IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

Case No : 2164/2010

In the matter between :

Ethekweni Municipality Applicant

and

Vukukhanye Personnel Services CC Respondent

Judgment

Lopes J

[1] The respondent is the registered owner of certain immovable property ('the property') measuring 2 023m² and situated at 62 Glenugie Road, Manors, Pinetown, KwaZulu-Natal.

[2] The applicant, the Ethekweni Municipality, seeks an order that the respondent be interdicted and restrained from using the property in contravention of the Pinetown Town Planning Scheme in the course of preparation ('the Town Planning Scheme') and the provisions of the National Building Regulations and

Building Standards Act, 1977 ('the NBR'). The applicant further seeks an order that the respondent be directed to demolish a generator room, and a wooden hut comprising offices, which are located on the property. It also seeks an interdict restraining the respondent from occupying any portion of those buildings in the absence of plans approved by the applicant.

The history of the property :

[3] The history of the property as it emerges from the papers, and insofar as it is relevant to this application, may be summarised as follows :-

a) the property is a residential site which is zoned 'Special Residential 1' in terms of the Town Planning Scheme;

b) during 1990 the respondent purchased the property from its previous owner who had used the premises for business purposes. The property was transferred into the name of the respondent;

c) in July of 2009 the respondent applied to the applicant's development and planning department to have the property re-zoned from 'Special Residential 1' to a 'Transitional' zone which would enable it to be used for office premises;

d) that application was considered and rejected by the applicant on the 8th October 2009;

e) on the 15th February 2010 the respondent appealed against the applicant's refusal of the re-zoning application. That appeal was dismissed on the 27th July 2010; and

f) in the intervening period since it acquired ownership of the property, the respondent:-

(i) submitted a set of three plans in June of 2009 for certain building works on the property, designed to re-constitute the main dwelling and outbuildings as office premises. These plans did not pass the 'pre-scrutiny' stage and were returned to the respondent (in this regard it is important to note that the only approved building plans the applicant has on record are those for the construction of the residential dwelling in 1976);

(ii) alleges that it re-submitted those plans shortly thereafter but they have neither been approved nor rejected by the applicant and the respondent still awaits the applicant's decision in this regard;

(iii) has received a number of notices from the applicant objecting to the respondent carrying out building works and alterations to the premises without the requisite consent from the applicant; and

(iv) has continued to use the premises as business and office premises.

[4] If the zoning is in fact 'Special Residential 1', the respondent accepts that the uses to which the property has been put are in contravention of the Town Planning Scheme. However, Ms Mills, who appeared on behalf of the respondent, raised the following defences to the applicant's claim :-

a) that the property was zoned for 'Business and Commercial' use, and the respondent was entitled to conduct a business from the premises;

b) that the use to which the property was being put, is not necessarily a use which commenced after the adoption of the Town Planning Scheme. It is possible that this use was carried on as a pre-existing conforming use, and unless the applicant proves otherwise, it is not entitled to relief;

c) that the respondent was not obliged to provide the applicant with any plans or permission to carry out the building alterations which it did. In this regard Ms Mills referred to s 13 of the NRB, and submitted that the repairs which were carried out were within the ambit of the definition of 'minor building work' as defined in the regulations to the NBR; and

d) that in any event, and for reasons of equity, the demolition of the generator room and the wooden offices are not warranted.

[5] The respondent sought in the alternative that any order granted should require the respondent to re-submit its plans for the alterations which it carried out, within a reasonable period of time.

The issues :

[6] The first issue to be dealt with is the zoning of the property. The applicant set out as annexures to its affidavit, a zoning and locality plan taken from the Town Planning Scheme, as well as Table C to the scheme which sets out the

relevant uses to which the property may be put. The respondent's reply to this is that the property was in fact zoned 'Business and Commercial Use'. It reaches this conclusion based solely upon a rates assessment form sent to the respondent by the plaintiff, and containing under the heading 'Property Category' the words 'Business and Commercial (sewered)'.

