

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

Case Nr: 2198/2004

In the matter between:

WATERHOUSE PROPERTIES CC
MOORE, JEAN-MARIE DENIS MAURICE
MOORE, JUANITA CATHERINE

First Applicant
Second Applicant
Third Applicant

and

HYPERCEPTION PROPERTIES 572 CC
METSIMAHOLO LOCAL MUNICIPALITY
RAND WATER

First Respondent
Second Respondent
Third Respondent

HEARD ON: 26 AUGUST 2004

JUDGMENT: RAMPAL J

DELIVERED ON: 28 OCTOBER 2004

[1] I shall refer to the parties as in the main application under case no 4245/2003. Besides the main application there are four applications between the same parties to contend with.

In this judgment I deal with the application of the applicants to have certain portions of the answering affidavit in the main

application struck out as well as the application of the first respondent to have certain portions of the founding affidavit as well as the replying affidavit in the main application struck out. I do not deal with the first respondent's application for condonation of the late filing of the answering affidavit and the first respondent's application for leave to file a supplementary affidavit to the answering affidavit. By agreement between the parties I was requested to disregard these two ancillary applications. The effect of the agreement was that both applications were granted and that no order as to cost was made. I shall deal with the main application in a separate judgment.

- [2] In their application for striking out the applicants attacked the following paragraphs of the first respondent's answering affidavit:

Paragraph 2.1.9 answering affidavit page 123

Paragraph 2.1.1.3 answering affidavit page 123

Paragraph 2.1.1.4 answering affidavit page 128

Paragraph 2.1.1.6 answering affidavit page 130

Paragraph 5 annexure JWM19 answering affidavit page 165

- [3] Firstly as regards paragraph 2.1.9 of the answering affidavit page 123. The portion of the paragraph complained of reads as follows:

“Die plaaslike munisipaliteit Metsimaholo het die betrokke struktuur goedgekeur per die stds en streekbeplanner van die voormelde instansie, Mnr. Leon van Rensburg.”

The grounds of the objection were that the allegation was hearsay and therefore inadmissible since no confirmatory affidavit by Mr. Leon van Rensburg was annexed to the answering affidavit. Mr. Jordaan, counsel for the first respondent, contended that the objection was invalid. He relied on the fax from the second respondent dated 22 July 2004. Since there was no confirmatory affidavit by the author of the telefax, Mr. L.K. Mahlatsi, the municipal manager, the telefax itself does not carry much evidential weight. Therefore the objection is sustained. I rule that the averments contained in this paragraph are inadmissible. The relevant portion of the paragraph is struck out.

- [4] Secondly as regards paragraph 2.1.1.3 of the answering affidavit page 127. The paragraph reads as follows:

“Ek bevestig dat die betrokke struktuur ook geen brandgevaar of enige gevaar

hoegenaamd inhou nie. Ek het deur my prokureur van rekord, Walter Niedinger, 'n verslag aangevra van die plaaslike munisipaliteit Metsimaholo se brandweerafdeling, en heg ek 'n verslag ontvang vanaf die afdeling hierby aan as **AANHANGSEL "JWM18"**. Daar is gevolglik geen gevaar vir enige lewe of eiendom nie."

The report referred to in this paragraph is the letter marked annexure JWM 18 by Mr. R.P. Ramakatsa an official employee of Metsimaholo Local Municipality, the second respondent and reads as follows:

The grounds of the objections were that the deponent of the answering affidavit expressed an opinion on behalf of the second respondent whereas he was not an expert. That the foresaid annexure was irrelevant and inadmissible since in the first place it was a letter and not a sound statement. In the second place it did not specify precisely what structure was inspected, the house, the boathouse or the jetty. In the third place its author expressed expert opinion. It appeared that his official designation was a manager public safety and security and not an expert on fire hazards. Counsel for the first respondent conceded that the objection was based on valid grounds. The concession was correctly made.

Therefore the objection is sustained. The payments are irrelevant and inadmissible. The paragraph is struck out.

