

SOUTH AFRICA / JUDGMENT

De Winnaar and Others v Viveiros and Others (3512/2019) [2020] ZAFSHC 45 (5 March 2020)

[2020] ZAFSHC 45**COURT**

Free State High Court, Bloemfontein

BEFORE

Mhlambi

CASE / FILE NUMBER

3512/2019

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA,
FREE****STATE DIVISION, BLOEMFONTEIN****Case number: 3512/2019****In****the matter between:**

CORNELIA
FLOREIN DE WINNAAR
1ST
Applicant
DAVID
KENNETH STONES
2ND
Applicant
BAREND
HENDRIK JACOBUS GROENEWALD
3RD
Applicant
and
MANUEL
DE JESUS VIVEIROS
1ST
Respondent
TERESA
MARIA JOSÉ
2ND
Respondent

MANGAUNG
METROPOLITAN MUNICIPALITY
3RD Respondent

JUDGMENT

BY:

MHLAMBI J,

HEARD ON:

05 DECEMBER 2019

DELIVERED ON:

05 MARCH 2020

MHLAMBI, J

[1] The applicants sought an interdict restraining the first and second respondents from conducting or allowing any person to conduct a business from the premises situated at 121 Albrecht Street, Dan Pienaar, Bloemfontein: described as erf 6274, Dan Pienaar, Bloemfontein. Costs were sought from both first and second respondents jointly and severally, the one paying the other to be absolved.

[2] The application is opposed by both the first and the second respondents. The third respondent elected not to oppose the application. The first and the second respondents are registered owners of the property described as erf 6274 situated at 121 Albrecht street, Dan Pienaar, Bloemfontein[1]; held in terms of title deed T3843/2011 having the following restrictive title conditions[2]:

“1. TEN GUNSTE VAN DIE ADMINISTRATEUR VAN DIE PROVINSIE VAN DIE ORANJE-VRYSTAAT:

- (a) This erf shall be used for residential purposes only, and no trade, business or industry whatsoever, shall be conducted thereon.
- (b) Not more than one dwelling house for a single family, together with the necessary outbuildings which may not be used for residential purposes other than servants’ quarters, may be erected on this erf.”

[3] The applicants contended that various businesses were conducted on the property such as the Innovape Vape Shop, De Beers Prokureurs and the MUD Make-up designory on the strength of rental agreements entered into with the first and second respondents[3], in contravention of the Bloemfontein Town Planning Scheme, 1 of 1945. It was contended furthermore that this conduct was in conflict with the restrictive title conditions of the first and second respondents’ property. The provisions of the Town Planning Scheme and the restrictive title conditions were binding on the first and second respondents as these

conditions had not been removed, amended or suspended in accordance with the applicable legislation such as the Town Planning Ordinance 9 of 1969, the Special Planning Land Use Management Act (SPLUMA), 16 of 2013 or any bylaws. The property in question was zoned as “single residential 2”, prescribing that the use of the property was limited to residential use. [4]

- [4] The respondents opposed the application and contended that the addresses of the applicants’ properties are between 500 metres to a kilometre away from theirs. They denied that the first and second respondents conducted a business from the respondents’ property or allowed third parties to conduct business therefrom. The first and second respondents rented out the property to the tenants or third parties who conducted their various business therefrom. Any legal steps or proceedings should be directed or taken against the said tenants and not against the first and second respondents. The applicants had therefore failed to join such users of the property/ businesses and/ or their employees in these proceedings.
- [5] The respondents contended that the applicants did not have the locus standi to enforce the Town Planning Scheme (which they alleged to be invalid) as that function was the responsibility of the third respondent,

whose duty was to promote the area’s economic growth and development. Consequently, the applicants could not usurp this function and institute legal proceedings on its behalf. Albrecht Street did not have a residential character and the suburb’s

character was not affected by the businesses being conducted from the said property. Furthermore, the first and second applicants could institute a criminal prosecution against the first and second respondents for transgressing the municipal bylaws. Secondly, the third respondent’s intervention could be sought in that, the latter, if it had reasonable grounds to suspect that a person

contravened section 89[5], could serve a compliance notice which would instruct the occupier or owner of a property to cease such activity.