[7] This allegation is repeated at least three times in the answering affidavit. In its replying affidavit the respondent sets out that rates are computed according to the purpose for which the property is used, in accordance with the applicant's rates policy. In terms of that policy it does not matter whether the use to which the property is put is authorised or not. That is why the rates assessment form reflects the words 'Business and Commercial (sewered) - it has nothing to do with the town planning zoning of the property.

[8] I do not believe this defence has any merit. It is illogical to assume that the description of the property in a rates notice as being 'Business and Commercial (sewered)' overrides a zoning laid down in the Town Planning Scheme. The respondent adduces no evidence, other than the say so of the deponent to its answering affidavit, to substantiate such a finding.

[9] In any event, this argument seems to have been something of an afterthought. I say this because in an application by the respondent in July 2009 for the re-zoning of the property, the respondent's representative states that the

site is covered by a 'Special Residential 1' zone. In the application the respondent records that the site was used for business purposes 'as a result of the loss of residential amenity…', and that the respondent 'has undertaken to follow the regulated processes by obtaining a rezoning prior to operating an office use from the site'.

[10] I find that the property is zoned 'Special Residential 1'. In those circumstances, and on the respondent's own admission, the use to which the property is being put is in contravention of the Town Planning Scheme.

[11] Secondly, Ms Mills submitted that because of the provisions of s 67 of the Town Planning Ordinance 27 of 1949, the respondent is entitled to use the property for business purposes notwithstanding that such use is in contravention of the provisions of the Town Planning Scheme.

[12] The Ordinance provides :-

'67 … (1) No person in any area in respect of which a resolution to prepare a scheme shall have taken effect shall –

a) erect a building or structure or alter or extend a building or structure; or
b) develop or use any land, or use any building or structure for any purpose different from the purpose for which it was being developed or used, as the case may be, at the date when the resolution to prepare a scheme took effect; or
c) use any building or structure erected after the date when the resolution to prepare a scheme took effect for a purpose different from the purpose for which

it was erected; or

…

unless in any such cases he has first applied in writing to the local authority for authority to do so, and the said local authority has granted its written authority therefor, either with or without conditions :…

2) Where there has been any interruption in the development or use of any land or the use of any building or structure after the date when the resolution to prepare a scheme took effect for a continuous period exceeding eighteen months, or where any building or structure erected after such date is not used for the purpose for which it was erected within eighteen months after its completion, it shall not be lawful to re-commence such development or use or commence such use, as the case may be, without the authority of the local authority applied for and granted in the manner prescribed in sub-section (1).'

[13] In order to determine whether or not the respondent's unlawful acts are sanctioned by the provisions of s 67 of the Ordinance, it is necessary to look at the purpose of the above section of the Act.

[14] Breaking down sub-s 67(2) in order properly to understand it, it provides :-

a) that where there has been an interruption in the development or use of the building for a continuous period exceeding 18 months, after the date when the resolution to prepare a scheme took effect; or

b) where any building erected after the date upon which the resolution

> to prepare a scheme took place is not used for the purpose for which it was erected within 18 months after the completion of that building;

it shall not be lawful to re-commence such development for use or commence such use without the authority of the local authority.

[15] The purpose of the section as best I am able to interpret it is that if the use to which a building has been put is interrupted for a continuous period of more than 18 months, then it is unlawful to re-commence such use without the authority of the local authority. In addition, if the building or structure is not used for the purpose for which it was erected within 18 months after its completion, it will not be lawful to re-commence such use without the authority of the local authority.

[16] This provision does not govern the present matter. The suggestion is that because the applicant bears the onus of proving unlawfulness, it has to satisfy the court that no such interruption as envisaged in sub-s 67(2) took place. It is clear from the papers that the buildings on the property were originally constructed for residential use. The submission is that the applicant must prove that the original use has not been interrupted continuously for more than 18 months, during which 18 months the property was used for business purposes. Until the applicant does so, so the argument goes, the applicant has not discharged the onus of proving unlawful conduct on the part of the respondent.

