

SOUTH AFRICA / JUDGMENT

Georgiou t/a Georgiou Spa v Nelson Mandela Bay Metropolitan Municipality (CA26/2016) [2017] ZAECHGC 1 (17 January 2017)

[2017] ZAECHGC 1

COURT

Eastern Cape High Court, Grahamstown

BEFORE

C Plasket, J Roberson, M Lowe

CASE / FILE NUMBER

CA26/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, GRAHAMSTOWN

Case no. CA 26/2016

Date heard: 12/12/16

Date delivered:

17/1/17

Not

reportable

In

the matter between:

YVETTE

GEORGIOU t/a GEORGIOU SPA

APPELLANT

and

NELSON

MANDELA BAY METROPOLITAN MUNICIPALITY

RESPONDENT

JUDGMENT

PLASKET, J:

- [1] This is an appeal against an order granted by Makaula J sitting in the Eastern Cape High Court, Port Elizabeth in which he: (a) interdicted the appellant, Ms Yvette Georgiou, from using her property situated at [...] K. K. Road (Erf [...]) Lorraine, Port Elizabeth ‘as a health spa or in any other way contravening the existing Residential 1 zoning application to such Erf’; (b) interdicted her from using her property ‘for any purpose other than a guesthouse, residential building and dwelling house for so long as the property is zoned Residential 1 in terms of Table A of the Port Elizabeth Zoning Scheme Regulations’; and (c) directing her to pay the costs of the respondent in this appeal, the Nelson Mandela Bay Metropolitan Municipality (the Metro). Makaula J granted leave to appeal to this court.
- [2] Two issues arise for determination, one procedural and the other substantive. In the first instance, Ms Georgiou has applied for condonation for the late filing of the notice of prosecution of the appeal and the record, and the consequent extension of time for their delivery, as well as an order re-instating the appeal. This application is opposed by the Metro. The second, substantive, issue concerns the merits of the appeal.

The

facts

- [3] Ms Georgiou is the owner of the property. Its uses are governed by the Port Elizabeth Zoning Scheme Regulations, a zoning scheme as contemplated by chapter II of the Land Use Planning Ordinance 15 of 1985 (LUPO). Section 39(1)(b) of LUPO imposes an obligation on the Metro and other local governments to enforce compliance with zoning schemes.
- [4] The property is zoned Residential 1 in terms of the Zoning Scheme Regulations. That means that its primary use is as a residential building and dwelling house. Certain secondary uses are permitted but these require the consent of the Metro.
- [5] In March 2009 the Metro received an application from a firm called Peter Hickman and Associates, acting on behalf of Ms Georgiou, for special consent for a guest house and health spa to be operated on the property.
- [6] When the property was inspected on 6 August 2010 for purposes of the application, it was found that notwithstanding the pending application, the property was already being used as a guest house and spa.

- [7] The application was duly considered by the Metro and, on 30 August 2010, Ms Georgiou was informed, through Peter Hickman and Associates, that the application for special consent to operate the guesthouse had been conditionally granted but the application in respect of the spa had been refused. Two of the conditions for the special consent in respect of the guest house bear mention: first, it was a condition that ‘a maximum of 4 guest bedrooms/suites’ were permitted ‘to be used for the accommodation of overnight guest[s]’; and secondly, that ‘the owner be instructed to desist from operating the illegal SPA activity on the said premises’.
- [8] By letter dated 20 September 2010, Peter Hickman and Associates appealed internally against the refusal of special consent in respect of the spa. The appeal was dismissed on 2 May 2012.
- [9] Throughout this period, it would appear, and to the present, Ms Georgiou has continued to operate the spa. She does so in the face of the refusal of her application for special consent. That is common cause. She has never taken the decision to refuse special consent on review.
- [10] She has been warned that her operation of the spa is unlawful and has been put to terms: by letter dated 23 May 2013, for instance, the Metro’s Acting Executive Director: Human Settlements wrote to Ms Georgiou. The letter stated that ‘[y]ou are hereby called upon to, within a period of 14 days of this notice, cease the alleged illegal use of the property’ and that, should she fail to comply with this demand, ‘legal action will be instituted against you at your cost’.
- [11] On 3 June 2013, the Metro’s attorneys sent a letter to Ms Georgiou in which they demanded that she cease the unlawful use of her property ‘failing which our instructions are to launch interdict proceedings against you in the High Court and to seek an Attorney/Client costs order against you’.
- [12] This letter was followed by contact between an attorney representing Ms Georgiou and the Metro’s attorneys but no undertaking was given that Ms Georgiou would desist from operating the spa. The attorney who had approached the Metro’s attorneys had proposed an on-site inspection which would, he suggested, establish that the spa was only used for the benefit of guests of the guesthouse and that it did not offer its services to the public at large. (It was suggested by Ms Georgiou in her answering affidavit that her attorney had misunderstood her instructions, but that is of little moment for present purposes.)
- [13] The Metro’s attorneys responded by letter dated 13 August 2013 in which they said:
- ‘2 Our instructions remain that notwithstanding our client’s refusal of special consent for a health spa, your client has no intention of ceasing the unlawful use.