- [5] Thirdly as regards paragraph 2.1.1.4 answering affidavit page 128. The paragraph reads as follows:

“Ek bevestig verder dat die betrokke struktuur deur Rand Water goedgekeur is. Ek heg hierby aan as **AANHANGSEL “JWM19”** n eedsverklaring van Peter Hoge, ‘n opvangs-koördineerder van Rand Water, waarin hy onder andere bevestig dat die struktuur voldoen aan Rand Water se vereistes. In die eedsverklaring bevestig Peter Hoge ook dat die Eerste Applikant in hierdie aangeleentheid ook ‘n soortgelyke “Deed of Acknowledgement” onderteken het en die bedrag van R57.00 [SEWE EN VYFTIG RAND] betaal het, soos wat ek ook gedoen het.”

The documents referred to is annexure JWM19 a sworn statement by Mr. Peter Hoge, an official in the employ of the Rand Water, the third respondent and paragraph four thereof reads:

The grounds of the objection were that the said annexure JWM19 was irrelevant and inadmissible because its deponent expressed expert opinion concerning fire hazards. It appeared that his official designation was a treatment co-ordinator and not a fire expert. Counsel for the first

respondent conceded that the objection was based on valid grounds. The concession was correctly made. Therefore the objection is sustained. The averments are irrelevant and inadmissible. The application to struck them out is granted.

- [6] Fourthly as regards paragraph 2.1.1.6 answering affidavit page 130. The paragraph reads as follows:

“Ek ontken dat die waarde van die Eerste Applikant se eiendom wesenlik verminder het soos beweer word. Eerstens is die aard en voorkoms van die struktuur netjies en komplimenteert dit die waarde en voorkoms van die Eerste Respondent se eiendom asook die Eerste Applikant se eiendom.”

The grounds of the objection were that the deponent expressed expert opinion whereas he was a layperson and not competent to express such opinions. Counsel for the first respondent conceded that the objection was based on valid grounds. The concession was correct. Therefore the objection is sustained. The averment amounts to expert opinion. The deponent is not qualified to express such an opinion. Therefore the objection is sustained. The paragraph is struck out.

- [7] Fifthly as regards paragraph 4 annexure JWM19 answering affidavit page 165. The paragraph reads as follows:

“I confirm that such structure blends in with the surroundings, is not unsightly, does not pose a fire hazard or danger to any life or property and does not negatively effect the environment.”

The grounds of the objection were that the deponent expressed expert opinion and that he was not qualified to do so. Counsel for the first respondent conceded that the attack was justified. The concession was correct. The averment constitutes expert opinion which the deponent was not qualified to express therefore the objection is sustained. The offensive paragraph is struck out. This disposes of the applicant's application for striking out.

I shall make an order relating to this application at the end of this judgment.

- [8] I turn now to the first respondent's application. In his application for striking out, the first respondent attacked the following paragraphs of the applicant's founding affidavit.

Paragraph 5.3.4 founding affidavit page 31

Paragraph 7.2.1 founding affidavit page 38

Paragraph 7.2.2 founding affidavit page 38

Paragraph 73 founding affidavit page 43

Paragraph 81 founding affidavit page 47

Paragraph 82 founding affidavit page 47

Paragraph 83 founding affidavit page 48

Paragraph 84 founding affidavit page 48

Paragraph 91 founding affidavit page 50

Paragraph 92 founding affidavit page 50

Paragraph 94 founding affidavit page 51

Paragraph 44 replying affidavit page 214

Paragraph 58 replying affidavit page 217

Paragraph 77.1 replying affidavit page 221

[9] As regards paragraph 5.3.4 founding affidavit page 31. It reads as follows:

“I found out that this roof structure poses a fire hazard to the house on the First Applicant’s property,”

The ground of the attack was that the second applicant expressed expert opinion and that he was not competent to express such an opinion since he was not a fire expert. The counter argument was that the second applicant expressed a statement of fact and not an expert opinion. The attack is valid. The structure is not the only building with a thatch roof on the first respondent’s premises. What makes the particular structure alone a fire hazard but not the other

buildings with similar thatch roofs? In this paragraph the second applicant merely jumps to a baseless conclusion of his own. The contention that it requires an expert assessment of several risk factors to come to such a conclusion and to explain the distinction is probably more persuasive. The deponent does not possess the requisite expertise to do such an exercise. He is not a fire expert. I rule that he made no statement of fact, but a conclusion without factual basis. The objection is sustained. The averment is inadmissible. The application to strike it out is granted.