[17] I cannot agree with this interpretation. It is common cause that the conduct of the respondent is unlawful if the zoning of the property is 'Special Residential1', which I have found it to be. In my view that is all the applicant needs to do to establish prima facie unlawful conduct on the part of the respondent. If the respondent wishes to raise a defence to that allegation based on the past and distant history of the property, then it must raise such facts as would establish such a defence. That is not the same as burdening the respondent with the onus to prove lawfulness.

[18] It does not seem reasonable that the purpose of the section can be as is contended for by the respondent. One need only consider the steps which the municipality would have to take to enforce the provisions of the Act, if that was a correct interpretation. It would have to investigate and establish the use to which every property has been put since the resolution to prepare the Town Planning Scheme took effect. It would have to know, for instance, whether the property had been put to a different use from that for which the property was originally intended, when such different use first started and when it ended. These are clearly not matters of which the applicant would necessarily become aware, and I cannot envisage that the legislature intended that the applicant should have to do so in order to establish conduct by a party which is in contravention of the Town Planning Scheme. I am accordingly of the view that this defence has no merit.

[19] As part of the second defence, Ms Mills drew a distinction between town planning schemes in the course of preparation and town planning schemes which have been approved by the relevant member of the Executive Council ('MEC'). She submitted that where schemes have been approved by the MEC pursuant to the provisions of s 54 of the Ordinance, the applicant is entitled to prohibit the use of property in a manner contravening the provisions of the Town Planning Scheme, or to procure the demolition of buildings which do not conform to the provisions of the scheme. She submits that this operates in terms of s 56 of the Ordinance which does not apply to schemes in the course of preparation. She further submitted that non-compliance with a scheme in the course of preparation does not necessarily attract sanction because it is not necessarily unlawful.

[20] Section 54 of the Ordinance provides the Administrator with the power to refuse or approve a scheme after a report and recommendations on the scheme have been submitted to him. Section 56 of the Ordinance provides that once an approved scheme comes into operation, the responsible authority (in this case the applicant) shall observe and enforce the observance of all the provisions of the scheme. Certain powers are then given to the responsible authority.

[21] In thus interpreting the Ordinance, those sections dealing with the creation of schemes in the course of preparation have been ignored. These appear from s 45 of the Act onwards. Section 46 provides that every scheme (and a

'scheme' includes a scheme in the course of preparation) shall define the area to which it applies and shall specify the uses of land or buildings which are permitted or prohibited or which may be permitted by special consent. Those sections provide for public participation in the adoption of the provisions of a scheme in the course of preparation. They also provide that any owner of land may apply to the local authority for the re-zoning of the land, and provision is made for appeals against the decision of the local authority by any applicant or objector.

[22] The prohibitions which appear in s 67 are clearly enforceable at the instance of the applicant. In this regard see Essack v Pietermaritzburg City Council and Another 1971 (3) SA 946 (A) at 964 E – 965 D, Ethekweni Municipality v Tsogo Sun KwaZulu-Natal (Pty) Ltd 2007 (6) SA 272 (SCA) para 25.

[23] The third issue raised by the respondent's counsel was that nothing in the NBR required the respondent to submit plans or request permission from the applicant to carry out the building operations which it did. This was because the provisions of s 4(1) of the NBR provide :-

'(1) No person shall without the prior approval in writing of the local authority in question, erect any building in respect of which plans and specifications are to be drawn and submitted in terms of this Act.'

'Building' is defined in s 1 of the NBR and provides that it includes :-

'(a) any other structure, whether of a temporary or permanent nature and irrespective of

the materials used in the erection thereof, erected or used for or in connection with –

(i) the accommodation or convenience of human beings or animals;

(ii) …storage … of any goods …

(b) …

(c) …

(d) any part of a building, including a building as defined in paragraph (a), (b) or (c).

[24] It was submitted that neither the NBR nor the regulations promulgated pursuant thereto specify what buildings and structures require plans and specifications to be drawn and submitted under the NBR. In this regard reference was made to s 13 of the NBR which gives a building control officer the power to exempt the owner from the obligation to submit plans with regard to minor building works. Minor building works are defined in s 1 of the regulations to the NBR.