3 More pertinently, on Sunday, 9th June 2013, Radio Algoa published an advertisement procured by your client advertising the services of the spa to members of the public in contravention of the Zoning Scheme Regulations and contrary to your telephonic discussion with our Ms Natalie Marais on the 23rd July 2013 that your client has never conducted such business unlawfully.

4 An inspection of the property will accordingly serve no purpose and our instructions are to proceed with interdict proceedings unless we receive an undertaking in writing by your client that the services of the spa will immediately cease and that all related advertising will cease immediately.’

[14] It is common cause that no undertaking was given and the Metro duly launched its application to interdict the unlawful use of the property. In due course, an order, in the terms set out in paragraph 1 above, was granted by Makaula J.

Condonation

[15] Rule 27(3) of the uniform rules grants to courts the discretion to condone, on good cause being shown, any non-compliance with the rules. In *Van Wyk v Unitas Hospital & another (Open Democratic Advice Office as amicus curiae)*[1] the Constitutional Court summarised the approach that courts should take to applications for condonation:

‘This court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success.’

[16] The explanation given for the delay is not entirely satisfactory. I am also not convinced as to Ms Georgiou’s prospects of success. Despite these drawbacks, however, I am of the view that when the facts and circumstances are viewed holistically, it is in the interests of justice to grant condonation. The issues that arise on the merits are important and it is important, in particular, that clarity be given on the interpretation of regulation 3.11 of the Zoning Scheme Regulations. Furthermore, this matter has dragged on since 2013, the application for special consent having been made in March 2009. It is in the interests of justice to deal with it on its merits, rather than on a procedural basis which would simply have the matter struck from the roll with the potential of being revived. I also can detect no prejudice on the part of the Metro.

[17] In short, it seems to me that it is in the public interest that condonation be granted so that finality may be achieved. Because

condonation has been granted in the face of the shortcomings in the explanation for the delay, I consider it equitable that each party pay their own costs of the application for condonation.

The merits

[18] Ms Georgiou asserts that, despite the fact that the Metro has explicitly granted consent to operate the guesthouse subject to her not operating a spa and explicitly refused consent to operate the spa, she may lawfully do both. She relies on reg 3.11 of the Zoning Scheme Regulations as the source of her right to operate the spa, despite the refusal of special consent.

[19] Whether Ms Georgiou is correct or not depends on the interpretation of reg 3.11. The proper approach to the interpretation of documents, whether statutes, contracts or other documents (such as patents), was dealt with by Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality*,^[2] in which he said:

‘The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The “inevitable point of departure is the language of the provision itself”, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.’

[20] The Zoning Scheme Regulations are part of a larger body of statutory laws that are aimed at achieving orderly and rational development of land and land use in the Metro’s area of jurisdiction so as to achieve a proper balance, in the public interest, between the competing rights and interests of residents.

[21] The purpose of Part III of the Zoning Scheme Regulations, of which reg 3.11 is a component, is to determine use zones and uses to which property in those zones may be put. Other Parts of the Zoning Scheme Regulations concern development parameters – the determination of ‘the density of development, the maximum coverage of buildings, the maximum height of buildings, the minimum building lines along streets and the minimum side and rear spaces between buildings and boundaries’;^[3] the subdivision of land;^[4] and general amenity and convenience.^[5]

[22] Regulation 3.11 allows for the practice of a profession or occupation from home. Regulation 3.11.1 provides:

‘3.11.1 Notwithstanding the provisions of this part of the Scheme, it shall be permissible at the pleasure of the Council, for not more than one resident of a dwelling unit to practice a profession or occupation from such dwelling unit; provided that such profession or occupation, which for the purposes of this subregulation excludes a shop, industry or noxious use:-

(i) is clearly secondary to the use of the dwelling unit for dwelling purposes and does not change the residential character of the

dwelling unit or erf in any manner when seen from the outside of the property;

(ii) does not, in the opinion of the Council, interfere with the amenity of the area by virtue of noise, vibration, odour, smoke or fumes emission, or unsightly conditions;

(iii) creates no interference with radio or television reception in the immediate vicinity of the dwelling unit;

(iv) does not include the employment, or taking into partnership, of more than two persons on the premises of the dwelling unit; provided that the assembly of persons on the premises for employment elsewhere shall constitute the employment, or taking into partnership, of such persons on the premises of the dwelling unit;