[10] As regards paragraph 7.2.1 of the founding affidavit page 38.

The last sentence thereof reads as follows:

“The extent of the First Applicant’s prejudice is severe and substantial. The South Western view down the Vaal River from the First Applicant’s property is completely and permanently obscured. This view forms an integral, material and substantial part of the value of the First Applicant’s property and the focal point of enjoyment of the property by myself and the Third Applicant. Apart from this, the thatch roof in close proximity to

the First Applicant's house poses a fire risk and is an illegal structure both insofar as its size is concerned and insofar as it was erected without the required approval as is dealt with fully below."

The first attack is based on the grounds that the deponent is not a fire expert. I have already dealt with the pros and cons of the argument above. The finding I make, is likewise the same. The second attack is that the deponent is not a legal expert and is therefore incompetent to express an expert opinion on legal matters. The counter challenge was that the deponent expressed a statement of fact and not an expert opinion. The facts of the matter were that the structure was erected on the 1st June 2003, that the requisite prior approval of the local municipality in terms of section 4(1) National Building Regulations and Building Standards Act No 103/1977 was not sought beforehand and that the municipal approval was sought afterwards, more than four months later, on the 15th October 2003 to be precise. The attack is, in these circumstances, unsound. The structure was an illegal building at the time it was erected and

completed. This is a statement of fact and not an expert opinion. But even if it was an expert opinion or secondary evidence, it was redeemed by the first respondent's own version as briefly stated above. My ruling in the light of all this, is that the averments contained in this paragraph are admissible. The objection is overruled. The application to struck out, is refused.

[11] As regards paragraph 7.2.2 founding affidavit page 38. It reads as follows:

“The value of the First Applicant's property is materially prejudiced by the First Respondent's conduct.”

The attack was that the deponent expressed an expert opinion of a sworn appraiser and that he was not qualified to do so. The response was that the deponent's averment concerning the value of the first applicant's property was a statement of fact derived from the expert opinion backed up by an expert, Neil de Klerk, whose affidavit annexure M 19 appears on page 96 – 109 of the record. The objection is overruled. I rule the averments of the paragraph admissible. The paragraph remains. The application to struck out is

refused.

[12] As regards paragraph 73 founding affidavit page 43. It reads as follows:

“Apart from the fact that the Applicant’s case will be based on actionable common law nuisance as aforesaid, the Applicant’s case will further be that the jetty and roof structure is an illegal structure, as will be elaborated on below.”

The first ground of attack was that the deponent was not an expert qualified to express legal opinion. The second ground was that in any event, the averment boiled down to hearsay. The response was that it was a fact and not an opinion that the structure was an illegal structure on the first respondent’s own version. The illegality of the structure is simplicity admitted by the first respondent. Assuming that the deponents’ averments were tainted with the alleged expert or hearsay defects, such defects were redeemed by the first respondent’s own version as I pointed out in paragraph 10 *supra*. I rule the averments admissible. The paragraph stands as is. The attack is overruled. The application to struck out is refused.

[13] As regards paragraph 81 founding affidavit page 47. It reads as follows:

“The First Respondent failed to obtain the Second Respondent’s approval for the erection of the structure as envisaged in Section 4 of the Building Act.”

The grounds of the attack were that the second applicant’s averments were inadmissible secondary facts which were not underpinned by primary facts. The response was that the first respondent erected the structure without the requisite prior approval as envisaged in section 4 Act No 103/1977. It was contended that this was a statement of fact based on the first respondent’s own version. Was this an inference drawn from the primary facts which is admissible or was it an inference drawn from baseless secondary facts which is inadmissible?

