

SOUTH AFRICA / JUDGMENT

Du Plessis v Labuschagne and Others (3799/2016) [2017] ZAFSHC 24 (16 February 2017) [2017] ZAFSHC 24

COURT

Free State High Court, Bloemfontein

BEFORE

Nicholson, AJ

CASE / FILE NUMBER

3799/2016

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IN

THE HIGH

COURT OF SOUTH AFRICA,

FREE

STATE DIVISION,

BLOEMFONTEIN

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Case

number: 3799/2016

In the

matter between:

THERESA

DU

PLESSIS

Applicant

and

DIRK

MALAN

LABUSCHAGNE

1st

Respondent

ELMA

YORK 2nd

Respondent

(In their

capacities as partners of L & V Attorneys)

CHRISTINA

JACOBA

FENWICK
3rd Respondent
MANGAUNG
METROPOLITAN
MUNICIPALITY
4th Respondent

CORAM: NICHOLSON, AJ
HEARD

ON: 16 FEBRUARY 2017

JUDGMENT

BY: NICHOLSON, AJ

DELIVERED ON: 16 FEBRUARY 2017

REASONS

- [1] The applicant in this matter seeks a final prohibitory interdict against the first and second respondents, restraining them from operating an attorney's practice from the property situated at 76 Paul Roux Street, Dan Pienaar, Bloemfontein (the property) in contravention of the conditions of the Title Deed to the property and the Bloemfontein Town Planning Scheme (the Scheme) read together with Townships Ordinance 9 of 1969 (the Ordinance). In terms of both the Scheme and the Title Deed to the property, the property may only be used for Single Residential 2 purposes, that of a dwelling. The Scheme does make provision for property owners to apply for consent use to use the property for other designated purposes (section 18 (3)(b)) but, first and second respondents have not yet made use of the route provided to obtain the requisite consent use.
- [2] As a final interdict is a drastic measure that resolves the matter between the parties, the applicant must prove the following in order to succeed with her application:
1. That she has a clear right;
 2. That an injury or damage is actually committed or that there is a reasonable apprehension of an injury or harm; and
 3. There is no other satisfactory remedy available to her. (Erasmus Superior Court Practice 2nd edition vol 2 D6-12)
- [3] The Court is satisfied that the applicant has established her locus standi in the matter and that, as a property owner of a neighbouring property, she has a clear interest in this matter. (Pick 'n Pay Stores and Others v Teazers Comedy and Revue CC [2002] 3 All SA 147 (W) at 154).

- [4] The court is also satisfied that the applicant has established the reasonable apprehension of harm. She has clearly indicated that she purchased her property in what is predominantly a residential area, with a reasonable expectation that she would enjoy the amenities offered by such a zoning. The fact that a plethora of businesses, offices and home industries are now operated from properties in the area does not diminish her right to expect that the owners of such properties will be required to apply for the appropriate consent use. That other property owners are using their properties for various purposes, either with or without having first obtained the requisite consent use, does not excuse the first and second respondents from their legal obligations with regards to the use of their property. In other words, that the applicant may already be suffering the harm she now apprehends, as a consequence of the behaviour of other property owners, does not excuse the respondent's unlawful behaviour. The applicant is within her rights to attempt to preserve the amenities that she fears the continued growth of such property use in the area will further erode.
- [5] Furthermore, by their own admission, first and second respondents are aware that they lack the requisite consent use to operate their legal practice from the property. Whether the legal practice of L & V Attorneys is referred to as an "office" or as a "Business" makes no difference to the substance of the Applicant's claim that the first and second respondents are using the property in contravention of the applicable zoning and Title Deed restrictions. Respondents are required, in terms of section 3 of the Scheme, to comply with the conditions registered against the property unless these have been properly amended. The first and second respondents have, on their own admission, not yet sought such amendment.
- [6] The third requirement that the applicant must meet in order to succeed with her application however, requires some deeper consideration. The first and second respondent have argued that the Supreme Court of Appeal decision in *Food and Allied Worker's Union v Scandia Delicatessen CC* [2001] 3 All SA 342 (A) (Scandia) binds this court to dismiss the application in circumstances where a suitable alternative remedy is available to the applicant. In other words, the applicant must show cause why, in circumstances in which an alternative remedy exists, this remedy will not be satisfactory.
- [7] Scandia related to a matter in which a criminal prosecution was an alternative to the order sought and the court pronounced that there was no evidence before the court that said remedy would not satisfy the needs of the appellant in that case. Respondents argue, that by analogy, the interdict should, in this case, be dismissed on the basis that section 41 of the Ordinance provides for the prosecution of persons in breach of the Scheme. Furthermore, they aver that the applicant has, on her own papers, acknowledged that she was aware that the first and second respondent's use of the property for the running of their legal practice constitutes an offence. She offered no reasons why this remedy would not be satisfactory. First and second respondents would thus motivate that the applicant must stand or fall on the affidavits filed and thus, as there is a clear alternative remedy available to the applicant, and in the absence of any indication why it is not adequate in the present case, the court is bound by Scandia and must dismiss the application for a final interdict with costs.

