations to the immovable property of the Second Respondent situated at 117 Pine Street, Greytown, KwaZulu-Natal.

(b) That the First Respondent is hereby directed not to issue a completion and/or occupation certificate to the Second Respondent in terms of

Section 14(1) of the National Building Regulations and Building Standards Act No.103 of 1977 prior to the Second Respondent having complied with the Greytown Town Planning Scheme.

- (c) That the Second Respondent be and is hereby directed not to allow any tenant to occupy the premises situated at 117 Pine Street, Greytown, KwaZulu-Natal, prior to the approval of the building plans by the First Respondent.
- (d) That the Second Respondent be ordered to pay Application costs.

[6] The First Respondent initially filed a Notice to Abide by the decision of the Court on the 13th of March 2013. Later, it consented to the granting of the order in terms of paragraph 2(a) and 2(b) of the Notice of Motion as per email dated the 14th of March 2013.

[7] The Second Respondent is opposing the relief sought by the Applicants.

SUMMARY OF THE FACTS

[8] The First Applicant conducts a business, a B.P Filling Station, a Toyota Motor Vehicle dealership, a General Motors Vehicle dealership and a John Deere Tractor dealership.

[9] The Second Applicant is the owner of the immovable property where the First Applicant conducts its business.

The Second Respondent is the owner of the immovable property, adjoining the property of the First Applicant where the Second Respondent conducts business.

[10] The commercial properties fall within the jurisdiction of the First Respondent.

[11] The Applicants had noticed that there were renovations being carried out in the Second Respondent's property. They then commissioned Corpolo ITS CC, trading as Greene Land, being development consultants to investigate the lawfulness of the building works being conducted in the Second Respondent's property.

[12] Section 40 of Ordinance 27 of 1949 states that the purpose of the Town Planning Scheme to provide:

“A co-ordinated and harmonious development of the local authority area or any area or areas situate thereon...in such a way as will most effectively tend to promote health, safety, order, amenity, convenience and general welfare as well as efficiency and economy in the process of development...”

[13] The Applicant state that such a Town Planning Scheme is binding on a municipality, all other persons and organs of the State, except in certain circumstances. The First Respondent is therefore governed by the terms of its Greytown Town Planning Scheme which was adopted on the 14th of September 1954. In this case the Applicants are stating that the Respondents have not complied with the terms of the Town Planning Scheme in so far as it relates to the renovations and/or improvements that are taking place at the Second Respondent's premises.

[14] Briefly, the Second Respondent's defence is that they had submitted the plans to the First Respondent, whose Town Planning Department approved them. They had submitted the plans for approval prior to commencing the building or making extensions to the commercial property.

EVALUATION OF THE EVIDENCE

15.1 The *locus standi* of the Applicants to bring this application is not disputed. It is also common cause that the Greytown Town Planning Scheme governs and is applicable to the commercial properties.

15.2 It is submitted that the Respondents have acted illegally in that the building plans do not conform to the purpose for which the scheme was adopted. The plans submitted by the Second Respondent to the First Respondent are in

direct conflict with the scheme, as they do not provide on-site parking. This would impact negatively on the business of the Applicants and other businesses in the CBD. This would impact on the accessibility to their business interests, as this new building will increase traffic and congestion in the area.

15.3 It is further contended by the Applicants that the Second Respondent's plans do not comply with the National Building Regulation and Standards Act and the Greytown Town Planning Scheme.

15.4 The Second Respondent's property is zoned, a general commercial zone in terms of the Greytown Town Planning Scheme. The scheme prescribes that parking shall be provided by the owner of the immovable property being one off-street parking bays for every 23 square metres of gross shop area. The Second Respondent is supposedly should have provided for 19 off parking bays. It is also submitted that the Second Respondent is unable to provide for such parking as is there no space left for such a purpose in his premises.

15.5 However, the Town Planning Scheme is not inflexible – it states that in the event of the Second Respondent not being able to provide on-site parking, the Second Respondent shall contribute to a parking fund by way of a cash payment in lieu of the provision of on-site parking. This aspect is considered at the time of the approval of the plans.

