

SOUTH AFRICA / JUDGMENT

Burger and Others v Brown and Others (17204/2011) [2011]

ZAWCHC 468 (12 September 2011)

[2011] ZAWCHC 468

COURT

Western Cape High Court, Cape Town

BEFORE

Dlodlo

CASE / FILE NUMBER

17204/2011

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IN

THE HIGH COURT OF SOUTH AFRICA (WESTERN CAPE HIGH COURT, CAPE TOWN)

REPORTABLE

CASE

NO. 17204/2011

In

the matter between:

LOUIS

MATHYS BURGER

.....FIRST

APPLICANT

JUNE

ELAINE GERSTLE

.....SECOND

APPLICANT

GLENDA

MICHELLE ROPER

.....THIRD

APPLICANT

LUCAS

CORNELIUS VERWEY

.....FOURTH

APPLICANT

ELLEN

ELIZABETH VAN DER MERWE

.....FIFTH

APPLICANT

MALCOLM

EDGAR BROOKS
.....SIXTH
APPLICANT
ADRIANA
LUCIA VAN DYK
.....SEVENTH
APPLICANT
BRUCE
ANDREW JAMES
.....EIGHTH
APPLICANTAnd
GAVIN
MICHAEL BROWN
.....FIRST
RESPONDENT
BETTY
GENOFEVA BROWN
S
.....ECOND
RESPONDENT
THE
CITY OF CAPE TOWN
.....THIRD
RESPONDENT

Coram: DLODLO, J
Judgment
by: DLODLO,
J
For
the Applicants: ADV. A. OOSTHUIZEN (SC)
Assisted
by: ADV. P. TORRINGTON
Instructed
by: Bliden Campbell Attorneys
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TOWN
For
the 3rd

Respondent: ADV. M. O'SULLIVAN

Instructed: Webber Wentzel
15th
Floor,
Convention Tower
Heerengracht,
Foreshore
(REF.
R SAFEDA)
Date(s)
of Hearing : 8 SEPTEMBER 2011
Judgment
delivered on: 12 SEPTEMBER 2011
IN THE HIGH
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THE
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RESPONDENT

JUDGMENT

DELIVERED ON THURSDAY, 22 SEPTEMBER 2011 DLODLO. J INTRODUCTION [1] On 29 July 2011 the Applicants launched an application to review and set aside the City's decision in terms of section 7 of the National building Regulations and Building Standards Act 103 of 1977 ("the Building Standards Act") to approve the building plans submitted by the First and the Second Respondents in respect of alterations to a building erected on Erf 10977, Blaauwberggrandt ("the review application"). One of the Applicant's review grounds is premised on a legitimate expectation that plans in the Millrow Group Housing Development would not be approved in the absence of affording neighbours an opportunity to comment on or consent to alterations. Prior to launching the review proceedings (on 21 July 2011) the Applicants brought an application for interim relief, seeking an interdict preventing the First and Second Respondent from continuing with the building work on Erf 10977. An order granted on 21 July 2011 directed that the City should deliver a record of the proceedings sought to be reviewed, as required by Rule 53 (1) (b) by 3 August 2011. [2] On 4 August 2011 the City made the review record available to the Applicants. A dispute thereafter arose between the City and the Applicants as to whether certain documents had to be made available by the former. The said dispute led to the Applicants launching the present interlocutory application in terms of Rule 6 (11), seeking an order directing that the documents in question be made available in terms of the provisions of Rule 53 (1) (b). Interlocutory applications are governed by Rule 6 (11) which specifies that they may be set down at a time assigned by the Registrar or as directed by a Judge. The provisions of the rules relating to the time for filing Answering and Replying Affidavits do not apply to interlocutory applications. See *Gisman Mining and Engineering Company (Pty) Ltd (In Liquidation) v LTA Earthworks (Pty) Ltd* 1977

(4) SA 25 (W) at 25 F-H.

