IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No: 3692/2024

In the matter between:

SECTION 99 CLARIDGE COURT SHAREBLOCK (PTY) LTD **APPLICANT**

(Registration Number: -2006/34994/07)

and

PINO'S GENERAL TRADING CC **FIRST RESPONDENT**

CLARIDGE BODY CORPORATE **SECOND RESPONDENT**

ETHEKWINI MUNICIPALITY **THIRD RESPONDENT**

ORDER

The following order is made:

1. The application is dismissed.
2. The applicant is to pay the first respondent's costs, which are to be taxed on scale B.

JUDGMENT

DAYAL AJ

[1] The applicant is the owner of certain sectional title units in the scheme known as Claridge Court situated at [...] A[...] L[...] Street, Durban.

[2] The applicant carries on business under the name and style of “Egagasini”, a restaurant and entertainment venue, from sections 99 and 173 of the scheme. Section (unit) 99 is part of the applicant’s underground entertainment area.

[3] The first respondent carries on business as “Ace Butchery” from sections 103 and 104 of the scheme.

[4] The second respondent is the Claridge Body Corporate, and the third respondent is the Ethekwini Municipality.

[5] It is common cause that the first respondent has illegally erected a structure (a boundary wall) on the void common property identified in the sectional title plan of the scheme that is annexed to the founding affidavit.

[6] According to the applicant, the impugned boundary wall severely restricts ventilation to its patrons, who can number in the hundreds over its weekend trading hours.

[7] The applicant seeks a final order in the form of a mandatory interdict, to direct the first respondent to demolish and remove the unlawful structure failing which the sheriff is authorised to do so and recover the costs from the first respondent.

[8] The first respondent has opposed the application. The second and third respondents have not opposed the application. The Chairman of the second respondent has put up a confirmatory affidavit in the applicant’s founding papers.

[9] Neither party alleges any material disputes of fact or seek for the matter to be referred for oral evidence or trial, and both have elected to argue the application on the papers as they stand. The interdict sought by the applicant can be granted only if the facts as stated by the first respondent, together with the admitted facts in the applicant’s affidavits, justify the granting thereof.[1]

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[1] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-G.

The applicant's locus standi

[10] The first respondent has challenged the applicant's locus standi on the basis of s 7 read with s 9 of the Sectional Titles Schemes Management Act[2] ("the Act"). The first respondent also relies on *Spilhaus Property Holdings (Pty) Ltd and Others v Mobile Telephone Networks (Pty) Ltd and Another*[3] which although dealing with similarly worded sections of the now repealed Sectional Titles Act,[4] remains applicable.

[11] The applicant has alleged locus standi based upon the following grounds:

(a) the applicant is the owner of commercial unit 99;

(b) the impugned boundary wall directly impacts the applicant's business;

(c) consequently, the applicant has a direct and substantial interest;

(d) the void common property was designed and used to allow ventilation to the underground entertainment area;

(e) the underground lounge relies on the louvres that feed fresh air to it, and other mechanical ventilations are not sufficient to suck in and out the breath of patrons when the place is packed to capacity over weekends; and

(f) the first respondent's conduct in erecting the illegal structure has resulted in extensive damage to the applicant's premises.

[12] Mr *Mjoli*, for the applicant, argued that from a reading of the applicant's founding affidavit it bases its locus on the fact that the impugned structure is affecting its rights of use of unit 99.

[13] The first respondent challenges the above argument on the following grounds:

(a) that the applicant is operating illegally from the premises; and

(b) that the applicant has in fact caused the ventilation problem by closing off the entire parking entrance with glass doors which severely hinder ventilation.

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[2] Sectional Titles Schemes Management Act 8 of 2011.

[3] *Spilhaus Property Holdings (Pty) Ltd and Others v Mobile Telephone Networks (Pty) Ltd and Another* [2019] ZACC 16; 2019 (4) SA 406 (CC).

[4] Sectional Titles Act 95 of 1986.

[14] In *Oribel Properties 13 (Pty) Ltd and Another v Blue Dot Properties 271 (Pty) Ltd and Others*,[5] the Supreme Court of Appeal relying on CG Van der Merwe *Sectional Titles, Share Blocks and Time-sharing*, held that s 41 of the repealed Act (which is similarly worded to s 2(7) of the Act) does not 'detract from the powers enjoyed by the owner of a section to institute proceedings where his own rights whether of ownership - in his unit or otherwise are infringed'.