- [6] The applicants should have followed the said steps as they constituted suitable alternative remedies which would have yielded the appropriate relief. In those circumstances, the applicants should not have persued the urgent application route.
- [7] The respondents identified three main issues for determination, namely:
1. Whether the respondents’ conduct in allowing other persons to conduct a business from their premises justified an order granting an interdict against them in terms of prayer 1 of the notice of motion.
 2. Whether the applicants have the necessary locus standi to bring this application;

3. Whether the applicants have established the third requirement for a final interdict namely, that they have no other satisfactory remedy available to them other than the interdict.
- [8] Whether the respondents' conduct in allowing others to conduct business on the property justified the granting of a final interdict

The respondents pointed out that they only rented out their premises at 121 Albrecht Street and did not "allow" businesses to conduct business thereon. If the applicants sought interdicts against the businesses conducted at 121 Albrecht Street, they should have done so directly against those firms, as the respondents could not be prevented or be interdicted from renting out their registered property at 121 Albrecht Street, Dan Pienaar, Bloemfontein. The applicants therefore failed to make out a case against the respondents as the latter never conducted businesses on the premises as alleged.

- [9] During argument, Mr Benade, who acted on behalf of the respondents, relied on the provisions of sections 88 to 95 (parts of Chapter 8) of The Municipal Land Use Planning Bylaw of the Mangaung Metropolitan Municipality. Section 89 deals with offences and penalties. Section 89(2) provides as follows:

"An owner who permits his land to be used in a manner set out in sub-section 1(c) and who does not cease that use or take reasonable steps to ensure that the use ceases, or who permits a person to bridge the provisions of a Land Use Scheme, is guilty of an offence and liable upon conviction to a fine not exceeding R 100 000.00 or imprisonment for a period not exceeding 10 years' or to both a fine and such imprisonment."

On being taxed by the bench on this provision and whether the word "permits", as contained in that section, was not equivalent to the word "allow" as used in the papers, Mr Benade conceded that he could not argue past that point. He argued that the court should take cognisance of the fact that the said sub-section created an offence. I understood him to be saying that the subsection, though crucial to the adjudication of the application, was not supportive of the applicants' case for the granting of the interdict; on the contrary, he argued that it buttressed the respondents' case in that the applicants had an alternative remedy in the form of a criminal charge which could be laid against the respondents for the contravention of that section[6]. He suggested further remedies in terms of SPLUMA and the Municipal bylaw mentioned above which, in effect, needed the participation and co-operation of the third respondent.

- [10] It is not necessary for purposes of this decision, to discuss in detail the further remedies which were suggested based on the above Act and bylaw. It is clear from the papers and the respondents' arguments that it is not in dispute, and is indeed common cause, that the property in question is a dwelling house which has not being rezoned and whose title deed prohibited its use for business purposes. As it is nowhere indicated in the respondents' papers that the restrictive title conditions were removed, the renting out of the property to third parties who utilise the property for business purposes, is in conflict of such restrictive conditions. The argument that renting out the property is not equivalent to allowing or permitting third parties to act contrary to the law is without substance. The dictionary

meaning of the verb “allow” is to approve of, sanction; accept, acknowledge, permit, let someone have or do something or authorize[7]. The respondents’ conduct, in my mind, falls squarely within this definition.

[11] Locus Standi

It was contended on behalf of the respondents that the applicants’ assertion of having locus standi, was simply based on their addresses being within Dan Pienaar, Bloemfontein. The respondents maintained that the applicants lived far away from 121 Albrecht Street, Dan Pienaar. They were therefore not living in close proximity of this latter address or property. On this ground alone, the applicants’ locus standi was dubious and they could therefore not seek interdictory relief against the respondents. I was referred in this regard to the following passage in *Intercape Ferreira Mainliner vs. Minister of Home Affairs*[8]: “The immediate neighbours have a special interest, as an affected class in upholding the zoning scheme”. The reference to this case does not, in my view, assist the respondents’ case in any way as is shown below.