[3] The aforementioned interlocutory application was initially enrolled for hearing on 26 August 2011 but it was not heard because the City (Third Respondent) required time to file Answering papers. Although urgency appears to have been conceded even by the City it is necessary for completeness sake to mention why this matter qualifies to be heard as an

urgent application. The review application itself is to be heard on 24 October 2011. Importantly, if any documentation is ordered by the Court to be delivered, that must take place within the time constraints so as to enable the examination of such documentation and a possible supplementing of the Founding Affidavit in terms of Rule 53 (4) and the necessary exchange of Affidavits between the parties. The eight Applicants all own properties which are part of the Millrow Group Housing Scheme situated in Blaauwberg. The First and Second Respondents, who also own property in the said group housing scheme, have commenced certain building construction work. The Applicants contend that the building construction work contravenes certain zoning scheme regulations and that the City, in approving the First and Second Respondents' building plans for the aforesaid construction work, acted in contravention of section 7 of the Building Standards Act and contrary to certain practices established in relation to the Millrow Scheme. DISCUSSION [4] It is important from the outset that it be pointed out that Rule 53

- (1) (b) obliges the functionary in question to deliver "the record of such proceedings sought to be corrected or set aside, together with such reasons as he is by law required or desires to give or make". The city opposes the application on the basis that the record delivered is the complete record which served before the section head, Mr Benito Ivan Cogill ("Mr Cogill") on 4 July 2011, for his approval in terms of section 7 of the Building Standards Act. The City contends that what it delivered constitutes a complete record of proceedings in terms of Rule 53 and that it complied with the terms of the order granted on 21 July 2011. The city also contends that the appropriate procedure for the Applicants to have followed is to submit an access to information request in terms of the Promotion of Access to Information Act 2 of 2000 ("Promotion of Access to Information Act"). I gather from the Answering papers that the City gave the Applicants an undertaking to expedite a request submitted in terms of the Promotion of Access to Information Act. Ms O' Sullivan prefixed her submissions as follows: "Although a Court has a discretion to allow new matter in a replying affidavit, ordinarily a distinction must be drawn between a case in which the new material is first brought to light by the Applicants who knew of it at the time when the founding affidavit was prepared, such as the present instance, and a case in which facts alleged in the Respondent's answering affidavit revealed the existence or possible existence of further grounds for relief sought by the Applicants. It is submitted that it is only in the latter instance that a Court would permit an Application to enlarge upon what has been revealed by the Respondent. (*Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger* 1976 (2) SA 701 (D)). It is submitted that the Court ought not to permit the Applicants in *casu* to make out their case in reply, where no such case was advanced in the founding affidavit, in circumstances where all the facts contained in the replying affidavit ought to have been known to the Applicants at the time at which the founding affidavit was delivered." [5] It is important to have regard to what is contended by David Charles Bettsworth, an ex-employee of the City who filed an Affidavit in support of this interlocutory application. It is also important to bear in mind that the City contends differently. According to the City in order to consider an application for zoning clearance, the present practice in the City is that

the relevant official considers the zoning of the Erf in terms of the information available at the front desk, being the professional planning zoning viewer which contains zoning maps and aerial photographs. Additionally (the City further contends) if the Integrated Planning Operational System reflects a previous land use application, then the history of the property would be searched. What further emerges from the Answering papers is that the title deed of the property in question is also considered to determine restrictive conditions or possible membership of a home association. According to Mathysen (deponent of the Answering Affidavit) all that could be found in the title deed was the following: "The owner of this erf shall not make any alterations, additions or demolitions to any part of the buildings erected on the property including boundary walls and fences, and he shall not change the external colours scheme or materials of such buildings without the written consent of the Local Authority ". [6] One Clifford James Marks made a recommendation to the City in terms of section 6 (1) of the Building Standard Act. In this regard it is maintained that Marks considered the fact that the erven was part of a group housing scheme. He attended a site inspection on 27 June 2011 and was aware that the Erf formed part of a group housing development and was on smaller than conventional erven, when he made his recommendations to the City. It is not my intention to dwell much on the content of the papers. But it suffices probably, to mention that the City denies that the files now sought as part of the record were considered by the relevant officials and consequently it contends that they do not form part of the review record. The Applicants claim that the additional documents ought to have been considered when the decision to approve the plans was made inter alia on the basis of an e-mail query sent in October 2010 to officials. The City, on the other hand maintains that the e-mail in question did not form part of the record of decision and that the officials concerned were not involved in assessment of the building plan. [7] The onus in the instant application are on the Applicants. They must satisfy this Court on a balance of probabilities that the City is obliged to produce the documents in question on the basis that they form part of the review record. In *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999

