IN THE SUPREME COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No: 141/2003

In the matter between:

CLUB TWELVE	Excipient
and	
RAND WATER BOARD	Respondent
INRE	
RAND WATER BOARD	Plaintiff
and	
BURGER IZAK JOHANNES	First Defendant
CLUB TWELVE (aka KLUB 12)	Second Defendant

CORAM:	KRUGER J
JUDGMENT:	KRUGER J
HEARD ON:	26 NOVEMBER 2004
DELIVERED ON:	3 MARCH 2005

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[1] Second defendant excepts to plaintiff's Particulars of Claim

as lacking averments to sustain a cause of action. Second defendant says that plaintiff makes no allegation which entitles it to any rights in respect of the first defendant's land.

[2] Second defendant says that plaintiff has no power to order it to demolish the structures mentioned in prayer 1 of the combined summons. Second defendant points out in the exception that plaintiff has to rely on clause 2.2 of Annexure "C" of the structure plan, which provides as follows:

> "Except with the written consent of the Rand Water Board, no habitable buildings or structures, toilets, French drains, conservancy or septic tanks, sewage pumping installations or sewage works shall be permitted below the flood control line, as defined."

[3] Second defendant's case is that on a proper interpretation of Annexure "C", clause 2.2 therereof purports to forbid a decision authorising the construction of such structures by an authorising authority, alternatively, clause 2.2 is *ultra vires* its empowering statute referred to below.

In the premises, second defendant says, it is the permissions foreseen in Section 6A(12) of the 1967 Act and in Section 27 of the 1991 Act, which clause 2.2 of Annexure "C", the guide plan seeks to prohibit.

[4] In the exception the following is stated:

"1.11 Plaintiff has not alleged that:

1.11.1 First and/or Second Defendants are functionaries who can either grant or refuse and/or permit the actions foreseen in Section 6A(12) of the 1967 Act and Section 27 of the 1991 Act;

1.11.2 Either First or Second Defendant has or is using the land either:

1.11.2.1 "for a purpose other than for the purpose for which it is zoned in terms of a town planning scheme binding or becoming binding in that area or for a purpose other than a purpose for which it was being used immediately prior to that date." (1967 Act); or

1.11.2.2 "any land in the area to which the regional structure plan or the urban structure plan, as the case may be, applies for a purpose other than the purpose for which it-

i) was being used immediately before that date (commencement of a regional structure plan); or

ii) is zoned in terms of a town planning scheme which is or may become binding in that area." (1991 Act).

1.12 Plaintiff makes no allegation that it is a member of a class of person whose interests are sought to be protected by clause 2.2 of the guide plan and/or either the 1967 Act or the 1991 Act;

1.13 Plaintiff makes no allegation that it has allegedly suffered special damages as a result of the alleged actions of First Defendant;

1.14 Plaintiff makes no allegations of any actions by either the First and/or Second Defendant which is contrary to the provisions of the regional structure plan.

2. In the premises, Plaintiff's Particulars of Claim do not disclose a cause of action."

SUBMISSIONS BY COUNSEL FOR EXCIPIENT

[5] Counsel for excipient submits that for subordinate legislation, such as the Guide Plan/Structure Plan, to legitimately grant a right to claim demolition, the enabling statutory provisions (the 1967 Act and/or the 1991 Act) have to expressly state that a Plaintiff is entitled to claim a demolition order, with reference to **VAN STADEN v PRETORIA CITY COUNCIL** 1950 (4) SA 365 (T) at 368-369. The power to demand demolition is a drastic one and accordingly, the legislative enactment upon which a Plaintiff relies must expressly make provision for such a power (**VAN STADEN v PRETORIA CITY COUNCIL (supra)**, 368A). The Plaintiff does not allege any form of common law right to entitle it to a

demolition order, such as contract and/or nuisance and/or encroachment.

[6] Counsel for excipient points out that in **<u>JOHANNESBURG CONSOLIDATED INVESTMENT CO LTD v MITCHMOR INVESTMENTS (PTY) LTD AND ANOTHER</u>** 1971 (2) SA 397 (W) it was held (at 410 D - E) that a Plaintiff must plead the right from which it claims its entitlement to a demolition order. He says that Plaintiff has made no allegation as to the origin of its right to demolish either in common law due to encroachment and/or nuisance or stemming from a particular by-law. In the premises, the mere absence of approval, even if such approval was required, does not entitle the Applicant *per se* to a demolition order, such as claimed. Counsel says in the absence of an allegation of an empowering statutory provision or an allegation which entitles the Plaintiff in terms of the common law to claim demolition, the Particulars of Claim are expiable and should be struck out. The <u>Mitchmor</u>-case dealt with further particulars, and is not in point.

