

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

CASE NO: 2022/014415

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED. NO

14 April 2025

Date **T ENGELBRECHT**

In the matter between:

DAARUS SA'ADA PRPERTIES CC

APPLICANT

and

UMAR MATSELANE VIOLET

FIRST RESPONDENT

CITY OF JOHANNESBURG

SECOND RESPONDENT

This order is made an Order of Court by the Judge whose name is reflected herein, duly stamped by the Registrar of the Court and is submitted electronically to the Parties/their legal representatives by email. The Order is further uploaded to the electronic file of this matter on Caselines by the Judge his/her secretary. The date of this Order is deemed to be 14 April 2025.

JUDGMENT

ENGELBRECHT, AJ

Introduction

[1] This application was brought in 2022 on an urgent basis in a Part A to interdict the First Respondent from the continuation of the building of certain structures on Erf 1[...] M[...] W[...] situated at 3[...] S[...] A[...] Avenue, M[...] W[...]. This was then made an order of court on 23 August 2022 by Judge Senyatsi.

[2] On 23 November 2023, the Applicant brought a Notice of Amendment to amend the relief claimed in Part B for demolishing of the structures being erected on Erf 1[...] M[...] W[...], which was effected on 6 December 2023. The relief in Part B now reads as follows:

5. *That the structures/dwellings being constructed on the property that:*

5.1 *Appear in the pictures attached hereto marked as “A1” to “A5” (and so attached and marked to the Founding Affidavit), being the structure added onto the main house and which illegal structure has as roofing corrugated iron, as distinct to the main house which is covered in black tiles) and*

5.2 *Do not form part of the structures that are depicted on the approved plan of AHD architects attached hereto marked as “B” (attached to the First Respondent’s answering affidavit marked as A1)*

5.2.1 *be declared to be illegal/unapproved structures;*

5.2.2 *that the first and second respondents are directed to demolish the structures and the costs of such demolition are to be borne by the first respondent.*

5.3 *The First Respondent is to bear the costs of this application on the scale of attorney and client.*

[3] Me. Babha stated on behalf of the Applicant, that the matter before this court was only about Part B. The matter was heard on 06 March 2025 during which Mr Bhamjee

on behalf of the First Respondent, argued that the building as referred to in the amended Notice of Motion (structures being constructed and added onto the main house) now complies with the building plan submitted and approved by the Second Respondent on 18 July 2023, which the Applicant disputed.

[4] On 25 February 2025, the First Respondent filed a Supplementary Affidavit in which it attached and addressed the Occupation Certificate provided by the Second Respondent on 15 February 2025, the approved plans and photographs of the state of the premises currently. The Applicant then disputed this affidavit as the First Respondent did not request condonation to file this affidavit and it was argued that the Occupancy Certificate does not even look legitimate.

[4.1] During this hearing, the First Respondent requested a postponement *sine die* to inspect and ensure that the building is now in compliance with the building plan. As the matter was already before me, I then denied the request for postponement *sine die* but postpone the matter to 19 March 2025 to allow such inspection *in loco* and granted the following order:

1. *The matter is postponed to 19 March 2025 at 12:00.*
2. *The applicant's, the first respondent's, and the second respondent's representatives are ordered to attend at the first respondent's property ("the property") together with the applicant's architect and Mr. Sidney Shai and Mr. Julius Makhura of the second respondent, on an agreed upon date and time prior to 11 March 2025, to inspect the property and assess the status of the buildings and structures on the property.*
3. *In the event that any party wish to file any further affidavit/affidavits, the same shall be filed on or before 14 March 2025.*
4. *The first and second respondents are to pay the wasted costs occasioned by the postponement, jointly and severally, the one paying the other to be absolved, on the Party and Party scale on Scale A."*

[5] On 19 March 2025, an Explanatory Affidavit was filed by the Applicant to explain what transpired and what was found at the inspection *in loco* as ordered on 7 March 2025. It is accepted that this affidavit was filed in terms of the court order granted on 7 March 2025, although the same was not filed on or before 14 March 2025 as ordered.

[5.1] The First Respondent conceded in this Explanatory Affidavit that a full inspection was held as envisaged in the court order granted on 7 March 2025.

[5.2] As a result of what was observed at this inspection, further documentation was requested by the First Respondent's architect; therefore, the affidavit was filed late.

[5.3] From the report of the architect, it is clear that:

[5.3.1] Other alterations were made to the main house that were not part of the approved building plans for 2023.

[5.3.2] All parties agreed that there are currently illegal existing structures on the premises for which other documentation is needed, such as building plans and relaxation of building lines.

[6] At the hearing on 19 March 2025, the Applicant then requested that the matter be postponed *sine die* to allow the Applicant to address further illegal structures found on the property based on the following three reasons:

[6.1] The Notice of Motion allows for the inclusion of the existing outbuilding to the left in the photographs, so attached as A1 – A5;

[6.2] that the building is also attached to the main house as a result of a wall between the newly constructed building and the outbuilding;

[6.3] that the illegality and therefore a request for the demolition of this outbuilding was always the Applicant's case, as the Applicant refers to it in her Answering Affidavit.