- (2) SA 279 (T) at 317 E- H the Court inter alia held as follows: "It is well established law that Courts are reluctant to go behind a discovery affidavit which is prima facie taken to be conclusive. In *Marais v Lombard* 1958 (4) SA 224 E at 227 G it was held that 'When a party making discovery has sworn an affidavit as to the irrelevancy of certain documents, the Court will not reject that affidavit unless a probability is shown to exist that the deponent is either mistaken or false in his assertion.' In *Continental Ore v Highveld Steel & Vanadium Ltd* (supra) the following was held at 597 E-H 'It has further been held in a series of cases before the enactment of the present Rules that when a party to an action refuses to make discovery of or to produce for inspection any documents on the ground that they are not relevant to the dispute, the Court is not entitled to go behind the oath of that party unless reasonably satisfied that the denial of relevancy is incorrect. *Caravan Cinemas (Pty) Ltd v London Film Productions* 1951 (3) SA 671 (W), per Murray AJP, at 675-7. "' The limitation of the material is of course subject to an exception. The conclusiveness of a discovery affidavit

can be challenged where mala fides is shown. The limitation challenge must be weighed up against the delay and costs. Ms O'Sullivan's submission is that there is a dispute of fact in this regard and seeing that the Applicants seek final procedural relief in relation to the composition and extent of the review record without having asked for a referral to oral evidence, this Court must follow the rule enunciated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984

- (3) SA 623 (A). Ms O'Sullivan also submitted that seeing that building plans may not be copied without the written consent of the copyright holder, if compelled to deliver them, the City will have to obtain consents of the owners of the copyright of the plans in question. [8] In truth, the record to be delivered is only that portion of the record relevant to the review proceedings in question although it must be borne in mind that the Constitutional obligation to give reasons for administrative decisions, plays a role in determining

what the relevant evidential material is to be disclosed by the functionary. See *Ekuphumuleni Resort v Gambling Board, Eastern Cape and Others* 2010

- (1) SA 228 (ECD). Mr Oosthuizen submitted that, as in the case in implementing the rules pertaining to discovery, the relevance of a document is to be determined from the issues in dispute as appearing from the pleadings and from the nature of the case or the documents

in issue. I agree with this submission. I was referred to *Webster v Webster* 1992

- (3) SA 729 ECD at 734 A where the following formulation appears: "What is of importance, however, is the obvious inadequacy of the discovery. While the Court will not go behind the contents of a discovery affidavit, such affidavit is not conclusive. If from the pleadings and the nature of the case the Court regards it as probable that the party making discovery has other relevant and disclosable documents in his possession, it may order production

thereof. *Rellams (Pty) Ltd v James Brown & Homer Ltd* 1983 (1) SA 556 (N)". In *Greenberg v Pearson and Another* 1994

- (3) SA 264 (W) at 268 B- 269 B Van Schalkwyk J is on record thus: "To this Mr Price responds by saying that the very issue for determination by the trial Court is the alleged infringement of copyright. The determination of that issue will require evidence, and above all documents. The plaintiff should not now be thwarted in the prosecution of its case by being denied access to the documents it will require to prove its case. The second defendant's assertion that the documents are not relevant is not, according to Mr Price, conclusive. *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N). " " (underlining is my own) In *Rellams (Pty) Ltd v James Brown & Hamer Ltd* supra Van Heerden J remarked inter alia as follows at 560 G: "...After an examination and consideration of the recognised sources as well as the pleadings and the nature of the case the Court may come to the conclusion that the party making discovery in all probability has other relevant and disclosable documents in his possession or power and may order further and better discovery or production in conflict with the claim in the affidavit. *Herbstein and and Van Winsen* (supra at 410) and *Lenz*

Township Co (Pty) Ltd v Munnick and Others 1959 (4) SA 567 (T)." I fully associate myself with these above quoted sentiments. [9] The Review application (if one has regard to the Founding Affidavit) advances a number of grounds. One of such grounds is that the Applicant have always had a legitimate expectation that plans for alterations of the dwellings in Millrow would not be approved by the City unless the established practice of notifying the neighbouring owners of the proposed building work had been followed. Regard being had to the aforementioned ground, then documents proving or disproving the existence of such established practice are a relevant part of the record to be produced by the City. Clearly I am in agreement that the record of the proceedings sought to be reviewed would therefore consist not only of the building plans submitted by the First and Second Respondents, but also of documents relevant to the established practice allowed and relied on by the Applicants. The point is that if one of the grounds of review is alleged to be that the functionary did not adhere to a previously established practice, then the documentation which shows that such practice existed (or did not exist) is clearly a relevant part of the record, I would imagine. There is no dispute that the wanted documents are in the City's possession. I would understand probably if the City raises privacy or public policy considerations (for example those relating to medical records or school results) against the documents being made available. The City does not do so.

