



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CIRCUIT LOCAL DIVISION, THEMBALETHU, GEORGE)**

Case no: 22330/2024

In the matter between:

ANDRIES JOHAN VAN TONDER

Applicant

and

THE GEORGE MUNICIPALITY

First Respondent

**THE BODY CORPORATE, WILDERNESS MILKWOOD
SECTIONAL TITLE SCHEME (SS363/2002)**

Second Respondent

JUDGMENT DELIVERED ELECTRONICALLY ON 20 AUGUST 2025

MANGCU-LOCKWOOD, J

A. INTRODUCTION

[1] The applicant, a member of the second respondent (*“the Scheme”*), seeks declaratory orders against the first respondent (*“the Municipality”*), as follows:

1.1 That it be declared that the letting of dwelling units in the [Scheme] ...zoned “General Residential Zone II” with primary use right of “*Group Housing*”, by ...members of the second respondent, for short term occupation by paying guests or tenants other than to one family as living accommodation and housing of such family, is in contravention of Schedule 1 of the George Integrated Zoning Scheme By-law (2023) (and its predecessors the Wilderness Town Planning Scheme Regulations 1984 (revised 1998) and the George Integrated Zoning Scheme By-law (2017), and is unlawful;

1.2 That it be declared that the use of a dwelling unit in the [Scheme] only allows for it being used as living accommodation and housing of one family (as defined in the 2023 By-law) and which means that the dwelling unit shall only be rented out or be leased to such a family for use as their regular and chosen place of abode, for whatever period of time.

[2] The application is opposed by both respondents, who have raised points in *limine*. Both respondents argue that this Court should refuse to exercise its discretion to grant the declaratory relief, and state that the relief sought is overbroad and vague. In addition, the Municipality raises, firstly, non-joinder of the individual owners of the Scheme, and secondly, states that the essence of the matter should rather been referred to the Community Schemes Ombud in terms of the Community Schemes Ombud Service Act 9 of 2021 (“CSOS Act”).

[3] There is also a condonation application brought by the Scheme for the late filing of its answering affidavit, which was two-and-a-half months out of time. The affidavit sets out the reasons for lateness, which include the fact that the *dies non* commenced during the festive season of 2024, and that in January 2025 the applicant was requested, by means of a notice in terms of uniform rule 35(12), to produce a legal opinion that he relied upon, and it was when he failed to respond to the notice that the answering affidavit was finalized. The condonation application is not opposed. All the parties have now filed all the affidavits they wish to, and accordingly there is no

prejudice caused to any party. Finally, all the parties agree that this is a matter raising matters of public importance. For all these reasons, I consider it in the interests of justice to condone the late filing of the answering affidavit.

B. RELEVANT BACKGROUND

[4] The applicant is the registered owner of a unit in the Scheme, and it falls within the area of the Municipality. In terms of the George Integrated Zoning Scheme By-law (2023)¹ (*“the By-Law”*) the property of the Scheme is zoned under General Residential Zone II (*“GRZ II”*) and has a primary use right of *“Group Housing”*.

[5] The units in the Scheme - 26 in total - are *“dwelling units”*, a term which is defined² in the By-Law. While some units are occupied permanently by their owners or indefinitely by long-term tenants, some are not used as primary residence, but as holiday homes.

[6] Of the units that are not used as primary residence, the majority are used by their owners exclusively. However, a minority of owners - 4 in total - rent out their units to short-term guests through websites such as *airbnb.com* or *lekkeslaap.co.za*, when they

¹ The By-Law was adopted by the Municipality’s Council in terms of Section 12 of the Local Government Municipal Systems Act, 2000 (Act 32 of 2000) on 28 September 2023 and promulgated in terms of Section 13 of said Act on 6 October 2023 by virtue of P.N 8831/2023. An amendment was promulgated on 8 August 2024 by adding a section 3 to Sch 3: “Special Area Overlay Zone for Uniondale Business Area” but remained known and referred to as *“George Integrated Zoning Scheme By-law (2023)”*.

² A “dwelling unit” is defined as follows:

“...a self-contained, inter-leading group of rooms with a uniform architectural style approved by the Municipality used for the living accommodation and housing **of one family**, together with such outbuildings as are ordinarily used with such a dwelling unit —

- (a) with not more than one kitchen;
- (b) provided that a maximum of two habitable rooms which are not inter-leading with the main dwelling unit and do not include a kitchen, are permissible and an outbuilding is not an interleading room;
- (c) **does not include tourist accommodation** or accommodation used as part of a hotel; and
- (d) including the conducting of an office based work-related activity of a professional, clerical, or administrative nature by an employee of a company from their place of residence, which excludes a home occupation, and does not result in additional trip generation.” (my emphasis)

themselves are not in residence. According to the papers, these owners agree to short-term rentals to one “family”³ or household at a time.