(v) does not involve the public display of goods, whether in a window or otherwise, or the exhibition of any sign other than a notice or sign not exceeding 0,08 square metre in area, ordinarily exhibited on dwelling houses to indicate the name and profession or occupation of the resident;

(vi) occupies no more than a minor part of the floor area of the buildings on the erf;

(vii) does not involve the regular parking or storing on the premises of any vehicle used for the transporting of goods, materials or passengers for hire or reward, other than the vehicle required for the personal use of the resident in connection with the practice of his profession or occupation;

(viii) does not create a volume of traffic inconsistent with the level of traffic on the street on which the dwelling unit is located;

(ix) does not absolve the resident from complying with the Council’s by-law or other regulations.’

[23] Regulation 3.11.2 empowers the Metro to ‘impose conditions in addition to those contained in the proviso to subregulation 3.11.1 if, in its sole discretion, it deems the imposition of such additional conditions to be necessary’. Regulation 3.11.3

provides that non-compliance with a reg 3.11.1 or reg 3.11.2 condition 'shall constitute a contravention of these regulations'. Regulation 3.11.4 makes special provision for the running of a shop on a dwelling unit. It states that the 'Council may upon application' consent to such use but that it is automatically subject to the conditions that form part of reg 3.11.1 and that the person wishing to apply for consent to run a shop must serve written notice on his or her neighbours, which shall contain

full details of the proposed business.

[24] It is clear from the papers that the reg 3.11 defence is an afterthought on the part of Ms Georgiou. She set up and began to

operate the spa before she applied for special consent. If she had relied from the outset on reg 3.11, I cannot imagine why she would have applied for special consent and why, when the special consent was refused, she took the refusal on internal appeal. Even after this she continued to operate the spa in open defiance of the Metro and in contempt of the rights of her neighbours. At no stage did she as much as hint that she was entitled to operate the spa in terms of reg 3.11 despite the Metro having refused her consent to do so and having imposed a condition for the operation of the guesthouse that 'the owner be instructed to desist from operating the illegal SPA activity on the said premises'.

[25] I have some difficulty with the idea that despite the Metro having applied its mind to the operation of the spa, and having decided against granting consent for that use, reg 3.11 would nonetheless allow it. I do not intend deciding this issue because, in my view, the appeal can be dealt with on the basis of an interpretation of reg 3.11.

[26] It was argued by Mr van der Linde who appeared for Ms Georgiou that reg 3.11 allows any resident of a dwelling unit to operate a business from home without notice or application to the Metro. That, he contends is precisely what Ms Georgiou did. In my view, two difficulties arise.

[27] First, the scheme contemplated by reg 3.11 is an exception to the regime put in place by the rest of Part III of the Zoning Scheme Regulations and for this reason, no doubt, is 'permissible at the pleasure of the Council' and hemmed in by various other conditions. The 'pleasure of the Council' denotes a wide, but not unfettered, discretion on the part of the Council.[6] It presupposes knowledge on the part of the Council: it must be in a position to form a view as to whether to tolerate the secondary use of a dwelling unit for the operation of a profession or occupation.

[28] In other words, reg 3.11 contemplates that the Metro must be informed, in advance, by the resident concerned of his or her plans to use his or her dwelling unit for professional or occupational purposes. The interpretation contended for by Mr van der Linde, that residents can, in terms of reg 3.11, simply set up practices or businesses at their homes while the Metro remains ignorant of this fact and its impact, would render reg 3.11.1(ii), for example, superfluous and meaningless: the practice of a profession or occupation from

home may be allowed if, in addition to the ‘pleasure of the Council’, the business or occupation ‘does not, in the opinion of the Council, interfere with the amenity of the area by virtue of noise, vibration, odour, smoke or fumes emission, or unsightly conditions’. How could the council form the requisite opinion as to the effect on the amenity of the area if a resident does not have to inform it of his or her plans to practice his or her profession or occupation from home?

[29] This interpretation is further strengthened by reg 3.11.2 which empowers the council to impose conditions on the use of the property if, in its ‘sole discretion’, it deems particular conditions necessary; and reg 3.11.4 which imposes additional

obligations, including the notification of neighbours, on a person wishing to practice the occupation of shopkeeper from his or her home. Both clearly contemplate prior knowledge of the planned profession or occupation.

[30] No procedure is specified in the Zoning Scheme Regulations for a reg 3.11 ‘application for consent’. It is not necessary or desirable for this court to express a view on what shape or form that procedure could or should take. That is for the Metro and not the court to determine. Whatever form the notification to the Council may take, it must contain sufficient information to enable the Council to decide whether the proposed secondary use is permissible at its pleasure, will not interfere with the amenity of the area, does not fall foul of any of the other provisos, and should or should not be subject to further conditions.