- [10] Ms Mathysen (deponent to the Answering Affidavit) avers that she examined files pertaining to previous renovations. According to her in respect of certain renovations dealt with in the files she has examined "no consents from neighbours were obtained. In this regard Mr Oosthuizen's contention cannot be faulted. He contended that if Ms Mathysen found it necessary to examine these files in relation to the question of whether an established practice exists, there is no conceivable basis on which the files should not be made available to the Court and the other parties. Why should the other parties be content with Ms Mathysen's account of what she saw in these files? Why should the other parties not be afforded an opportunity of examining these files themselves? What I also fail to comprehend, is the City's preparedness to make these documents available to the Applicants in the event that the latter requests to access the files in terms of the Promotion of Access to Information Act. Why should the Applicants follow a long route? In my view, it is unfair and unreasonable that the City should expect that the other parties should forego their right to be heard speedily and await delivery of the documents when the City finds it convenient to itself to make them available? I only hope and trust that the City is not being obstructive in this regard. I am told that the City suggested the use of the Promotion to Access of Information Act as a vehicle to be used to ensure that the documents reach the Applicants rather too late quite a number of days after the launching of the interlocutory application. Why complicating a fairly straightforward procedure? I mean Rule 53 (1) does not excuse a functionary from the obligation to deliver a record simply because one of the parties might have been able to obtain the record in terms of the Promotion of Access to Information Act. The mechanism created by the Promotion of Access to Information Act may not be well suited to obtaining of access to documentation in proceedings brought as a matter of

urgency. The City has had no difficulty in conceding that the building plans submitted by the First and Second Respondents relate to a unit in a group housing

scheme. Clearly a group housing scheme necessarily consists of houses characterized by uniformity and harmonious appearance. In order to ascertain whether the plans approved conform to the requirements of such a group housing scheme (i.e. are of a uniform

and harmonious appearance when compared with the other units in the development) the Court will have to have regard to the appearance

and dimensions of those other developments. I hold that the town planning and building files pertaining to such other developments

must necessarily constitute a part of the record. The contention that the documents sought in this interlocutory application are subject to their onus copyrights and their concerns are therefore obligatory, does not hold water. It is important to note that these documents are needed for judicial proceedings and will not therefore be subject to anybody's copyright. The above represents my reasons for the order I made on 12 September 2011 which for purposes of completeness I repeat infra. ORDER: (a) An order is hereby granted that the Third Respondent complies with the provisions of Rule 53 (1) (b) and must deliver to the Registrar of this Court within three (3) days of the date of this order, the following documents: (i) The original building plan files for all erven in the Millrow Development; (ii) The zoning map pertaining to the Millrow Development; (iii) The Town Planning files pertaining to the Millrow Development; (iv) Correspondence pertaining to approvals in the Millrow Development; (v) Record of all previous applications for plan approval made in respect of all erven in the Millrow Development. (b) The Third Respondent shall pay the costs of this application. DLODLO J

JUDGMENT

DELIVERED ON THURSDAY, 22 SEPTEMBER 2011

DLODLO. J INTRODUCTION

- [1] On 29 July 2011 the Applicants launched an application to review and set aside the City's decision in terms of section 7 of the National Building Regulations and Building Standards Act 103 of 1977 ("the Building Standards Act") to approve the building plans submitted by the First and the Second Respondents in respect of alterations to a building erected on Erf 10977, Blaauwberggrandt ("the review application"). One of the Applicant's review grounds is premised on a legitimate expectation that plans in the Millrow Group Housing Development would not be approved in the absence of affording neighbours an opportunity to comment on or consent to alterations. Prior to launching the review proceedings (on 21 July 2011) the Applicants brought an application for interim relief, seeking an interdict preventing the First and Second Respondent from continuing with the building work on Erf 10977. An order granted on 21 July 2011 directed that the City should deliver a record of the proceedings sought to be reviewed, as required by Rule 53 (1) (b) by 3 August 2011.