[7] Counsel for excipient says that the Guide Plan/Structure Plan obtains its status and purpose from the 1967 Act, and later the 1991 Act. He says in accordance with Section 6A of the 1967 Act, prior to its repeal, Guide Plan Committees were set up to compile draft plans for the future "special development of the area defined". Counsel stressed that the purpose of a Guide Plan is set out in Section 6A(1)(b) of the 1967 Act, which determines as follows:

> "Such plan <u>*can determine that land may be utilised for a specific purpose only*</u> *or, with the consent of the Minister or Administrator or a specified authority, according to the provisions of the plan,* <u>*also for such other purposes for which provision is made by the plan*</u>*."*
> (Counsel's underlining).

[8] Counsel submitted that, in terms of Section 5 of the 1991 Act, the objects of a policy plan shall be to promote the orderly physical development of the area to which that policy plan relates <u>to the benefit of all its inhabitants.</u>

[9] He says that neither of the Physical Planning Acts have, nor can the Guide Plan have as its intention, the protection of a specific class of persons or of the Plaintiff specifically. Rather the Acts and/or the Guide Pan/Structure Plan were enacted for the benefit of all inhabitants and to orderly regulate future planning for development.

[10] In the premises, he submitted that prejudice to the Plaintiff cannot be presumed as foreseen by **PATZ v GREENE & CO** 1907 TS 427 and that the Plaintiff had to plead prejudice as a general requirement for purposes of a final interdict. The Plaintiff has failed to make any such allegations.

[11] He argues that in the premises, in the absence of an allegation that the erection of buildings constituted use of the land for a purpose different than that for which it was being used before enactment of the Guide Plan or from what is provided for in terms of a Town Planning Scheme, the allegations of the Applicant do not constitute illegal action by the First Defendant.

[12] Counsel for excipient accordingly submitted that the Applicant cannot avail itself of the type of interdict foreseen by the decision in **PATZ v GREENE (supra)**. He further submitted that such type of interdict foreseen by **PATZ V GREENE (supra)**, only provides for a prohibitory action and not for a mandatory interdict, such as is claimed by the Plaintiff.

[13] As to the prohibition in clause 2.2, counsel for excipient stressed the words "shall be permitted". He says it is clear from section 6A(1)(a) and (b) that the purpose of a guide plan was to be "*a draft Guide Plan in which guide lines for the future spatial development of the area defined in the Notice are laid down"* and that the plan could determine that "*the land may be utilised for a specific purpose only or … according to the provisions of the plan, also for such other purposes for which provision is made by the plan"*.

[14] Counsel says the intention was not to regulate the owners of

land, such as the First Defendant, but the planning authorities. Such is also patently clear, so counsel says, from the absence of a provision in the 1967 Act that creates a criminal offence, in the event of, or that at least, prohibits any actions by a land owner which is conflict with a Guide Plan. The Act only forbids a change of use in land and/or use for the purpose of land; from what it was either being used for before approval of a Guide Plan or from what is provided for in a specific Town Planning Scheme.

[15] Counsel says the intention of the Guide Plan was to regulate the planning authority and not the owner of the land. He says the owner was only regulated by means of the provisions of the Act which stipulated that he was not allowed to change the use of his land or to use it in contravention of a Town Planning Scheme.

[16] In the premises he submitted that clause 2.2 of Annexure "C" of the Vaal River Complex Guide Plan and/or Regional Structure Plan, does not and cannot regulate the

actions of a land owner, such as the First Defendant but rather the authorities who are to decide upon the future spatial development of an area when approving the establishment of townships and/or approving applications for amendments of land use.

[17] Counsel for excipient submitted that should it be found that clause 2(2) of the Guide Plan/Regional Structure Plan, seeks to prohibit an owner from erecting buildings below the 50-year flood line without the consent of the Rand Water Board, then clause 2(2) goes beyond the powers of:

(i) The Committee that was established to compile a draft Guide Plan; and

(ii) The Minister to approve such a Guide Plan.

[18] In the premises, counsel submitted that an interpretation of clause 2(2) which limits the First Defendant's rights of ownership to be subject to the consent of the Plaintiff, would be *ultra vires* Guide Plan's empowering provisions. He

submitted that the interpretation of the entire Annexure "C" to the effect that it regulates the property owner itself, would be *ultra vires* the empowering provisions contained in Section 6A(1).