[14] In the case of **WILLCOX AND OTHERS v COMMISSIONER FOR INLAND REVENUE** 1960 (4) SA 599 AD at 601 H to 602 A Schreiner J.A. said the following:

“But in order to apply this principle to the present case the

appellants had to show that the first of the two passages was indeed a finding of primary fact, as that expression is used in this connection. There is nothing artificial or technical about the notion of primary facts. Facts are conveniently called primary when they are used as the basis for inference as to the existence or non-existence of further facts, which may be called, in relation to primary facts, inferred or secondary facts.”

[15] In the case of **SWISSBOROUGH DIAMOND MINES (PTY) LTD AND OTHERS v GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS** 1999 (2) SA 279 TPD at 323 F – G Joffe J. said the following about the founding affidavit in motion proceedings:

“It is trite law that in motion proceedings the affidavits serve not only to place evidence before the Court but also to define the issues between the parties. In so doing the issues between the parties are identified. This is not only for the benefit of the Court but also, and primarily, for the parties. The parties must know the case that must be met and in respect of which they must adduce evidence in the affidavits. In *Hart v Pinetown Drive-Inn Cinema (Pty) Ltd* 1972 (1) SA 464 (D) it was stated at 469C-E that

‘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 it does not support the relief claimed is sound.’

An applicant must accordingly raise the issues upon which it would seek to rely in the founding affidavit.”

- [16] In the case of **DIE DROS (PTY) LTD AND ANOTHER v TELEFON BEVERAGES CC AND OTHERS** 2003 (4) SA 207 CPD at paragraph 28 p. 217 Van Reenen J. commented instructively on the evidential value of the secondary facts:

“It is trite law that the affidavits in motion proceedings serve to define not only the issues between the parties, but also to place the essential evidence before the Court (see *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the republic of South Africa and Others* 1999 (2) SA 279 (W) at 323(G) for the benefit of not only the Court but also the parties. The affidavits in motion proceedings must contain factual averments that are sufficient to support the cause of action on which the relief that is being sought is based. Facts may be either primary or secondary. Primary facts are those capable of being used for the drawing of inferences as to the existence or non-existence of other facts. Such further facts, in relation to primary facts, are called secondary facts. (See *Willcox and Others NO v Commissioner for Inland Revenue* 1960 (4) SA 599 (A) at 602A; *Reynolds NO v Mecklenberg (Pty) Ltd* 1996 (1) SA 75 (W) at 78I.)”

Secondary facts, in the absence of the primary facts on which they are based, are nothing more than a deponent’s own conclusions (see RADEBE AND OTHERS v EASTERN TRANSVAAL DEVELOPMENT

BOARD 1988 (2) SA 785 (A) at 793C-E) and accordingly do not constitute evidential material capable of supporting a cause of action.

(the emphasis is mine.)

[17] In the founding affidavit in the instant case there are virtually no primary facts showing that the second respondent did not grant prior approval to the first respondent for erection of the structure. Such primary facts could have been sourced from the second respondent who is the primary agency empowered by law to approve or disapprove the proposed erection of any building within its district. No affidavit from the designated building control officer employed by the second respondent was annexed to the founding affidavit. It follows therefore that the second applicant's averments boiled down to secondary facts which in the absence of primary facts are deponents own conclusions which ordinarily would be inadmissible evidence. But that is not where it ends.

[18] Had I been called upon to adjudicate the first respondent's application to strike out before the answering affidavit was filed, I would have had no hesitation to strike the averments contained in this paragraph 81 out for lack of primary facts. But since the application to strike out was filed afterwards, I could not close my eyes to what the respondent had to say in its answering affidavit about the municipal approval. What was stated in the answering affidavit redeemed the otherwise baseless secondary facts averred in the founding affidavit. I could not consider the attack in isolation by disregarding the answering affidavit which contained averments which justified the inferring of the secondary facts relied upon by the applicants. The first respondents own version implicitly provided the required primary base or primary facts if you will. Therefore I overruled the objection. The paragraph is allowed to stand. I rule it admissible in the circumstances. The application to strike it out, is refused.

