

SOUTH AFRICA / JUDGMENT

Highway Junction (PTY) Ltd and Others v DI-Thabeng Truck and Taxi (PTY) Ltd (5821/2021) [2022] ZAFSHC 178 (27 July 2022) [2022] ZAFSHC 178

COURT

Free State High Court, Bloemfontein

BEFORE

ZIETSMAN P

CASE / FILE NUMBER

5821/2021

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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case No: 5821/2021

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

HIGHWAY JUNCTION (PTY) LTD

First Applicant

SWINBURNE VILLAGE HOME OWNERS

ASSOCIATION NPC

Second Applicant

SWINBURNE STORE CC

Third Applicant

and

DI-THABENG TRUCK AND TAXI (PTY) LTD

First Respondent

DI-THABENG LOGISTICS (PTY) LTD

Second Respondent

DI-THABENG FINANCE (PTY) LTD

Third Respondent

DI-THABENG FUEL SUPPLY (PTY) LTD

Fourth Respondent

DI-THABENG FUEL MANAGEMENT (PTY) LTD

Fifth Respondent

MEMBER OF THE EXECUTIVE COUNCIL, FREE STATE

PROVINCIAL DEPARTMENT OF ECONOMIC, SMALL

BUSINESS DEVELOPMENT, TOURISM AND

ENVIRONMENTAL AFFAIRS

Sixth Respondent

MALUTI-A-PHOFUNG LOCAL MUNICIPALITY

Seventh Respondent

THE MINISTER OF WATER

AND SANITATION

Eighth Respondent

THE MINISTER OF MINERAL RESOURCES

AND ENERGY

Ninth Respondent

THE CONTROLLER OF PETROLEUM PRODUCTS Tenth Respondent

CORAM:

ZIETSMAN P, AJ

HEARD ON: 21 JULY 2022

DELIVERED ON: 27 JULY 2022

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 27 July 2022

[1] This is an application whereby the Applicants apply for a final interdict against the First to Fifth Respondents (hereinafter referred to as "the Di-Thabeng Group"), whereby the First to Fifth Respondents are to be interdicted and/or restrained from any further construction at the property concerned, Portion 5 of the Farm Franshoek No. 1861, Swinburne, Free State Province until:

1.1 the necessary environmental approvals have been obtained under the National Environmental Management Act, 107 of 1998;

1.2 a water use license has been obtained under the National Water Act, 36 of 1998;

1.3 land-use approval has been obtained under the Municipal Planning By-law of 2015; and

1.4 a building plan approval has been obtained under the National Building Regulations and Building Standards Act, 103 of 1997.

[2] Furthermore the Applicants also apply for an interdict against the Di-Thabeng Group restraining them from using the property referred to above for any uses other than that of agricultural until:

2.1 the necessary environmental approvals have been obtained under the National Environmental Management Act, 107 of 1998;

2.2 the use of the land had been changed in terms of the provisions of the Spatial Planning Land Use Management Act, 16 of 2013 and/or the Municipal Planning By-law of 2015; and

2.3 the land use accords with the approved building plans on the property.

[3] The further legal relief sought by the Applicants against the Di-Thabeng Group is an interdict from fuel retailing until a site and retail license have been obtained under the Petroleum Products Act, 120 of 1977, that the Di-Thabeng Group be ordered to desist from breaching their duty of care as envisaged by Section 28 of NEMA and Section 19 of NWA and lastly that the Di-Thabeng Group should pay the Applicants' costs, jointly and severally, the one to pay the other to be absolved.

[4] It is to be noted that various other parties have also been joined in the application, being the MEC, Free State Provincial Department of Economic, Small Business Development, Tourism and Environmental Affairs, the Maluti-A-Phofung Local Municipality, the Minister of Water and Sanitation, the Minister of Mineral Resources and Energy and the Controller of Petroleum Products. None of these further Respondents opposed the application, and in fact the Sixth, Eighth and Ninth Respondents, being the MEC, Free State Provincial Department of Economic, Small Business Development, Tourism and Environmental Affairs, the Minister of Water and Sanitation and the Minister of Mineral Resources and Energy filed a

notice to abide the decision of the Court.