[7] Me. Babha requested that if I am not inclined to grant such postponement that I allow the architect to be sworn in so that he could give oral testimony about his report, which was immediately opposed by Mr Kahn on behalf of the First Respondent.

[7.1] This request from Me. Babha was denied by the court for the following reasons:

[7.1.1] The explanatory affidavit was filed 15 minutes before the hearing of the matter. Mr. Khan indicated that he did not even have a chance to peruse or answer to it.

[7.1.2] Any such indulgence by the court would place the First and Second Respondents in an untenable position to listen and cross-examine a witness on issues they did not even canvass with their respective clients.

[7.1.3] Referral for oral evidence in an opposed motion is not for the mere asking thereof at the hearing of the matter.

[8] Me. Babha then continued to argue the various reasons for such postponement as stated above. If the matter is not postponed *sine die*, it was argued that the Applicant will have to start *de novo*, which will be prejudicial to the Applicant, as there is, according to her, no need for a new application and that it would be practical just to postpone this application sine die.

[9] At the hearing on 19 March 2025, Mr. Kahn on behalf of the First Respondent's indicated that the:

[9.1] Structures being constructed as depicted on A1–A5 and added onto the main house with the corrugated iron roof, are now legal in terms of the approved building plan.

[9.2] That the relief so claimed by the Applicant has now become academic.

[9.3] There is an intervening building plan at the municipality, Second Respondent for the existing structure, which seems to be the garage/carport although it might be used for another purpose, which might also affect the FAR on the property.

[9.4] This issue with the existing structure is a new issue which would have to be dealt with as a new case with new sets of affidavits, as that is not and cannot be dealt with on the papers before this court.

[9.5] Mr Kahn further argued that the amended Notice of Motion does not include this outbuilding and that the Founding Affidavit also does not address this outbuilding, which now might or might not be illegal.

[9.6] Mr Kahn further argued that every time the Applicant asked for the matter to stand down to get instructions, a new argument was proposed to convince the court that this outbuilding should be included in the existing papers, and relief and therefore, the matter is to be postponed *sine die*.

[9.7] If the court is inclined to postpone the matter that will constitute judicial outreach as there is just no possible reading of the Notice of Motion that this existing outbuilding or any other illegal structures or this reference to the building line and exceeding of the FAR property can be read into the relief claimed, or is addressed in the existing Founding Affidavit. Furthermore, there is no rule that

states that an Applicant may make out their case based on something stated by the First Respondent in her affidavit.

[9.8] Mr. Kahn argued that the Explanatory Affidavit was filed 15 Minutes before the hearing of this matter and that he did not have a chance to peruse the same or to respond thereto. The Second Respondent is now aware of this existing structure, and is dealing with it, but the same does not form part of the papers before this court.

[9.9] Mr. Kahn conceded that his client, the First Respondent, was “*naughty*” and did not build in terms of the approved plan, but still insists that each party is to pay their own costs, but if the Postponed sine die is granted that Party and Party Scale B costs are to be paid by the Applicant.

[10] At the hearing on 6 March 2025, Mr. Ndlovu on behalf of the Second Respondent indicated that a Notice to Abide was filed dated 13 March 2025. Me Babha stated that the Second Respondent first opposed the matter and now filed this notice but I could not find any Notice to oppose and she did not refer me to such.

[10.1] Mr. Ndlovu also stated that he was informed that an inspection was held at the premises, that the newly erected rooms added into the main house referred to in this application, now comply with the approved building plan, but that he has no information on why the occupation certificate was filed so late or whether there is an inspection report. The matter was then postponed to allow all parties to attend to the inspection *in loco*.

[10.2] On the 19 March 2025, Mr. Ndlovu indicated that the inspection was attended with two building inspectors and that the occupation certificate was indeed issued by the City of Johannesburg, that the plan so approved in 2023 indeed address the illegal structures being constructed during that time period and that the First Respondent had to remove two walls as she build four rooms instead of two rooms as approved on the building plan.

[10.3] Mr. Ndlovu also reported that the occupancy certificate was then only issued after the two walls were demolished. Therefore, the issues of this application and the structures being erected added onto the main house referred to in this application have been resolved, and the old existing structure, relaxation of building lines and alleged exceeding of the applicable FAR on the approved building plan are now new matters.

[10.4] Mr. Ndlovu argued that the old existing structure does not form part of the main house and was not added onto the main house, as it is an existing structure at the back of the house. This seems to be a carport used as a room, which is being looked at by the Second Respondent, who undertook to take the matter further, as there seems to be an old intervening plan at the municipality which needs to be perused by the Second Respondent.