[19] As regards paragraph 82 founding affidavit page 47. It reads as follows:

“No building control officer performed any of the functions referred to in Section 6 of the Building Act.”

The grounds of the attack were precisely the same as those raised against paragraph 81 *supra*. So was the response. Therefore my ruling is also the same.

[20] This regards paragraph 83 founding affidavit page 47. It reads among others as follows in sub-paragraph 1 thereof:

“83.1 the area in which the structure was erected was in fact disfigured thereby, and”

The attack was that the deponent was not qualified to express such expert opinion(s). The response was that since no building control officer was involved before and during the erection process, the area was as a matter of fact and not opinion disfigured by such unauthorised erection. The objection is sustained. The averments constitute expert opinion which the deponent is not qualified to express. It is therefore ruled inadmissible. The application to strike out, is granted.

[21] As regards paragraph 84 founding affidavit page 48. It

reads:

“On the same bases, the Second Respondent will be precluded by statute from granting such approval, should application be made to it in future by the First Respondent for the erection of the same structure in the same position.”

The objection and the response were the same as in paragraph 83 above. Therefore my ruling is also the same.

[22] As regards paragraph 91 founding affidavit page 50. It reads as follows:

“The First Respondent did not obtain the written consent of the Department of Health and Welfare for the erection of the structure to be permitted.”

The ground of the attack was that the second applicant had no personal knowledge as to whether the first respondent had obtained the requisite written consent of the Department of Health and Welfare or not. The averments, it was contended, were secondary facts not founded on primary facts. The response was that it was not the case of the first respondent that it had such a written consent. The attack seems to me to be justified. There was no confirmatory

affidavit from the Department of Health and Welfare annexed to the founding affidavit from which the second applicant's secondary knowledge could have been derived. The objection is sustained. The averment constitutes secondary fact unsupported by primary facts. The paragraph is ruled inadmissible. There were no redeeming averments in the answering affidavit. The application to strike out, is granted.

[23] As regards paragraph 92 founding affidavit page 50. It reads as follows:

“92. If the First Respondent obtained such written consent from the Department of Health and Welfare, which the Applicants deny;

92.1 it was not granted after consultation with the Third Respondent being Rand Water, and

92.2 it was not granted after consultation with the Second Respondent being the relevant local authority.”

The attack and the response were the same as those raised in respect of paragraph 91 above. Therefore my ruling is also the same.

[24] As regards paragraph 94 founding affidavit page 51. It reads

as follows:

“The Second Respondent did not relax such provisions, and if it did which the Applicants deny, such relaxation was not effected either after consultation with the Director-General of the Department of Water Affairs and the Department of National Health and Population Development, or at all.”

The attack was that the second applicant had no first hand knowledge of the true state of affairs. This was demonstrated by the words:

“The Second Respondent did not relax such provisions
and if it did....”

It was contended that the words I have highlighted, show that the averment was not founded on primary facts. The response was that the first respondent could not provide any proof that the Director General of the Department of Water Affairs had been consulted. The response is fallacious. It presupposes the opposite of what the law requires. The *onus* rested on the applicant to prove that such consultative process did not take place. It was not incumbent upon the first respondent to prove that it did. The objection is sustained. The averment constitutes secondary facts. It is

not founded on primary facts. The paragraph is ruled and inadmissible. The application to strike it out, is granted.

[25] As regards paragraph 44 replying affidavit page 214. It reads as follows:

“I deny that the Metsimaholo Municipality approved the erection of the thatch covered jetty at the waterfront of the First Respondent’s property, alternatively had such structure been approved by the Metsimaholo Municipality (which remains denied), such approval was *ultra vires* and in contravention of the provisions of the Building Act as expressly placed in dispute in the Applicant’s founding affidavit.”

The attack was that the averment was founded on secondary facts and not primary facts. The response was that on the first respondent’s own version, there was no prior approval of the building plans at the time the erection started.

I have previously dealt with the argument when I was considering the objections to the founding affidavit. My ruling remains the same (*Vide* paragraph 13 – 17 *supra*).