- [5] It is firstly to be noted that this application was issued by the Applicants on 14 December 2021 and various of the complaints that the Applicants initially had become historic and can be regarded as past transgressions.
- [6] Before arguments were raised by the respective parties before me, I pointed out to them that in my practice as an advocate at the Free State Bar I did give advice to the Di-Thabeng Group at a stage in the past, however on an unrelated matter, and requested the parties to indicate whether they have any objection against me sitting as the Judge in this matter. Both parties, Mr Rip SC and Mr De Waal SC indicated that they do not have any objection.
- [7] Furthermore, the following issues were raised before arguments were advanced:
- 7.1 At a stage a notice of amendment in terms of Rule 28 was filed by the Applicants of their Notice of Motion, however was withdrawn when objected to;
- 7.2 The Di-Thabeng Group moved for the striking of certain paragraphs of the founding affidavit, however did not raise the striking issue during argument that followed. I am therefore not of the intention to strike any of the averments in the founding affidavit;
- 7.3 I also indicated to the parties that I have in the court file, it seems to be original, building plans which was apparently submitted to the Maluti-A-Phofung Municipality for approval. The parties indicated that approval has not taken place yet;
- 7.4 The Applicants furthermore handed up a Draft Order before any arguments were advanced, which they furnished to the Respondents the morning of the hearing. Applicants indicated that they will argue, on the basis that the Draft Order should rather be granted which they will deal with during argument which only entails a change in the wording and the paraphrasing of the Notice of Motion. The Di-Thabeng Group through Mr Rip SC objected to the basis of such a Draft Order as, according to him, various changes as to the original Notice of Motion have been effected to which they object. I therefore decided to let the parties argue the matter and then adjudicate the matter upon the original Notice of Motion as it was filed by the Applicants.
- [8] Mr De Waal SC and Mr Rautenbach on behalf of the Applicants, at the start of the proceedings indicated that there are only four main issues which needs adjudication and upon which they will move for an interdict against the Di-Thabeng Group, being:
- 8.1 The zoning of the property concerned;
- 8.2 The unlawful retailing of petroleum products;
- 8.3 Environmental transgressions;
- 8.4 The unlawful construction of buildings without the necessary approved building plans.
- [9] For purposes of this judgment, I will also refer to as the parties did, to the following abbreviations and acronyms:

- 9.1 “the By-law” : the Maluti-A-Phofung Municipal Planning By-law of 2015.
- 9.2 the “NBRBS Act”: National Building Regulations and Building Standards Act 103 of 1977.
- 9.3 “NBR”: refers to the National Building Regulations promulgated under the NBRBS Act.
- 9.4 “NEMA”: National Environmental Management Act, 107 of 1998.
- 9.5 “PPA”: the Petroleum Products Act, 120 of 1977.
- 9.6 “SPLUMA”: Spatial Planning and Land Use Management Act, 16 of 2003.
- 9.7 “the Scheme”: the Harrismith, Tshiame and Intabazwe Town-Planning Scheme, 51969.