[7] At a special general meeting (“SGM”) held on 27 September 2023, the Scheme resolved by a majority of 75% to adopt rules in terms of section 10 of the Sectional Title Schemes Management Act 2011 (“the Rules”). In terms thereof, there is no limitation on an owner’s use of a dwelling unit as short-term accommodation. The applicant was a trustee of the Scheme at the time of the SGM of 27 September 2023.

[8] The applicant states, firstly, that the letting of the dwelling units as short-term rental accommodation “*results in a serious infringement of the lifestyle of permanent residents of the Scheme that is being sought and promoted, by living within an area zoned Residential II, with primary use rights as “group housing”*”.

[9] He states further that the short-term letting of dwelling units in the Scheme to guests other than “family” contravenes the By-Law, as well as its predecessors, namely the Wilderness Town Planning Scheme Regulations, 1984 (“the Wilderness Regulations”), as well as the George Municipality Integrated Zoning Scheme By-Law, 2017 (“the 2017 By-Law”). He bases this argument on an interpretation of all three instruments although, primarily on the 2023 By-Law.

[10] The applicant refers to differing interpretations of the By-Law between him, the Municipality and the Scheme. The Municipality’s view is that the zoning of the land and the use rights afforded in terms thereof allow for the short-term letting on condition that it is to a “family”, as defined in the By-Law. It states that there is no limitation on the duration in respect of which an owner of a dwelling unit as primary use under General Residential Zones II may rent out the entire dwelling unit to a family. Further, that there is no ambiguity or absurdity arising from the express provisions of the By-Law.

³ A “family” is defined as follows in the By-Law:

- “(a) one or more individuals occupying a dwelling who are related through marriage or common law, blood relationship, legal adoption, or legal guardianship and no more than 3 unrelated people; or
- (b) a group of not more than 5 unrelated persons, including domestic workers or boarders but excluding the exclusive use thereof by students attending a place of instruction.”

[11] The Municipality's interpretation has been conveyed to the applicant since, at least April 2023, as indicated by emails from various officials of the Municipality which are attached to his founding affidavit dated 13 April 2023, 24 April 2023 and 10 August 2023. In all that correspondence the Municipality's officials added that the final decision in respect of the rental of dwelling units rested with the Scheme.

[12] As for the Scheme, its view is encapsulated in the Rules adopted on 27 September 2023, which place no limitation on an owner's use of a unit as short-term accommodation. The applicant does not seek any ancillary relief against the Scheme, its members or the Municipality. It is accordingly evident that the issue arising for determination is purely a question of law, involving interpretation of the By-Law. The question that arises is whether this Court should exercise its discretion in favour of granting the declarators sought.

C. THE LAW ON DECLARATORY REMEDIES

[13] In terms of section 21(1)(c) of the Superior Courts Act 10 of 2013, this Court has the power in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.

[14] In *Cordiant Trading*⁴, the following was stated of s 19(1)(a)(iii) of the Supreme Court Act 59 of 1959, the predecessor to s 21(1)(a):

“Although the existence of a dispute between the parties is not a prerequisite for the exercise of the power conferred upon the High Court by the subsection, at least there must be interested parties on whom the declaratory order would be binding. The applicant in a case such as the present must satisfy the court that he/she is a person

⁴ *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* [2005] ZASCA 50; [2006] 1 All SA 103 (SCA); 2005 (6) SA 205 (SCA) para 16.

interested in an “existing, future or contingent right or obligation”... In *Durban City Council v Association of Building Societies* 1942 AD 27 Watermeyer JA with reference to a section worded in identical terms said at 32:

“The question whether or not an order should be made under this section has to be examined in two stages. First the court must be satisfied that the applicant is a person interested in an ‘existing, future or contingent right or obligation’, and then, if satisfied on that point, the Court must decide whether the case is a proper one for the exercise of the discretion conferred on it.”.’