- [2] On 4 August 2011 the City made the review record available to the Applicants. A dispute thereafter arose between the City and the Applicants as to whether certain documents had to be made available by the former. The said dispute led to the Applicants launching the present interlocutory application in terms of Rule 6 (11), seeking an order directing that the documents in question be made available in terms of the provisions of Rule 53 (1) (b). Interlocutory applications are governed by Rule 6 (11) which specifies that they may be set down at a time assigned by the Registrar or as directed by a Judge. The provisions of the rules relating to the time for filing Answering and Replying Affidavits do not apply to interlocutory applications. See *Gisman Mining and Engineering Company (Pty) Ltd (In Liquidation) v LTA Earthworks (Pty) Ltd* 1977
- (4) SA 25 (W) at 25 F-H.
- [3] The aforementioned interlocutory application was initially enrolled for hearing on 26 August 2011 but it was not heard because the City (Third Respondent) required time to file Answering papers. Although urgency appears to have been conceded even by the City it is necessary for completeness sake to mention why this matter qualifies to be heard as an urgent application. The review application itself is to be heard on 24 October 2011. Importantly, if any documentation is ordered by the Court to be delivered, that must take place within the time constraints so as to enable the examination of such documentation and a possible supplementing of the Founding Affidavit in terms of Rule 53 (4) and the necessary exchange of Affidavits between the parties. The eight Applicants all own properties which are part of the Millrow Group Housing Scheme situated in Blaauwberg. The First and Second Respondents, who also own property in the said group housing scheme, have commenced certain building construction work. The Applicants contend that the building construction work contravenes certain zoning scheme regulations and that the City, in approving the First and Second Respondents' building plans for the aforesaid construction work, acted in contravention of section 7 of the Building Standards Act and contrary to certain practices established in relation to the Millrow Scheme.

DISCUSSION

- [4] It is important from the outset that it be pointed out that Rule 53
- (1) (b) obliges the functionary in question to deliver "the record of such proceedings sought to be corrected or set aside, together with such reasons as he is by law required or desires to give or make". The city opposes the application on the basis that the record delivered is the complete record which served before the section head, Mr Benito Ivan Cogill ("Mr CogilP) on 4 July 2011, for his approval in terms of section 7 of the Building Standards Act. The City contends that what it delivered constitutes a complete record of proceedings in terms of Rule 53 and that it complied with the terms of the order granted on 21 July 2011. The city also contends that the appropriate procedure for the Applicants to have followed is to submit an access to information request in terms of the Promotion of Access to Information

Act 2 of 2000 ("Promotion of Access to Information Act"). I gather from the Answering papers that the City gave the Applicants an undertaking to expedite a request submitted in terms of the Promotion of Access to Information Act. Ms O' Sullivan prefixed her submissions as follows:

"Although a Court has a discretion to allow new matter in a replying affidavit, ordinarily a distinction must be drawn between a case in which the new material is first brought to light by the Applicants who knew of it at the time when the founding affidavit was prepared, such as the present instance, and a case in which facts alleged in the Respondent's answering affidavit revealed the existence or possible existence of further grounds for relief sought by the Applicants. It is submitted that it is only in the latter instance that a Court would permit an Application to enlarge upon what has been revealed by the Respondent. (Shakot investments (Pty) Ltd v town Council of the Borough of Stanger 1976 (2) SA 701 (D)). It is submitted that the Court ought not to permit the Applicants in casu to make out their case in reply, where no such case was advanced in the founding affidavit, in circumstances where all the facts contained in the replying affidavit ought to have been known to the Applicants at the time at which the founding affidavit was delivered."

[5] It is important to have regard to what is contended by David Charles Bettsworth, an ex-employee of the City who filed an Affidavit in support of this interlocutory application. It is also important to bear in mind that the City contends differently. According to the City in order to consider an application for zoning clearance, the present practice in the City is that the relevant official considers the zoning of the Erf in terms of the information available at the front desk, being the professional planning zoning viewer which contains zoning maps and aerial photographs. Additionally (the City further contends) if the Integrated Planning

Operational System reflects a previous land use application, then the history of the property would be searched. What further emerges from the Answering papers is that the title deed of the property in question is also considered to determine restrictive conditions or possible membership of a home association. According to Mathysen (deponent of the Answering Affidavit) all that could be found in the title deed was the following:

"The owner of this erf shall not make any alterations, additions or demolitions to any part of the buildings erected on the property including boundary walls and fences, and he shall not change the external colours scheme or materials of such buildings without the written consent of the Local Authority".