The applicable law

[12] In *Intercape Ferreira Mainliner*, supra, paragraph 135 of the said case reads as follows:

“[135] It has been the consistent view of our courts that town planning and zoning restrictions are enacted in the interests of a class of persons, namely the residents of the area, and that such residents thus have standing to interdict violations without proof of actual harm. For the decisions in this court which accord with this approach, see BEF (Pty) Ltd v Cape Town Municipality and Others 1983

- (2) SA 387 (C) at 400D - 401H; *Esterhuyse v Jan Jooste Family Trust and Another* 1998
 - (4) SA 241 (C) at 252C - 254D; *Hayes and Another v Minister of Finance and Development Planning, Western Cape, and Others* 2003
 - (4) SA 598 (C) at 623D - E; *Tergniet and Toekoms Action Group and Others v Outeniqua Kreosootpale (Pty) Ltd and Others* (CPD case No 10083/2008, 23 January 2009).” (underlining my emphasis). In *Independent Outdoor Media (Pty) Ltd v City of Cape Town*[9] the view was expressed that there is no reason why an interdict should not be granted in the face of a breach of a bylaw even if a criminal prosecution may follow upon an offender being guilty of unlawful conduct.
- [13] In two similar cases in this Division[10], the legal position set out above was emphasised and confirmed; that breach of zoning provisions constituted a sufficient injury to qualify as sufficient injury or harm to justify the granting of a final interdict. In such situations, there is no alternative relief applicable or reasonably available to the applicants. The only effective remedy would be an interdict. It is therefore obvious that the applicants do have the necessary locus standi to seek interdictory relief against the respondents.

[14] Alternative remedy

In the light of the above authorities and the remarks I made above, I am of the view that the respondents' arguments in respect of the availability of alternative remedies to the applicants, based on SPLUMA and the bylaw, are not sound and are without substance. In my view, the application was justified and must therefore succeed.

[15] The only aspect outstanding is the question of the non-compliance with the rules in respect of the late filing of the applicants' reply. It is not necessary to deal with this aspect as I agree with Mr Benade, who did not persist in the opposition of the condonation application and was also of the view that the success or not thereof would not affect the outcome of the decision in this application. Besides, it was not relevant to the points in issue.

[16] The case of CF DE Winnaar & Others/ PC Lotter & Others (Case Number 3633/2019), the facts of which are of the same exact nature as this one, served before me. By agreement between the parties, I was requested to adjudicate the matters simultaneously and that the judgment in the one, will be applicable to the other. I grant this request.

[18] It is trite that the successful party is entitled to the award of costs.

[17] The following order is granted:

1. The first and second respondents are interdicted and restrained from conducting or allowing any other person to conduct a business from the premises situated at 121 Albrecht Street, Dan Pienaar, Bloemfontein described as Erf 6274, Dan Pienaar, Bloemfontein;
2. The first and second respondents are ordered, jointly and severally, to pay the costs of this application, the one paying the other to be absolved.
3. The above judgment and order is applicable to Case Number 3633/2019.

MHLAMBI, J

Counsel for the Applicant: Adv. R. Van der Merwe

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Instructed by:

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Dan Pienaar

- [1] Paragraph 3.3 on page 10 of the founding affidavit
- [2] Page 30 of the founding affidavit
- [3] Paragraph 7.2 on page 62 of the opposing affidavit
- [4] Paragraph 7.7 on page 15 of the founding affidavit
- [5] See para 9 below
- [6] See also the Applicants' heads of argument para 4.5
- [7] The New Shorter Oxford English Dictionary.
- [8] 2010 (5) SA 367 (WCC) at 401 B
- [9][9] 2013 2 All SA 679 (SCA); Chapman's Peak Hotel v O'Hagan's 2001 (4) All SA 415 (C) at para 18
- [10] Cornelia F DE Winnaar & 2 Others v Mark Semple & 2 Others Case no. 2825/2019 as per Jordaan J and Gillian McKay and 2 Others v Ursiweb (Proprietary) Ltd & 2 Others Case 3510/2019 as per Mathebula J

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Prepared on 10 October 2026 · Esheria