[11] Before the court can even consider this application for a postponement *sine die*, the court first needs to address the argument that the outbuilding on the property, which might be legal or illegal, might affect the FAR, whether there is a building line relaxation approved by the Second Respondent or the new alterations in the main house were included or can be included in the papers before the court either in the reading of the Founding Affidavit or the relief so claimed in the Notice of Motion. If the court finds that these issues fall outside of the scope of the papers before this court, the matter cannot be postponed *sine die* and must be finalised.

[11.1] In the matter of ***Fisher v Ramahlele and others 2014)4 SA 614 (SCA)***, the appeal court stated that:

“It is for the parties, either in pleadings or affidavits, which serve the function of both pleadings and evidence, to set out and define the nature of their dispute and it is for the court to adjudicate upon those issues.... There may also be instances where the court may mero motu raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that, it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.

[11.2] In another case, ***Advertising Regulatory Board v Bliss Brands 2022 (4) SA 57(SCA)*** which Judge Fisher questioned the constitutionality of the powers of the Advertising Board after reference to the Ramahlele case, the Appeal court held that:

“This admonition in the Ramahlele case, regrettably, was disregarded by the high court. Bliss Brands’ submission to the jurisdiction of the ARB should have put paid to any challenge to jurisdiction or to the constitutionality of the Code or Moi.

Instead, the issuance of the directive resulted in virtually an entirely new case for decision”¹

[12] After nearly three years, I understand that the Applicant wants this matter to be finalised and that the lack of co-operation with the Second Respondent must be extremely frustrating.

[12.1] However, the Applicant had the chance to file a Supplementary Founding Affidavit to address any other issues they wished to address on this property, during the last three years or even during this time since the matter was heard on 6 March to 19 March 2025, but elected not to do so and therefore must be held to what is before this court.

[12.2] It is trite that an Applicant should make out their case in a Founding Affidavit and not in argument, and there is no rule or caselaw that an Applicant can rely on something stated in the Answering Affidavit which is not referred to at all in her Founding Affidavit, to make out her case. ²

“ It is, in any event, imperative that a litigant should make out its case in its founding affidavit and certainly not belatedly in argument. The exception, of course, is that a point that has not been raised in the affidavits may only be argued or determined by a court if it is legal in nature, foreshadowed in the pleaded case and does not cause prejudice to the other party.”

[12.3] I cannot find any reference in the Founding Affidavit to any outbuildings or other existing structures or that the building plan might have been wrongly approved.

[12.4] I further cannot find any justification in the argument that these issues should be addressed in terms of the Notice of Motion as:

12.4.1 The existing structure is not *being constructed*;

12.4.2 The existing structure is not *added onto the main house*;

12.4.3 The wall between the newly constructed rooms and this existing outbuilding is an existing structure, as I cannot see anywhere on all these pictures, so attached in this matter, that the same is newly constructed or being constructed.

¹ Bliss Brands fn14 para 10.

² My Vote Counts NPC v Speaker of the National Assembly 2016(1) SA 132 (CC) at paragraph 177.

12.4.4 In the event that the building plan was wrongly approved as these structures now exceeds the FAR applicable on the property or building lines were nit relaxed, the relief so claimed on the Notice of Motion against the First Respondent will not address those issues.

[12.5] Therefore, I agree with Mr. Kahn that the relief requested in prayers 5 – 5.2.2 in this application is now academic as the building which was being erected now complies with the approved building plan. No order will be made in this regard.

[12.6] Furthermore, for the convenience of the court this matter should now be finalised and if needed a new matter with new papers should be brought to ask the appropriate relief where necessary to address the approval of the building plan where needed and any other illegal structures on this property which can be supported by the inspection already done and the report so provided.

COSTS

[13] In terms of the amended Notice of Motion, the Applicant requests a costs order in the event of opposition.

[13.1] In this matter, an order was granted against the First Respondent to stop building construction on the property. Still, the First Respondent elected to proceed and to finalise the building with a complete deviation from the building plans already approved on 19 July 2023.

[13.2] Despite the indication in the First Respondent's affidavit that the building is now in terms of the existing building plan, the Second Respondent had to inspect to inform the First Respondent to demolish the middle walls of the building, as she created four rooms instead of the approved two rooms. That caused the delay in the provision of the occupancy certificate.

[13.3] Therefore, the Applicant did not have an alternative but to bring this matter to court and to set it down for finalisation as the First Respondent was "*naughty*" as stated by Mr. Kahn.

[14] Therefore, the following order is made.

[14.1] Application for a postponement is denied.

[14.2] The First Respondent is ordered to pay the costs of this application on a Party and Party Scale C, including the costs of Counsel.

ENGELBRECHT T
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION

Delivered: This judgment and order were prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the order is deemed to be the 14 April 2025.

Appearances:

For the Applicant:	Advocate Babha
For the First Respondent:	Advocate Khan
Date of Hearing:	19 March 2025
Date of Judgment:	14 April 2025