[26] As regards paragraph 58 replying affidavit page 217. It reads as follows:

“There is no lightning conductor, fire hose or fire extinguisher anywhere neat the First Respondent’s thatch covered jetty. The thatch roof is constructed of wood and dry thatch. Thatch roofs are notorious for being fire risks. That is why lightning conductors are placed in close proximity of all thatch roofs and that is why insurance companies require higher premiums and stricter fire precautions in respect of all thatch roofs. The extent to which the thatch has dried out over the last six months is clearly evident by comparing the colour of the thatch in “M10” taken during 2003 to the colour thereof in e.g. video clip 4 taken recently in 2004”.

The attack was that the second applicant’s averment in connection with the insurance premiums was his personal conclusion without any supporting primary basis. The response was that the averments were based on statements of facts. The contention was that any thatch structure was a fire hazard. I was urged to take cognisance of that human experience. I am impressed by the response. It is a matter of fact generally known to all persons of average intellect that a structure with a thatch roof is more vulnerable to fire than a

structure with say concrete tile roof. One does not have to be an expert of any sort to know that fact.

Therefore the attack is dismissed. The averments are ruled admissible. The paragraph remains. The application to strike the averments out, is refused.

[27] As regards paragraphs 77.1 replying affidavit page 221. It reads as follows:

“The fact that it may be a positive addition to the value of the first respondent’s property is irrelevant to the fact that the erection thereof was illegal, and”

The attack was that the averment that the structure was illegal boiled down to the second applicant’s own conclusion which was deficient from an evidentiary perspective. It was argued that the primary facts were lacking to justify such a conclusion.

This is not a new ground on which the alleged illegality of the structure was attacked. The response was also the same as before. Therefore my ruling is the same. *Vide* paragraphs

13 – 17 *supra*.

[28] In conclusion I have to mention that in my view none of the several issues raised and traversed in the two applications to strike out went beyond the root of the matter. Indeed many of them were side issues. The real issues I discussed in a separate judgment which relates exclusively to the main application.

[29] I turn now to the issue of costs in respect of the application to strike out as brought by the applicants. There were five objections raised in connection with the answering affidavit. All five were sustained. Therefore the applicants are entitled to 100% of the costs relating to this application to strike out. I would therefore grant the application with full costs in favour of the applicants.

[30] The issue of costs in respect of the first respondent's application to strike out, did not produce a clear cut winner. There were gains and losses from both sides. There were fourteen objections raised in connection with the founding affidavit and the replying affidavit collectively. The success rate of the first respondent was six over fourteen. This means six of the first respondents objections were sustained, but

eight were overruled. The success rate of the applicants was the converse of the first respondents. This means I made eight rulings in favour of the applicants and six against them. Therefore the applicants were substantially successful in the opposition of the application. Comparatively speaking their success rate was 57,1% to the first respondent's 42,9%. Since the first respondent's applications to strike out substantially failed, I would therefore dismiss a substantial part of their application with costs. However considerations of fairness and equity dictate that the first respondent should not be ordered to pay such costs in full, but to pay the difference between their respective measures of success namely 57,1% less 42,9% which is 16,2%.

[30] Accordingly I make the following order:

- 30.1 The applicants' application to strike out, is granted.
- 30.2 The first respondent is directed to pay the full costs of the applicants relating to such an application.
- 30.3 The first respondent's application to strike out, is substantially refused.
- 30.4 The first respondent is directed to pay 16,2% of the applicant's costs relating to such application.

M.H. RAMPAI, J

On behalf of Applicants:	Advocate T van der Walt Instructed by Bowman Gilfillan Inc. JOHANNESBURG Honey Attorneys BLOEMFONTEIN
On behalf of First Respondent:	Advocate A.F. Jordaan S.C. Assisted by Advocate S. Guldenpfenning Instructed by Roux Incorporated JOHANNESBURG Symington & De Kok BLOEMFONTEIN
On behalf of Second Respondent:	No Appearance
On behalf of Third Respondent:	No Appearance

/S Pieterse