[19] Counsel says neither Section 6A(1) of the 1967 Act, nor Section 6 of the 1991 Act, grants the authority for a Guide Plan to determine the manner in which land is to be used, such as for agricultural purposes, industrial purposes, townships development, open spaces, etc. In the premises, counsel submitted that the provisions of Annexure "C" of the Guide Plan is *ultra vires*.

[20] Excipient asks that the exception be upheld and that the particulars of claim be struck out.

<u>ASSESSMENT OF EXCIPIENT'S SUBMISSIONS</u>

[21] Whatever is reasonably incidental to the proper carrying out of an authorised power, is considered as impliedly

authorised. See **MAKOKA v GERMISTON CITY COUNCIL** 1961 (3) SA 573 (A) at 582A:

> "A power would be regarded as reasonably ancillary to the main power conferred if the true object which the legislature had in mind in conferring that power, would be defeated if the ancillary power is not implied, or if the power conferred cannot in practice be carried out in a reasonable manner unless the ancillary power is implied."

See also **STOFBERG v LADYBRAND KO-OPERATIEWE LANDBOU MAATSKAPPY BPK** 1970 (2) SA 57 (O) at 61 H – 62 D; **CAPE DIVISIONAL COUNCIL v WESTERN CAPE TIMBERS (PTY) LTD AND ANOTHER** 1976 (3) SA 714 (C) at 717A – C.

[22] The Guide Plan does not in terms make provision for the Applicant to apply for a demolition order when there is non-compliance with clause 2.2 nor does it in terms make provision for any alternative procedures to be followed. It would be impossible for the Plaintiff to reasonably fulfil the statutory obligations imposed upon it by clause 2.2 should it not have the ancillary power of applying to a court of law to obtain a demolition order against an owner of land who erects buildings or permits buildings to be erected on his

land.

The power to make demolition orders is a power which courts have exercised over a number of years to enable parties to enforce compliance with contractual and statutory rights.

[23] In a long line of cases, the courts have held that it has a discretion to award damages rather than an order to demolish a building. The significance thereof is that the right to order demolition is accepted:

HORNBY v MUNICIPALITY OF ROODEPOORT-MARAISBURG AND ARTHUR 1918 AD 278 at 296/7;

DE VILLIERS v KALSON 1928 EDL 217 at 231;

HIGHER MISSION SCHOOL TRUSTEES v GRAHAMSTOWN TOWN COUNCIL 1924 EDL 354 at 366;

TOWN COUNCIL OF ROODEPOORT-MARAISBURG v POSSE PROPERTY (PROPRIETARY) LTD 1932 WLD 78 at 87/8;
JOHANNESBURG CONSOLIDATED INVESTMENTS CO LTD v MITCHMOR INVESTMENTS (PTY) LTD & ANOTHER (supra) at 405 D – 407 G;

RAND WATERRAAD v BOTHMA EN 'N ANDER 1997 (3) SA 120 (O) at 130 F – 138 H.

[24] Where a party seeking relief for contravention of a statutory provision is not obviously the object of protection by such provision, it is generally necessary that such party allege and prove that it is a member of a class of persons whose interests are sought to be protected by the statutory provisions in question, or that it has suffered special damages as a result of such contravention. See -

ROODEPOORT-MARAISBURG TOWN COUNCIL v EASTERN PROPERTIES (PROP) LTD 1933 AD 87 at 94-95;

UNITED DAIRIES CO-OPERATIVE LTD v SEARLE AND ANOTHER 1974 (4) SA 117 (ECD) at 124 F – 128 A;
VON MOLTKE v COSTA AREOSA (PTY) LTD 1975 (1) SA 255 (C) at 259 A – B.
MINISTER OF HEALTH AND WELFARE v WOODCARB (PTY) LTD AND ANOTHER 1996 (3) SA 155 (N) at 160 C -162 A.

[25] The Plaintiff does not fall within such a category. The Plaintiff, in terms of the Guide Plan, is the authority charged with giving or withholding its consent for the erection of

certain structures below the flood control line. In such circumstances it is not necessary to allege or prove that the Plaintiff is a member of a class of persons whose interests are sought to be protected by clause 2.2, or that it has suffered special damages or prejudice as a result of the actions of the First Defendant.

[26] Mr. Gautschi submitted that the Plaintiff's clear right is based upon its role given to it in terms of the Guide Plan to regulate building operations below the flood line as determined by the Plaintiff and its right to protect its right of control by means of an interdict. See **CITY COUNCIL OF JOHANNESBURG v BERGER** 1939 WLD 87; **KINGWILLIAMSTOWN MUNICIPALITY v HORWITZ** 1946 EDL 128 at 131. He says the Plaintiff's rights in this regard are set out in paragraphs 4 to 13 of the particulars of claim, and have been sufficiently pleaded. In my view the Plaintiff has shown that it has a right which is being offended against by the actions of the Defendants.