[6] One Clifford James Marks made a recommendation to the City in terms of section 6 (1) of the Building Standard Act. In this regard it is maintained that Marks considered the fact that the erven was part of a group housing scheme. He attended a site inspection on 27 June 2011 and was aware that the Erf formed part of a group housing development and was on smaller than conventional erven, when he made his recommendations to the City. It is not my intention to dwell much on the content of the papers. But it suffices probably, to mention that the City denies that the files now sought as part of the record were considered by the

relevant officials and consequently it contends that they do not form part of the review record. The Applicants claim that the additional documents ought to have been considered when the decision to approve the plans was made *inter alia* on the basis of an e-mail query sent in October 2010 to officials. The City, on the other hand maintains that the e-mail in question did not form part of the record of decision and that the officials concerned were not involved in assessment of the building plan.

- [7] The onus in the instant application are on the Applicants. They must satisfy this Court on a balance of probabilities that the City is obliged to produce the documents in question on the basis that they form part of the review record. In *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999

- (2) SA 279 (T) at 317 E- H the Court *inter alia* held as follows:

"It is well established law that Courts are reluctant to go behind a discovery affidavit which is *prima facie* taken to be conclusive. In *Marais v Lombard* 1958 (4) SA 224 E at 227 G it was held that 'When a party making discovery has sworn an affidavit as to the irrelevancy of certain documents, the Court will not reject that affidavit unless a probability is shown to exist that the deponent is

either mistaken or false in his assertion.' In

Continental Ore v Highveld Steel & Vanadium Ltd (*supra*) the following was held at 597 E-H

'It has further been held in a series of cases before the enactment of the present Rules that when a party to an action refuses to make discovery of or to produce for inspection any documents on the ground that they are not relevant to the dispute, the Court is not entitled to go behind the oath of that party unless reasonably satisfied that the denial of relevancy is incorrect. *Caravan Cinemas (Pty) Ltd v London Film Productions* 1951 (3) SA 671 (W), per Murray J, at 675-7. '"

The limitation of the material is of course subject to an exception. The conclusiveness of a discovery affidavit can be challenged where *mala fides* is shown. The limitation challenge must be weighed up against the delay and costs. Ms O'Sullivan's submission is that there is a dispute of fact in this regard and seeing that the Applicants seek final procedural relief in relation to the composition and extent of the review record without having asked for a referral to oral evidence, this Court must follow the rule enunciated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984

- (3) SA 623 (A). Ms O'Sullivan also submitted that seeing that building plans may not be copied without the written consent of the copyright holder, if compelled to deliver them, the City will have to obtain consents of the owners of the copyright of the plans in question.
- [8] In truth, the record to be delivered is only that portion of the record relevant to the review proceedings in question although it must be borne in mind that the Constitutional obligation to give reasons for administrative decisions, plays a role in determining

what the relevant evidential material is to be disclosed by the functionary. See *Ekuphumuleni Resort v Gambling Board, Eastern Cape and Others* 2010

(1) SA 228 (ECD). Mr Oosthuizen submitted that, as in the case in implementing the rules pertaining to discovery, the relevance of a document is to be determined from the issues in dispute as appearing from the pleadings and from the nature of the case or the documents in issue. I agree with this submission. I was referred to *Webster v Webster* 1992

(3) SA 729 ECD at 734 A where the following formulation appears: "What is of importance, however, is the obvious inadequacy of the discovery. While the Court will not go behind the contents of a discovery affidavit, such affidavit is not conclusive. If from the pleadings and the nature of the case the Court regards it as probable that the party making discovery has other relevant and disclosable documents in his possession, it may order production

thereof. *Rellams (Pty) Ltd v James Brown & Homer Ltd* 1983 (1) SA 556 (N)". In *Greenberg v Pearson and Another* 1994

(3) SA 264 (W) at 268 B- 269 B Van Schalkwyk J is on record thus:

"To this Mr Price responds by saying that the very issue for determination by the trial Court is the alleged infringement of copyright. The determination of that issue will require evidence, and above all documents. The plaintiff should not now be thwarted in the prosecution of its case by being denied access to the documents it will require to prove its case. The second defendant's assertion that the documents are not relevant is not, according to Mr Price, conclusive. *Rellams (Pty) Ltd v James Brown & Hamer Ltd* 1983 (1) SA 556 (N). " " (underlining is my own)

In *Rellams (Pty) Ltd v James Brown & Hamer Ltd* supra Van Heerden J

remarked inter alia as follows at 560 G:

"...After an examination and consideration of the recognised sources as well as the pleadings and the nature of the case the Court may come to the conclusion that the party making discovery in all probability has other relevant and disclosable documents in his possession or power and may order further and better discovery or production in conflict with the claim in the affidavit. *Herbstein and Van Winsen* (supra at 410) and *Lenz Township Co (Pty) Ltd v Munnick and Others* 1959 (4) SA 567 (T)."

