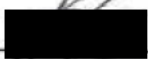




**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case Number: 2024/059416

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
30/07/2024	
DATE	SIGNATURE

In the matter between:

SANDTON CROWNE PROPERTIES (PTY) LTD

Applicant

and

**THE MUNICIPAL MANAGER: CITY OF
EKURHULENI METROPOLITAN MUNICIPALITY**

First Respondent

**CITY OF EKURHULENI METROPOLITAN
MUNICIPALITY**

Second Respondent

THE EKURHULENI APPEAL AUTHORITY

Third Respondent

32 KLOOF ROAD (PTY) LTD

Fourth Respondent

**THE MEMBER OF THE EXECUTIVE COMMITTEE
FOR THE GAUTENG DEPARTMENT OF ROADS
AND TRANSPORT**

Fifth Respondent

JUDGMENT

YACOOB J

- [1] The applicant seeks in this court an urgent interdict to prevent the fourth respondent from acting on a decision taken by the second respondent ("the Municipality"), pending the outcome of the applicant's challenge of that decision. Only the fourth respondent opposes the relief with which this court is seized, that is part A of the application, and for convenience I refer to it simply as "the respondent". The matter was initially set down on the urgent roll of 11 June 2024, and was removed by agreement to be set down on the roll of 09 July 2024, together with an undertaking by the respondent not to continue the work sought to be interdicted pending the outcome of part A, to permit the proper filing of affidavits.
- [2] The first, second and third respondents are the Municipality's City Manager, the Municipality and the Ekurhuleni Appeal Board, and have together filed a single notice to oppose part B of the application, and a notice to "observe proceedings" in part A.
- [3] The respondent is the registered owner of property, the intended use of which is the subject of this litigation ("the property"). The applicant is the registered owner of a number of contiguous erven, which together provide the home of a large shopping centre operated by the applicant ("Village View"). Village View is a neighbour of the property, each occupying a corner diagonally opposite the other at the intersection of Kloof Road and Van Buuren Road in Bedfordview. One of the erven making up Village View is an "adjoining property" as defined in section 1 of the Municipality's Spatial Planning and Land Use Management By-Law, 2019 ("SPLUM").

- [4] Village View is zoned for use "Business 1" in accordance with the applicable land use scheme, which is the City of Ekurhuleni Land Use Scheme, 2021 ("the Scheme"). The property is zoned "Business 3" in terms of the Scheme.
- [5] According to the applicant, it first became aware of the respondent's plans for the property when plans for drive through restaurants were published on social media on 11 April 2024. This was well after the respondent's special consent use application in terms of s 58 of SPLUM, submitted for it by the sixth respondent, had already been granted, on 15 August, 2023. The applicant then sought and obtained information on the application in terms of the Promotion of Access to Information Act.¹ It submitted a petition to the Municipality to intervene in the application, and, after receiving the approval decision, noted an appeal in terms of the relevant by-law, on 22 May 2024. Thereafter, on 24 May 2024, is when the applicant states it became aware of site clearing taking place on the property, which awareness resulted in the institution of this urgent application, which was issued on 30 May 2024. However, the respondent alleges that it began work on the property on 15 April 2024.
- [6] The application issued on 30 May 2024 includes both part A and part B. Part B is the review of the decision of the Municipality granting a consent use to the respondent, and of any approval of site development or building plans giving effect to the consent use. Part A seeks to interdict the respondent from acting on the approval pending the outcome of the appeal the applicant has lodged in terms of s 99 of SPLUM alternatively the outcome of part B.
- [7] I accept that, if the applicant only became aware of the proposed development on the dates alleged, and in the manner alleged, the matter is urgent. The respondent also does not dispute urgency.
- [8] The question then arises whether the applicant has established that it is entitled to an interdict.

¹ 2 of 2000.

- [9] The requirements for an interim interdict are well-established:²
- a. The interdict must protect a *prima facie* right worthy of protection. Even if the existence of the right is open to some doubt, it would be sufficient for an interim interdict.
 - b. There must be a well-grounded apprehension of irreparable harm if the interim relief is not granted but the final relief eventually granted.
 - c. The balance of convenience must favour the grant of interim relief. This would include the applicant's prospects of success in pending proceedings.
 - d. There is no other satisfactory remedy available to the applicant to protect the *prima facie* right at issue.
- [10] The elements are considered holistically, and the applicant's strength on certain elements may make up for the weakness of another. The requirements are not a checklist, and the court may weigh them up in exercising its discretion whether to grant the relief sought.³
- [11] The applicant's primary complaint is that no proper notice was given as required for an application for a consent use in terms of s 58 of SPLUM, as set out in Schedule 4 of SPLUM which sets out the procedure to be followed for a special consent use application. Paragraph 3 of Schedule 4 makes provision for notification of adjoining property owners, paragraph 4 for newspaper advertisements, and paragraph 5 for notices to be displayed on site at the property.
- [12] It is common cause that the applicant, as an owner of an adjacent property, was entitled to be informed. The applicant states that it never received any notification. The respondent claims that it sent the notification by registered post on 12 February 2023 to an address it obtained from the Municipality. It does not annex any proof of the document on which that address was obtained, or of the date on which the letter was purportedly sent, by registered post. In the

² Summarised in *Johannesburg Municipal Pension Fund and Others v City of Johannesburg and Others* 2005 (6) SA 273 (W) at para 8.