[27] Whereas Mr Serfontein, for second defendant says that the erection of a building does not necessarily change the use of the land, Mr. Gautschi says that the erection of a building clearly constitutes a different purpose for which the land is used than its use as barren farm land. Mr. Gautschi says the moment you erect a building the purpose changes, and that the allegation in the particulars of claim that the buildings were erected in contravention of legislation as per clause 2.2 of Annexure "C" to the Guide Plan establishes unlawfulness as required. I am satisfied that further physical development includes the erection of buildings and that the erection of the buildings referred to in the particulars of claim, brought about a change of land use.

[28] In my view the interpretation of clause 2.2 relied upon by the second defendant, namely that it only prohibits an authorising local authority (such as a local authority empowered to give permission for the construction of buildings) to authorise construction of structures, if permission has not been obtained from the plaintiff, is a

forced interpretation not supported by the wording of clause 2.2 in its ordinary sense. The interpretation of clause 2.2 contended for by the Second Defendant would lead to the absurdity that where a land owner erects structures without applying for any permission of any kind from the relevant authority, there would be no recourse against such land owner. Furthermore, such powers as the Plaintiff contends for in his this case, have been enforced by the courts. See **RAND WATER BOARD v VEY AND ANOTHER,** WLD Case No 27312/92, unreported decision 19 April 1993.

[29] In answer to the argument that clause 2.2 is *ultra vires*, Mr Gautschi highlights the words “or any specified authority” in section 6A(1)(b) of the Physical Planning Act 88 of 1967, as it existed at the relevant time:

> *“Such plan [i.e. the Guide Plan] can determine that land may be utilised for a specific purpose only or, with the consent of the Minister or Administrator or a specified other authority, according to the provisions of the plan, also for such other purposes for which provision is made by the plan.”* (Emphasis added).

[30] The empowering statute therefore clearly provides that the Guide Plan may require the permission of the Minister or

Administrator or some other specified authority (such as the Plaintiff) to be obtained before land may be utilised for a purpose other than specified.

[31] The empowering statute clearly limits the rights of ownership of the land owner and regulations issues in terms of it such as the Guide Plan, regulating procedures to obtain such permission cannot be *ultra vires*.

[32] I agree with Mr Gautschi when he says that the Physical Planning Act does not stop at laying down guidelines. Section 6A(1)(b), inserted in 1971 by section 6 of Act 73 of 1975 refers to powers of the minister, Administrator "or a specified other authority". He says the 1967 Physical Planning Act is a empowering Act to regulate and prohibit. In terms of the Physical Plan Act 125 of 1991 a guide plan should be deemed a regional structure plan (s. 37(2)(a)(ii)(bb)). Mr. Gautschi referred specifically to section 27 (1)(b) of the 1991 Physical Planning Act which contains a prohibition and which makes it clear that the Act is not there

merely for planning. S 27(1)(b) creates an offence and clearly goes wider than planning.

[33] This being a pleading where the plaintiff relies on subordinate legislation, there is no need to refer to all empowering legislation.

CONCLUSION

[34] On the defendants' interpretation of clause 2.2 if a person bypasses the local authority, the plaintiff would be powerless to act. I am satisfied that the interpretation of clause 2.2 relied upon by plaintiff is the correct one, namely that it empowers plaintiff to act as it does in the particulars of claim. Plaintiff is qualified to regulate buildings and structures with reference to the flood line of the river, and plaintiff can only properly fullfil this control function if it has the power to obtain a demolition order.

[35] At the very least, the interpretation of plaintiff's powers relied

upon by the plaintiff is a reasonably possible interpretation which cannot be excluded.

[36] As to costs, I am satisfied that the complexity of this matter warranted the employment of two counsel. The notice of exception was signed by two counsel. The matter is of importance to the respondent, and it was a wise precaution to employ two counsel.

[37] The second defendant's exception against the plaintiff's particulars of claim is dismissed with costs, including the costs attendant upon the employment of two counsel.

A. KRUGER, J

On behalf of Excipient/Second Defendant: Adv. E.F. Serfontein
Instructed by
Neuhoff Van Deventer
BLOEMFONTEIN

On behalf of Respondent/Plaintiff:	Adv. A. Gautschi SC and Adv. I.M. Lindeque Instructed by Hill McHardy & Herbst BLOEMFONTEIN
On behalf of First Defendant:	No appearance

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