- [10] According to Mr De Waal SC on behalf of the Applicants with reference to the aforementioned four groups of transgressions, the first two, being the zoning of the property and/or the use of the property contrary to the scheme and SPLUMA as well as the retail of fuel contrary to the fact that no retail license in terms of PPA has been obtained, constitutes continuing transgressions for which the Applicants have made out a case according to Mr De Waal SC for the interdict required against the Di-Thabeng Group as far as the continuing transgressions in this regard are concerned. He also moved for an interdict for past transgressions, being the environmental transgressions and the failing to have approved building plans.
- [11] The basis of the interdict required regarding the past transgressions, it was argued, is that the Di-Thabeng Group will on the probabilities again in future conduct in irregularities and transgressions. Therefore, and an interdict is still a requisite to prohibit the Di-Thabeng Group from engaging in environmental transgressions and/or continuing with building on the site without the necessary approved building plans. According to the Di-Thabeng Group of Respondents there is no such evidence that as far as the aforesaid averred past transgressions are concerned, indeed constituted transgressions, but even if the Di-Thabeng Group committed such past transgressions, there is not evidence that it will be committed again or will be continued transgressions by the Di-Thabeng Group.
- [12] I am in agreement with the First to Fifth Respondents regarding the aforesaid past transgressions, on the basis that there is a clear factual dispute as to whether certain environmental transgressions have been committed, and is there no evidence that even if it had been committed, the Di-Thabeng Group will in future again commit such transgressions relating to the environmental activities. As far as the building plans are concerned, it is common cause that the Di-Thabeng Group indeed started the building project on the property concerned without the necessary approved building plans from the Municipality. It is also however common cause that the Di-Thabeng Group stopped building and/or stopped the continuance of the development pending the approval by the Municipality of “as built” plans which was submitted to the Municipality for approval. There is in my view also no evidence that the Di-Thabeng Group will continue building despite not having the necessary authorisation from the Municipality’s side. On the aforesaid basis, I am not going to deal

further with the environmental transgressions and/or the transgressions regarding the failure to have the necessary building plans approved in the circumstances.

[13] As far as the continuing transgressions are concerned as averred by the Applicants, I will deal with the zoning of the site concerned herein later and will start off by the argument relating to the retail of fuel without a license by the Di-Thabeng Group.

[14]

14.1 The Di-Thabeng Group averred, and it was accepted as such by the Applicants, that it indeed obtained a wholesale license certificate issued in the name of Di-Thabeng Fuel Supply (Pty) Ltd on 9 March 2020 by the Controller of Petroleum Products in terms of the PPA.

14.2 According to the Applicants in a reading or interpretation of the PPA, a licensed wholesaler may only sell as minimum of 1500 litres of petroleum products per transaction and no lesser amount. If, according to the Applicants, a lesser amount is sold a retail license is required for a specific premises where such fuel is sold. Accordingly, the Applicants aver that a licensed wholesaler would therefore not be allowed to sell quantities of petroleum products in a quantity which is less than 1500 litres per transaction, whilst a licensed retailer may indeed legally sell such lesser amount of petroleum products to an end-consumer.

14.3 According to the Di-Thabeng Group the interpretation as referred to above is that a wholesaler may indeed only sell a minimum of 1500 litres per transaction, and that is precisely what the Di-Thabeng Group did. They indeed informed their clients that they are a wholesale licensee and that a client may only transact with the group in transaction intervals of 1500 litres each paying in advance. Then thereafter their client can collect whichever amount of diesel or petroleum products it needs in the process. In other words, the Di-Thabeng Group issued an invoice to the client for at least 1500 litres of petroleum products in advance, payment by their clients for the total of such at least 1500 litres of petroleum products take place and thereafter the client collects the petroleum products as needed, which might entail for instance 200 litres of petroleum products per day or 400 litres of petroleum products per day, up until the 1500 litres. This, according to the Di-Thabeng Group, does not fall under the requirement of a retail license, in and because of the fact that they still only sell in bulk transactions, for 1500 litres upwards per transaction.

14.4 The question here is what does a transaction means. In my view a transaction can be interpreted to mean one transaction whereby an invoice is issued for the buying of at least 1500 litres of petroleum products to a specific client and payment by that client takes place for such 1500 litres of petroleum products or more on that invoice. The fact that delivery of the products in lesser amounts than 1500 litres of petroleum products, as needed by the client does in my view not mean that the wholesale license is not complied with or transgressed, however at least a bona fide dispute exists as to the interpretation of one transaction I cannot therefore find that the basis upon which the Di-Thabeng Group transact with their clients is employed to circumvent the legislation in that it was the intent with such a license to prevent less than 1500 litres petroleum products per transaction, i.e. delivery of 1500 litres or less at a time.