[25] The respondent submits that the applicant has not demonstrated that all the work which the respondent carried out on the property was not excluded from the definition of 'minor building work'. In those circumstances the applicant has not demonstrated that plans were required in terms of the NBR and accordingly it cannot be said that the respondent has contravened any of the provisions of the Act.

[26] What is clear is that the respondent seeks to invoke an exemption in terms of sub-section 13(1). However, it is required that such an exemption be given in

writing. No allegation whatsoever has been made by the respondent that it has the consent in writing of the applicant not to submit building plans on the basis of an exemption in terms of s 13(1).

[27] Indeed, the contrary is evident because the applicant has written a number of letters to the respondent complaining about the works and indicating that plans are in fact required. I accordingly find that this defence has no merit.

[28] Finally, it is submitted that the demolition of the generator and the wooden hut are not warranted. The submission was made that this was because of the way in which they have been built, and that they do not constitute a danger to any person. Those are matters, however, which are not for the respondent to decide. These matters are among the very reasons why the applicant is given the responsibility of overseeing building works.

[29] Notwithstanding the aforegoing, I am of the view that it may be unreasonable to order the demolition of the generator room and the wooden offices, on the basis that the respondent be given a final opportunity to remedy its default.

[30] In all the circumstances I am satisfied that the applicant has established the clear right necessary for an interdict. In as far as the respondent has operated in breach of the Town Planning Scheme and the NBR, there has

already been an injury committed. The applicant has been prevented from complying with its statutory obligations in overseeing the construction and use of premises within its area of jurisdiction. This of itself is sufficient prejudice to satisfy the second requirement for an interdict.

[31] Whilst it may be arguable that there are other remedies which the applicant could apply – for instance the institution of criminal proceedings against the respondent, the fact that there is an alternative statutory penalty does not disqualify the applicant from being granted the relief which it seeks.
See : Huisamen and Others v Port Elizabeth Municipality 1998 (1) SA 477 (E) at 483 I – 484 F.

[32] In my view the respondent cannot complain of any prejudice which it suffers as a result of its unlawful conduct.

[33] Finally and insofar as there are any disputes of fact on the papers, in my view they do not raise real, genuine or bona fide disputes of fact which impact upon the probabilities. I am satisfied that the respondent's conduct was unlawful, both in relation to the use to which it has put the property, and the changes it made to the property without consent.
See : Plascon-Evans Paints Ltd v van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634 E – I.

[34] I make the following order :-

(i) the respondent is interdicted and restrained forthwith from continuing, using, undertaking or conducting any activities in contravention of the Pinetown Town Planning Scheme in the course of preparation, at or upon the property described as Erf 1657 Pinetown and situated at 67 Glenugie Road, Manors, Pinetown, KwaZulu-Natal ('the property') and, in particular from using the property for any purpose other than those permitted uses in terms of a 'Special Residential 1' zoning.

(ii) The respondent is interdicted and restrained forthwith from occupying or in any way using any portion of the generator room and the wooden hut structure on the premises.

(iii) In the event of the respondent failing to submit plans in terms of the National Building Regulations and Buildings Standards Act, 1977 to the applicant for the generator room and wooden hut structure within 20 days of the date of this order, the respondent is directed to demolish, or cause to be demolished, those structures within 14 days of the lapse of the 20 day period.

(iv) In the event of the respondent failing to submit the necessary plans for approval by the applicant as envisaged in (iii) above, and failing to demolish the said structures within the time periods set forth above, the Sheriff of this Court is authorised and directed to cause such structures to be demolished, and in doing so may utilise the services of the applicant's employees or agents.

(v) The respondent is directed to pay the applicant's costs of this application, such costs to include the costs consequent upon the execution of

any order in terms of paragraph (iv) above.

Date of hearing :25th May 2011

Date of judgment : 21st June 2011

Counsel for the applicant : S Mahabeer (instructed by Naidoo Maharaj Incorporated)

Counsel for the respondent : L M Mills (instructed by Nxumalo and Partners)