[15] The last-quoted portion does not mean that, once an ‘existing, future or contingent right or obligation’ is established, a court is bound to grant a declarator, but that it must consider and decide whether it should refuse or grant the order, following an examination of all relevant factors.⁵

[16] As regards the discretion to be exercised, the following was stated by the SCA in *West Coast Rock Lobster*⁶:

“What was required was that there should be interested parties upon whom the declaratory order would be binding. In considering whether to grant a declaratory order a court exercises a discretion with due regard to the circumstances. The court must be satisfied that the applicant has an interest in an existing, future or contingent right or obligation. If the court is so satisfied it must consider whether or not the order should be granted. In exercising its discretion the court may decline to deal with the matter where there is no actual dispute. The court may decline to grant a declaratory order if it regards the question raised before it as hypothetical, abstract or academic. Where a court of first instance has declined to make a declaratory order and it is held on appeal that that decision is wrong the matter will usually be remitted to the lower court.”

⁵ *Cordiant*, para 17.

⁶ *West Coast Rock Lobster Association and Others v Minister of Environmental Affairs and Tourism and Others* [2010] ZASCA 114; [2011] 1 All SA 487 (SCA) para 45.

[17] Thus, whilst it is correct that the absence of an existing dispute is not an absolute bar to the grant of a declaratory order, a court may, in the exercise of its discretion, decline to deal with the matter where there is no actual dispute.⁷

[18] One such instance is if it regards the question raised before it as hypothetical, abstract or academic.⁸ It is not ordinarily desirable for a court to give rulings in the abstract on issues which are not the subject of controversy and are only of academic interest.⁹ The Constitutional Court stated as follows in *Ferreira*¹⁰:

“The objection to constitutional challenges brought by persons who have only a hypothetical or academic interest in the outcome of the litigation is referred to in *Zantsi v Council of State, Ciskei and Others*. The principal reasons for this objection are that in an adversarial system decisions are best made when there is a genuine dispute in which each party has an interest to protect. There is moreover the need to conserve scarce judicial resources and to apply them to real and not hypothetical disputes. The United States courts also have regard to “the proper role of the Courts in a democratic society” which is to settle concrete disputes, and to the need to prevent courts from being drawn into unnecessary conflict with coordinate branches of government.”

[19] A declaratory order cannot affect the rights of persons who are not parties to the proceedings.¹¹ The SCA stated as follows in *Clear Enterprises*¹²:

“Not all of the cases pending before the High Court involve the same parties. To the extent that they concern different parties any declaratory order that issues can hardly be binding on those other parties. Moreover, each of the pending applications involves

⁷ *Ex parte Nell* 1963 (1) SA 754 (A) at 760B. See *West Coast Rock Lobster* para 45.

⁸ *Ibid.*

⁹ *Zantsi v Council of State, Ciskei and Others* (CCT24/94) [1995] ZACC 9; 1995 (4) SA 615 (CC); 1995 (10) BCLR 1424 (CC) (22 September 1995) para 7.

¹⁰ *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* (CCT5/95) [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (6 December 1995) para 164.

¹¹ See *SA Mutual Life Assurance Society v Durban City Council* 1948 (1) SA 1 (N) and *Farlam et al op cit* at A1-33 to A1-34.

¹² *Clear Enterprises (Pty) Ltd v Commissioner for South African Revenue Services and Others* [2011] ZASCA 164 (SCA) paras 16-19.

different vehicles. The fallacy in the approach of the parties is that they assume, erroneously so, that what confronts us is a discrete point of statutory construction. It is not. It is first and foremost a fact-based enquiry. Any interpretive exercise to be undertaken will be inextricably linked to the facts. And, it is trite that every case has to be decided on its own facts. That is particularly the case where, as here, the one party contends that the facts advanced by the other are a “sham”, “fictional” and a “stratagem” to circumvent the applicable legislation. It follows that efforts to compare or equate the facts of one case to those of another are unlikely to be of assistance. For, as we well know, parties frequently endeavour to distinguish their case on the facts from those reported decisions adverse to their cause. Moreover, absent an undisputed factual substratum, it would be extremely difficult to define the limits of the declaratory relief that should issue.”

D. DISCUSSION

[20] In exercising the Court's discretion, I take into account firstly, the fact that the applicant's case is purely abstract. Although he makes allegations of “*serious infringement to his lifestyle*”, no detail whatsoever is provided in this regard. There is no suggestion, for example that the short-term letting complained about results in changes to the nature of the occupancy or the buildings, or contravention of the Scheme's Rules.

[21] Furthermore, the allegations made in support of the alleged infringement are not supported by the evidence. The applicant alleged that it was the lifestyle of permanent residents of the Scheme that was seriously infringed, and not only his. He also intimated that there are differing views on the issue amongst owners in the Scheme. However, that is not the case. It transpires from the Scheme's answering affidavit that, upon receipt of this application, its members' views were canvassed, and with the exception of the applicant, none of them associate themselves with this application. In other words, contrary to the indication given in the founding affidavit, the applicant is the only member of the Scheme who holds the view espoused in these proceedings.