³ *Eriksen Motors (Welkom) Ltd v Protea Motors Warrenton* 1973 (3) SA 685 (AD)

documents provided to the applicant in terms of the PAIA request, the letters sent by registered post were sent on 12 July 2023. Nevertheless, in two separate affidavits, the respondent states, on oath, that the letters were sent on 12 February 2023.

- [13] The applicant takes issue with the fact that the address to which the registered letter was sent is not its registered address. It does not comment on whether the address is, in fact, an address at which it receives official correspondence, and in the absence of the respondent providing documentary evidence of where the address was obtained, I must accept the applicant's version that it did not receive the letter. The tracking report from the post office confirms that the letter did not reach the recipient.
- [14] The respondent emphasises that paragraph 3 of schedule 4 of SPLUM requires that if an owner of an adjoining property is not resident on the property, the notice must be sent by registered post and may not hand deliver it. However Schedule 31 of SPLUM provides that the notice must be sent by registered post to such an owner in addition to hand delivery. Taking into account the notorious unreliability of the postal service, it may well have served the respondent to attempt every possible delivery mode available, including hand delivery and electronic delivery. However, as it is, the respondent is unable to demonstrate satisfactorily to this court at this point that it did what was required of it to ensure that the applicant, as owner of an adjoining property, was sent the notice, and I accept that the applicant did not, in fact, receive the notice.
- [15] The applicant also complains that the notice displayed on the site was of the required size and visibility. It was not possible to determine from the photographs attached to the founding affidavit whether the notice was of A3 size as required, and whether it was easily visible by passing traffic.
- [16] In determining whether an applicant has a *prima facie* right, I must take the applicant's version together with those facts put up by the respondent which the applicant cannot dispute.⁴ At this point the facts put up by the respondent are

⁴ *Webster v Mitchell* 1948 (1) SA 1186 (W)

unhelpful as they simply do not throw light on the question whether it is likely that the notices came to the attention of the applicant.

- [17] I am satisfied that the applicant has established that, as the owner of an adjoining property, it has a *prima facie* right worthy of protection, that is, the right to participate in and object to decisions regarding, *inter alia*, consent use applications for an adjoining property.
- [18] The respondent's various comments about the applicant being an "own interest litigant" are irrelevant. The applicant does not purport to litigate in anyone's interest but its own, and its complaints about improper notice are based on its contention that it, as an adjoining property owner, was excluded from the process of which it ought to have been a part.
- [19] The applicant contends that the irreparable harm that would result if the interdict is not granted is that its right to participate, to object and possibly to review would then become moot. This is the case but only to an extent.
- [20] The applicant has submitted an appeal in terms of s 99 SPLUM. The approval or grant of the application is automatically suspended by that appeal. Why then should this court grant an order interdicting the respondent from acting in terms of the decision pending the outcome of the appeal? The answer provided by the applicant is that the respondent proceeded with its work on the property even after the appeal was submitted, and declined to cease that work when it was asked to do so on the basis of the appeal. In addition, the undertaking provided by the respondent was only to suspend work pending the outcome of part A, not the outcome of the appeal. The merits or otherwise of the appeal are not relevant to this determination.
- [21] The balance of convenience must also be determined in the applicant's favour, as the whole process which the applicant seeks to have the benefit of, and which, as an adjoining property owner, it is entitled to, would become moot if the construction were to continue in the interim period.
- [22] As far as an alternative remedy is concerned, as set out above, the alternative remedy is the suspension of the decision by the lodging of the appeal in terms of

s 99 of SPLUM. But the respondent did not consider itself bound by that, because it does not consider the appeal to be a valid appeal. That is not for me to determine. It simply shows that there is no other effective remedy for the applicant at this point.

[23] The applicant sought to convince me that I should grant the alternative relief sought in Part A of its notice of motion, that is, to interdict the respondent from acting on the decision of the Municipality pending the outcome of Part B. In my view that relief is premature. The appeal still has to be determined, the respondent's contentions that it is invalid notwithstanding. Once the appeal is determined, it may be determined in the applicant's favour. Part B may then never be determined. Or the appeal may be determined in a way that leads the applicant to abandon part B for other reasons. I do not believe it would be in the interests of justice to grant the relief sought in the alternative form.

[24] I can see no reason why costs should not follow the result.

[25] For these reasons, I grant the following order:

- a. Part A of this application is urgent and the failure to comply with the rules and time periods pertaining to forms and service is condoned.
- b. The fourth respondent is interdicted from acting on the decision of the second respondent dated 15 August 2023, attached as annexure RS30 to the Founding Affidavit, by continuing with any earthworks or construction activities on Erf 2943 Bedfordview Extension 2 pending the outcome of the applicant's pending appeal filed in terms of section 99 of the Ekurhuleni Metropolitan Municipality Spatial Planning and Land Use Management By-Law.
- c. The fourth respondent is to pay the costs of part A on scale C.



S YACOOB
JUDGE OF THE HIGH COURT
JOHANNESBURG

For the applicant:
Instructed by:

JA Venter
Ivan Pauw & Partners

For the first to third respondents:
Instructed by:

T Langa
Matsemela, Krauses & Ngubeni Inc

For the fourth respondent:
Instructed by:

LM du Plessis
RHK Attorneys Inc

Date of hearing:

10 July 2024

Date of judgment:

30 July 2024