[15] The applicant's case is that the illegal structure on the void common property is interfering with its rights of use of unit 99.

[16] I accordingly find that the applicant has the requisite locus standi to have instituted the application in its own name.

The requirements for a final interdict

[17] The requirements for a final interdict are usually stated as:[6]

(a) a clear right;

(b) an injury actually committed or reasonably apprehended; and

(c) the lack of an adequate alternative remedy.

[18] In order to succeed in obtaining the remedy of an interdict against the first respondent, the applicant bears the onus to establish a clear right and as such, in order to establish a clear right, the applicant has to prove on a balance of probability the right which it seeks to protect. Whether that right is clearly established is a matter of evidence.

[19] The applicant alleges a clear right in the founding affidavit as follows:

'The First Respondent's conduct of erecting a structure on common property, without permission from the Second Respondent, is unlawful. Thereafter the Applicant has a clear right to the relief sought.'

[20] The first respondent's reply thereto (in its answering affidavit) is as follows:

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[5] *Oribel Properties 13 (Pty) Ltd and Another v Blue Dot Properties 271 (Pty) Ltd and Others* [2010] ZASCA 78; [2010] 4 All SA 282 (SCA) para 24.

[6] *Masstores (Pty) Ltd v Pick n Pay Retailers (Pty) Ltd* 2017 (1) SA 613 (CC) para 8.

'… illegality is not a basis to derive a clear right… The Clear right is not adequately established and the first requirement of the final relief sought falls short for want of substance.'

[21] The applicant does not deal with that allegation, and its replying affidavit is silent thereon.

[22] The first respondent has also alleged that the applicant is not operating its business lawfully. It goes on further to allege that the garage has not been demarcated for business purposes and is clearly in contravention of the third respondent's adopted Land Use Scheme. In other words, the applicant has approached court with unclean hands.

[23] The applicant does not deal with the legality of its business operations in the founding affidavit at all. It also fails to deal with the allegations of illegality made by the first respondent in its replying affidavit and only asserts that it is irrelevant and requires no further elaboration.

[24] The applicant puts up no evidence on the papers to contradict the allegations made by the first respondent that it (the applicant) is in fact operating illegally.

[25] To borrow from Van Reenen J in *Die Dros (Pty) Ltd and Another v Telefon Beverages CC and Others*:[7]

'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 323G) 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

[7] *Die Dros (Pty) Ltd and Another v Telefon Beverages CC and Others* 2003 (4) SA 207 (C) para 28.

facts, are called secondary facts. (See *Willcox and Others 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.'

[26] A case must be made out in the founding papers:
'Holding parties to pleadings is not pedantry. It is an integral part of the principle of legal certainty, which is an element of the rule of law, one of the values on which our Constitution is founded. Every party contemplating a constitutional challenge should know the requirements it needs to satisfy and every other party likely to be affected by the relief sought must know precisely the case it is expected to meet.'[8]

[27] I am of the view that the applicant has failed to establish a clear right on a balance of probability on the papers, as it has simply either ignored or failed to deal with material allegations made by the first respondent which clearly challenged the applicant's assertion of a clear right.

[28] I need not consider any of the other requirements for a final interdict on the basis that if the applicant fails to establish a clear right, then its case must fail.

[29] In the circumstances the application must accordingly be dismissed.

[30] There is no reason to depart from the principle that costs should follow the result. Mr *Cassan*, on behalf of the first respondent, correctly in my view, elected to remain bound by the prayer in the answering affidavit relating to costs.

Order

[31] In the result I make the following order:

1. The application is dismissed.

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[8] *SATAWU and Another v Garvas and Others* 2013 (1) SA 83 (CC) para 114.

2. The applicant is to pay the first respondent's costs, which are to be taxed on scale B.

DAYAL AJ

Case information

Date of hearing:	12 December 2024
Date of judgment:	17 January 2025
For the applicant:	Mr T S Mjoli
Instructed by:	S T MJOLI ATTORNEYS (Ref: T. Mjoli)
For the first respondent:	Adv S A Cassan
Instructed by:	BIRBAL & ASSOCIATES (Ref: A. Birbal)
For the second and third respondents:	No appearances