[22] Moreover, as was the case in *Voluntary Sterilization*¹³ there is no decision of the Scheme that has been challenged by the applicant. He does not seek to address any acts taken by the Scheme that have been implemented in relation to the interpretation issue that he has brought to this Court, specifically the adoption of the Rules adopted on 17 September 2023 at the SGM. Although the case law¹⁴ makes clear that this does not always have to be the case, it is nevertheless a factor that the Court is entitled to take into account, especially when regard is had to the other circumstances discussed in this section.

[23] As between the applicant and the Scheme, the differing interpretations between them crystallized into the Rules adopted on 27 September 2023. And so, properly construed and in essence, the rights he seeks to vindicate relate to the decision made at the SGM on 27 September 2023. It is in that context that the Municipality's preliminary point regarding the remedy available in terms of the CSOS Act is to be viewed. Whilst it is correct that the remedy as framed in these proceedings is not available at the CSOS, it is also correct that in terms of s 39(4)(c) and (e) of that Act, the following remedy is available to the applicant:

“(c) an order declaring that a resolution purportedly passed at a meeting of the executive committee, or at a general meeting of the association-

- (i) was void; or
- (ii) is invalid;

...

(e) an order declaring that a particular resolution passed at a meeting is void on the ground that it unreasonably interferes with the rights of an individual owner or occupier or the rights of a group of owners or occupiers.”

¹³ *Association for Voluntary Sterilization of South Africa v Standard Trust Limited and Others* (325/2022) [2023] ZASCA 87 (7 June 2023) para 9.

¹⁴ *Ex parte Nell* 1963 (1) SA 754 (A) at 760B. See *West Coast Rock Lobster* para 45.

[24] The applicant does not claim that that remedy is not available. He states that he has purposively opted to first pursue the relief he seeks here, and to thereafter, if necessary, address the SGM's resolution at an appropriate forum.

[25] This, in my view, calls to mind what was stated in *Ferreira*¹⁵, regarding the need to conserve scarce judicial resources and to apply them to real and not hypothetical disputes. As the Municipality states, it is evident that the applicant has devised a way to fit himself within the jurisdiction of this Court, by seeking the relief that he seeks. He does so mindful that he lacks the support of the members of the Scheme.

[26] One concerning feature regarding the relief sought by the applicant relates to its nature and extent. It is common cause that, although the relief is framed to target the owners in the Scheme, it will impact every single owner of a dwelling unit within the jurisdiction of the Municipality. This is the stated reason for the Municipality's decision to oppose this application instead of abiding the decision of the Court, which would be the norm in matters between body corporates and their individual members.

[27] The Municipality states that the relief will have an impact on the economic and tourism benefit of all taxpayers within its jurisdictional area. This is confirmed by the Scheme which points out that the impact of restricting the primary use to the applicant's interpretation would diminish their members' property values and have an impact on tourism. It is not unreasonable to conclude that the relief would similarly affect other group housing schemes and other owners of dwelling units within the Municipality's jurisdictional area.

[28] The magnitude of this impact is consonant with the objective of a zoning scheme, which is the coordinated and harmonious use and development of land.¹⁶ As the Constitutional Court stated in *Walele*¹⁷:

¹⁵ *Ferreira* para 164.

¹⁶ See *Lind and Another v Trustees for the of the time being of The Indigo Trust* (T3685/96) (10072/2020; 6800/2021) [2021] ZAWCHC 97 (18 May 2021) para 28 and the cases cited therein.

¹⁷ *Walele v City of Cape Town and Others* [2008] ZACC 11; 2008 (6) SA 129 (CC) para 130.

“...zoning schemes also confer rights on owners, because owners are entitled to require that neighbouring owners comply with the applicable zoning scheme. Where an owner seeks to depart from the scheme, the rights of neighbouring owners are affected and they are entitled to be heard on the departure. Owners in the area are also entitled to be heard when land is rezoned. A zoning scheme is therefore a regulated system of give and take: it both limits the rights of ownership but also confers rights on owners to expect compliance by neighbours with the terms of the mutually applicable scheme. The result is that where an owner seeks to use his property within the terms of the zoning scheme, it cannot be said that the rights of surrounding owners are affected materially or adversely.”