I fully associate myself with these above quoted sentiments.

[9] The Review application (if one has regard to the Founding Affidavit) advances a number of grounds. One of such grounds is that the Applicant have always had a legitimate expectation that plans for alterations of the dwellings in Millrow would not be approved by the City unless the established practice of notifying the neighbouring owners of the proposed building work had been followed. Regard being had to the aforementioned ground, then documents proving or disproving the existence of such established practice are a relevant part of the record to be produced by the City. Clearly I am in agreement that the record of

the proceedings sought to be reviewed would therefore consist not only of the building plans submitted by the First and Second Respondents, but also of documents relevant to the established practice allowed and relied on by the Applicants. The point is that if one of the grounds of review is alleged to be that the functionary did not adhere to a previously established practice, then the documentation which shows that such practice existed (or did not exist) is clearly a relevant part of the record, I would imagine. There is no dispute that the wanted documents are in the City's possession. I would understand probably if the City raises privacy or public policy considerations (for example those relating to medical records or school results) against the documents being made available. The City does not do so.

[10] Ms Mathysen (deponent to the Answering Affidavit) avers that she examined files pertaining to previous renovations. According to her in respect of certain renovations dealt with in the files she has examined "no consents from neighbours were obtained. In this regard Mr Oosthuizen's contention cannot be faulted. He contended that if Ms Mathysen found it necessary to examine these files in relation to the question of whether an established practice exists, there is no conceivable basis on which the files should not be made available to the Court and the other parties. Why should the other parties be content with Ms Mathysen's account of what she saw in these files? Why should the other parties not be afforded an opportunity of examining these files themselves? What I also fail to comprehend, is the City's preparedness to make these documents available to the Applicants in the event that the latter requests to access the files in terms of the Promotion of Access to Information Act. Why should the Applicants follow a long route? In my view, it is unfair and unreasonable that the City should expect that the other parties should forego their right to be heard speedily and await delivery of the documents when the City finds it convenient to itself to make them available? I only hope and trust that the City is not being obstructive in this regard.

I am told that the City suggested the use of the Promotion to Access of Information Act as a vehicle to be used to ensure that the documents reach the Applicants rather too late quite a number of days after the launching of the interlocutory application. Why complicating a fairly straightforward procedure? I mean Rule 53 (1) does not excuse a functionary from the obligation to deliver a record simply because one of the parties might have been able to obtain the record in terms of the Promotion of Access to Information Act. The mechanism created by the Promotion of Access to Information Act may not be well suited to obtaining of access to documentation in proceedings brought as a matter of urgency. The City has had no difficulty in conceding that the building plans submitted by the First and Second Respondents relate to a unit in a group housing scheme. Clearly a group housing scheme necessarily consists of houses characterized by uniformity and harmonious appearance. In order to ascertain whether the plans approved conform to the requirements of such a group housing scheme (i.e. are of a uniform and harmonious appearance when compared with the other units in the development) the Court will have to have regard to the appearance

and dimensions of those other developments. I hold that the town planning and building files pertaining to such other developments

must necessarily constitute a part of the record. The contention that the documents sought in this interlocutory application are subject to their onus copyrights and their concerns are therefore obligatory, does not hold water. It is important to note that these documents are needed for judicial proceedings and will not therefore be subject to anybody's copyright. The above represents my reasons for the order I made on 12 September 2011 which for purposes of completeness I repeat infra.

ORDER:

- (a) An order is hereby granted that the Third Respondent complies with the provisions of Rule 53 (1) (b) and must deliver to the Registrar of this Court within three (3) days of the date of this order, the following documents:
 - (i) The original building plan files for all erven in the Millrow Development;
 - (ii) The zoning map pertaining to the Millrow Development;
 - (iii) The Town Planning files pertaining to the Millrow Development;
 - (iv) Correspondence pertaining to approvals in the Millrow Development;
 - (v) Record of all previous applications for plan approval made in respect of all erven in the Millrow Development.
- (b) The Third Respondent shall pay the costs of this application.

DLODLO J

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Prepared on 12 October 2026 · Esheria