- [8] First and second respondents only raised this issue in the court on 9 February 2017 and applicant was thus granted an opportunity to supplement her arguments by way of supplementary heads of argument, to which the first and second respondents were given an opportunity to respond. These heads have been carefully scrutinised as has the various authority submitted by counsel in their Heads.
- [9] Scandia is authority for the view that criminal prosecution may be a suitable alternative remedy in appropriate cases but, as was pointed out by Rogers J in *Berg River Municipality v Zelphi* 2013 (4) SA 154 at par [47], this will not always be the case. And thus the court must assess its suitability as an adequate remedy. The Court in *Berg River* took the view that a criminal remedy is not an "ordinary remedy". Par [47] Furthermore, the Court found that it also did

not offer the individual similar relief to that of an interdict.

- [10] The court in *Berg River* emphasised that interdicts are the usual means by which municipalities enforce zoning schemes and restrictions. (par [48]) Certainly, the SCA in *Outdoor Media (Pty) Ltd v City of Cape Town* [2013] ZASCA 46 upheld the view that a criminal remedy was not a satisfactory alternative to an interdict preventing the unlawful displaying of advertising signs. It must be acknowledged, however, that in that case, past experience evidenced that criminal sanctions in such cases have been ineffectual. Par [35].
- [11] In conclusion, the court finds that in the present case, the criminal sanction provided in terms of section 41 of the Ordinance does not constitute an appropriate alternative remedy. The applicant is attempting to secure the immediate cessation of the unlawful use of the property and the criminal penalties offered by the ordinance would, it is believed, do little to deter the respondents. Criminal prosecution is at the discretion of the State and serves to punish past misconduct. To allow the respondents, in their capacities as partners in L & V attorneys to pay a fine and continue with their behaviour would be to undermine the Municipality's zoning regulations and allow

the respondents to continue unlawful behaviour until such time as their unlawful use is made lawful.

- [12] Suspension of interdicts restraining unlawful land use may well create an invitation to the public to use land illegally in the hope that the use will be legalised in due course and thus effectively protect such unlawful usage. The court appreciates that the granting of an interdict restraining the first and second respondents would effectively prevent L & V Attorneys from conducting their business. As lawyers, first and second respondent should have considered that possibility when

they embarked on using the property for a purpose for which it is not zoned. That said, the court has considered the submissions of the first and second respondent in this regard.

ORDER:

[13] For the above reasons, and after careful consideration of the papers and arguments presented to the court, the court orders that:

1. The applicant's application for an interdict restraining the first and second respondents from operating a legal practice from the property is granted.
2. The operation of the interdict is suspended until 1 April 2017 to allow the first and second respondents time to secure alternative premises from which to operate their legal practice until such time as the requisite consent use is obtained.
3. The Fourth respondent is ordered to monitor the use of the property to ensure that it is in compliance with the scheme and to take such steps as may be necessary to enforce usage in terms of the Scheme.
4. First and second respondents to pay the party and party costs of this application.

C. NICHOLSON, AJ

On behalf of applicant: M. Volschenk

Instructed by:

Phatshoane Henney Inc.

Bloemfontein

On behalf of 1st & 2nd respondents: D.M. Labuschagne

Instructed by:

L & V Attorneys

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