15.6 Such payment was not made by the Second Respondent to the First Respondent. The First Respondent appears not to have applied their minds to these provisions when they approved the Second Respondents plans. The Applicants had called upon the First Respondent to remedy the situation but it failed to take any steps to rectify the situation. This led to the Applicants to bring this application to Court.

15.7 It is contended by the Applicants that the Respondents acted illegally and that if this situation is not remedied this would cause huge congestion on the on-street parking in the vicinity and this will affect the business of the Applicant and will devalue their properties.

15.8 The Applicants addressed a letter to the Municipal Manager on the 7th of December 2012, a meeting with the Municipal Manager also followed. A further meeting with Mr Shaik took place also on the 22nd of January 2013 regarding the building on the Second Respondent's property. Again on the 29th of January 2013, a letter was addressed to the Municipal Manager. The situation remained unresolved, despite the Applicant's efforts to engage with the First Respondent in particular.

16.1 The Respondent's case is that the Applicants have not come to Court with clean hands, even though they concede, that there was an irregularity in the non-compliance with the Town Planning Scheme.

16.2 They submit that the plans to the extensions of the building were approved by the First Respondent.

16.3 Had they been aware of the requirements of the Scheme, they would have complied with same and they have been offered an opportunity to do so by the First Respondent.

16.4 The Second Respondent further submits that should the Applicant be offered the relief they seek, they will be prejudiced, in that the Second Respondent had already secured a tenant, Ackermans, for their premises; whose clients do not need the parking bays and this will not prejudice the Applicants.

APPLICATION OF LAW

[17] Though the Second Respondent contends that this is not a class action and there is no prejudice to other business interests in the area. The Court accepts the views of Plasket AJA in **JDJ Properties CC and Another v Umngeni**

Local Municipality and Another¹ that a land owner has sufficient interest to clothe him with *locus standi* in this matter. The facts of that case are almost similar to the facts of this application. They have a right to enforce the scheme and this gives them the required *locus standi*.

[18] It is also trite that the Courts cannot enforce illegal acts by the Municipality. The rule of law must be upheld irrespective of the ineptitude or the failure of the Municipality to apply the Town Planning Scheme and to adhere to the National Building Regulations.

[19] The First Respondent, the Municipality, has consented to the setting aside of the building plans and not granting the occupancy certificate to the new tenant.

[20] The Second Respondent's acceptance that there is an illegality in the actions of the First Respondent has changed the entire complexion of the case. The Second Respondent has indicated its intention of applying for the relaxation of the Town Planning Rules and offering to make a contribution to the parking fund. However, this does not cure the illegal action. With this concession, the defences raised by the Second Respondent fall away. I am persuaded to accept that the actions of the First Respondent were illegal and against the rule of law.

¹ 2003 JOL 29814 (SCA).

As stated in the JDJ case, Courts are prohibited from sanctioning the illegal actions of Municipality. The application succeeds.

[21] I therefore make the following order:

- (a) That the decision by the First Respondent to approve the building plans in respect of renovations and/or alterations to the immovable property of the Second Respondent situated at 117 Pine Street, Greytown, KwaZulu-Natal be and is hereby reviewed and set aside.
- (b) The First Respondent be and is hereby directed not to issue a completion and/or occupation certificate to the Second Respondent in terms of Section 14(1) of the National Building Regulations and Building Standards Act No. 103 of 1977 prior to the Second Respondent having complied with the Greytown Town Planning Scheme.
- (c) That the Second Respondent be and is hereby directed to forthwith cease any alterations, electrical installations and/or any building works of whatever nature to the premises situated at 117 Pine Street, Greytown, KwaZulu-Natal until it has complied with the Greytown Town Planning Scheme.

- (d) That the Second Respondent be and is hereby directed not to allow any tenant to occupy the premises situated at 117 Pine Street, Greytown, KwaZulu-Natal, prior to the approval of the building plans by the First Respondent.

COSTS:

- (e) I have reserved the issue of costs, as I want the First Respondent to address this Court in the light of the evidence before this Court, why it should not bear the costs of the Application. The issue for costs is therefore adjourned to a date to be arranged with the Registrar, for argument on cost.

MBATHA J

Date of hearing:	26 March 2013
Date of judgment:	12 April 2013
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