[31] The second reason why reg 3.11 cannot avail Ms Georgiou is that it only applies to secondary uses. In terms of reg 3.11.1(i), a profession or occupation may only be practiced from a person’s home if it ‘is clearly secondary to the use of the dwelling unit for dwelling purposes . . .’.

[32] A primary use is defined in reg 2.0 to mean ‘any building or use listed in Column 2 of Table “A” which may be erected or carried out without the consent of the Council’. A secondary use, in terms of the same regulation is ‘any building or use listed in Column 3 of Table “A” which may be erected or carried out only with the Special Consent of the Council’.

[33] Table A provides that the primary use for the use zone applicable in this matter, Residential 1, is dwelling houses. Secondary uses, which are uses ‘permitted with the Special Consent of the Council’ are the following:

‘Places of Public Worship

Places of Assembly

Places of Instruction

Institutions

Special Uses

Guest Houses'

- [34] From the above, it is apparent that the secondary use of Ms Georgiou's property is the guesthouse. That precludes the spa as a secondary use, with the result that the operation of the spa is not permitted by reg 3.11.
- [35] It was argued in the alternative that paragraph 2 of Makaula J's order is over-broad. It interdicted Ms Georgiou from using the property 'for any purpose other than a guesthouse, residential building and dwelling house for so long as the property is zoned Residential 1 in terms of Table A of the Port Elizabeth Zoning Scheme Regulations'.
- [36] The argument, as I understood it, was that the order has cast in stone the current uses, which now can never be changed. It is not suggested in the papers that Ms Georgiou may wish to establish a place of public worship or of instruction or some other permitted secondary use, in place of the guesthouse but I do not understand the order to prohibit her from applying for special consent in the event of her deciding to change the nature of her business to another use permitted by Table A. This is a sensible, contextual understanding of the order. It is, as a result, not over-broad.
- [37] For the above reasons, the appeal cannot succeed.

Costs

- [38] The Metro sought an attorney and client costs order in the court below. Instead, it was granted party and party costs. It has not cross-appealed against that order. It now seeks a costs order on an attorney and client scale in respect of the appeal because, it was argued by Mr Euijen, who appeared for the Metro, the appeal was frivolous and a tactic aimed at delay.
- [39] I have some sympathy for Mr Euijen's argument, given the history of the matter, but one problem looms large: Makaula J granted leave to appeal. He must have been satisfied that there were reasonable prospects of success on appeal and that the appeal was not frivolous. In the light of this fact, an award of attorney and client costs is not justified.

The order

- [40] For the reasons set out above, the appeal must fail. I make the following order.

The appeal is dismissed with costs.

C Plasket

Judge of the High Court

I agree.

J Roberson

M Lowe

APPEARANCES

For the appellant: H van der Linde SC instructed by Deon van der Merwe Attorneys, Port Elizabeth and Neville Borman & Botha, Grahamstown

For the respondent: M Euijen SC instructed by Gray Moodliar, Port Elizabeth and Whitesides, Grahamstown

[1] Van Wyk v Unitas Hospital & another (Open Democracy Advice Office as amicus curiae) [2007] ZACC 24; 2008

(2) SA 472 (CC) para 20.

[2] Natal Joint Municipal Pension Fund v Endumeni Municipality 2014 (4) SA 593 (SCA) para 18.

[3] Part IV.

[4] Part V.

[5] Part VI.

[6] An unfettered discretion in public law is a contradiction in terms, a ‘constitutional blasphemy’ because ‘[u]nfettered

discretion cannot exist where the rule of law reigns’. See Wade and Forsyth Administrative Law (8 ed) at 35, 357. The term ‘at the pleasure of. . .’ appears to have its roots in the appointments by the Crown and, in particular, the common law rule, now limited to an extent by statute, that appointments of civil servants and members of the armed forces carry with them no security of tenure. They are dismissible at will – at the pleasure of the Crown. Wade and Forsyth at 67-69. The same is true of the appointment and dismissal of cabinet ministers. In South Africa, although ministers often say that they hold their positions at the pleasure of the President, it is perhaps better to describe the position as Christina Murray and Richard Stacey do – that ‘the choice of members [of the cabinet] , reallocation of Cabinet portfolios and dismissal of members is entirely at the discretion of the President’. ‘The President and the National Executive’ in Woolman, Roux, Klaaren, Stein, Chaskalson and Bishop (eds) Constitutional Law of South Africa (2 ed) (Vol 1) at 18-28. See further, in a contractual context, Hazara Estate Ltd v Doornkop Sugar Estates Ltd 1942 AD 17 at 23.

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