[29] Here, the applicant acts only in his interest. Whilst on the one hand he has made out no case for the alleged infringement he claims to have incurred, there is to consider, on the other hand, the impact on the rest of the population within the Municipality’s jurisdiction. If granted, the relief will have an impact on the rights of property ownership and freedom to contract of those who own dwelling units within the Municipality’s area of jurisdiction. It will curtail the use of their private property, without them being afforded an opportunity to be heard, and without following the normal process of enacting legislation. To use the language of the SCA in *West Coast Rock Lobster*, the relief would effectively “*bind persons who are strangers to the present dispute*”¹⁸. It can also not be ignored that there is a high likelihood of those persons being aggrieved¹⁹, a point which is made by the Municipality.

[30] One must also accept that a policy decision was taken by the Municipality, and that is what is reflected in the provisions of the By-Law. That is in accordance with the Constitutionally enshrined powers of a municipality to make and administer by-laws for

¹⁸ *West Coast Rock Lobster Association and Others v Minister of Environmental Affairs and Tourism and Others* (532/09) [2010] ZASCA 114; [2011] 1 All SA 487 (SCA) (22 September 2010) para 51.

¹⁹ See *SA Mutual Life Assurance Society v Durban City Council* 1948 (1) SA 1 (N) and *Farlam et al op cit* at A1-33 to A1-34.

the effective administration of matters, in terms of s 156(2), read with s 151(2)²⁰. Whether the Municipality permits the short-term letting of a “dwelling unit” for primary use, and whether it decides to further confine the use of a “dwelling unit” to occupation by one family as a regular place of abode, are matters of public policy which fall within the executive and legislative powers of the Municipality.

[31] Seen in that light, the relief sought amounts to effective amendment of the By-Law, or, at the very least, it will oblige the Municipality to apply the By-Law in a manner which it has not done and which it does not wish to do. That this is so, is confirmed by the correspondence attached to the founding affidavit from the various employees of the Municipality, who each confirmed the Municipality’s interpretation. This does not mean that the applicant is precluded from challenging the Municipality’s interpretation. However, the manner in which the matter has reached the Court has the effect of sidestepping the usual processes of enacting legislation, to the detriment of the rest of the population within the Municipality’s jurisdiction.

[32] And even though the relief as framed goes to the heart of the Municipality’s policy decision and interpretation, the applicant has also not challenged any decision of the Municipality as being unlawful or anything of the sort, including its policy decision as reflected in its interpretation of the By-Law, or implementation thereof.

[33] Moreover, as the respondents point out, the relief sought is vague in that there is no attempt to define what is considered to be “short-term” occupation. In this respect, the effect of the order would be to define “short-term” occupation in accordance with the applicant’s belief, without the input of other residents within the Municipality’s jurisdiction. That is another indication that the effect of the order sought will be an intrusion by this Court into the legislative powers of the Municipality, contrary to principle of separation of powers.

²⁰ Section 151(2) of the Constitution vests the executive and legislative authority of a municipality in its Municipal Council.

[34] In light of the considerations above, I consider it inequitable to grant the declarator sought by the applicant, which affects the whole of the Municipality's jurisdiction. More so given that, firstly, the matter has come to this Court as a matter directed solely at the conduct of the Scheme, though there is no live dispute raised. Secondly, the facts of this case concern one individual's unhappiness with the decision of the Scheme, in circumstances where he has alternative remedy available as already discussed, and the nature of the relationship between them is contractual, governed as it is by the Scheme's constitution and rules. Thirdly, in the absence of a live dispute between the parties, it is clear that the applicant seeks, in essence, an opinion from this Court. As the Constitutional Court stated in *Ferreira*, "*the proper role of the Courts in a democratic society is to settle concrete disputes*"²¹. It is simply not in the interests of justice, nor the interests of the proper administration of justice, for the relief to be granted.

[35] For all the above reasons, I am of the view that it would be inappropriate to grant the declaratory relief sought, and the application is accordingly dismissed. There is no reason why costs should not follow the result.

E. ORDER

[36] In the circumstances, the following order is made:

1. The application is dismissed.
2. The applicant shall pay the costs of the first and second respondent, including costs of counsel, at Scale B.

N. MANGCU-LOCKWOOD
Judge of the High Court

²¹ *Ferreira* para [164].

Appearances:

For the applicant : Adv D.L. van der Merwe
Instructed by : Ewald Burger Attorneys

For the first respondent : Adv A.F. Schmidt
Instructed by : Boshoff Incorporated

For the second respondent: Adv U.K. Naidoo
Instructed by : Arleen Vosloo Attorneys