[15] I am therefore of the view that the Applicants should not be successful in obtaining an interdict in relation to the way in which the Di-Thabeng Group utilizes their wholesale license certificate, which, according to the parties may be utilized from any premises in the Republic of South Africa. I am therefore not convinced that the Applicants have shown that it has a clear right to obtain an interdict against the Di-Thabeng Group as far as the selling of petroleum products are concerned.

[16] The only continuing transgression left, according to the Applicants, is that the Di-Thabeng Group is continuing to utilize the premises being Portion 5 of the Farm Franshoek No. 1861, Swinburne, Free State Province from where several operations of the Di-Thabeng Group are being conducted contrary to the zoning of the property concerned. In this regard, the following are of importance:

16.1 On 2 November 2020 a zoning certificate was issued to the owner of Portion 5 of the Farm Franshoek No. 1861, Harrismith by the Chief Town Planner: SPLUM, Human Settlements and Traditional Affairs that the current zoning of Portion 5 of the Farm Franshoek No. 1861, district Harrismith is as follows:

“Zoning: Agriculture

Permitted uses: Agricultural use

Building restrictions: None.

Additional rights as per the title deed: Parking of trucks.”

16.2 Although there are various conditions taken up in the title deed the important part of the title deed is taken up in paragraph 3(a) and (b) thereof, which reads as follows:

“3. Onderhewig aan die volgende voorwaardes ten gunste van Petrus Lafras de Jager, Identiteitsnommer [...], getroud buite gemeenskap van goedere, sy erfgename, eksekuteurs, administrateurs of regsverkrygendes, soos uiteengesit in Sertifikaat van Verenigde Titel T [...]:

- (a) “The transferee undertakes not to use the property hereby sold or allow it to be used in any manner which would conflict with the terms and conditions of the Notarial Lease No. [...] or of Notarial Deed of Servitude No. [...] or allow any activities on the property hereby sold to conflict in any way where the amenities presently enjoyed by the lessee of the property to be used in a manner that would detract from the viability, aesthetics or amenities enjoyed by the said service station and restaurant;
- (b) The property hereby sold may be used as a parking area where the trucks may stop whether overnight or otherwise, and for no other purpose without the prior written consent of the transferor, or his successors in title, which consent may not be unreasonably withheld. The property shall, however, not be used for any purpose that may conflict with the service station and restaurant on the joining property as envisaged under any law’.”

16.3 According to the Applicants, the property concerned is therefore zoned for agricultural purposes as well as the parking of trucks. According to the Applicants the Respondents (the Di-Thabeng Group) are therefore not allowed to utilise the premises other than for the aforesaid purposes and that before the Di-Thabeng Group may utilise the property for other purposes, it must either rezone the property or obtain an extension of the activities conducted through the necessary authorities being the Maluti-A-Phofung Local Municipality and more specifically SPLUMA.

16.4 According to the Di-Thabeng Group (First to Fifth Respondents), the zoning certificate they have indeed includes all the conditions as set out in the title deed, which includes the parking of trucks. According to the Di-Thabeng Group the answer lies in the Town Planning Scheme, No. 51969 of the Harrismith, Tshiame and Intabazwe Town Planning Scheme which was issued in terms of the By-laws published in Provincial Gazette of 6 November 2015 which indeed contains various definitions as to the arrangement of the scheme. The definitions are taken up in paragraph 2 of the Town Planning Scheme and nowhere refers to a definition for the parking of trucks. It only refers to a definition for “truck stop”. In the definition of “truck stop” it was determined that such a facility includes “the parking of trucks and busses”.

16.5 The Di-Thabeng Group therefore argues that whereas the Town Planning Scheme referred to above only refers to the parking of trucks (which they are allowed to do according to the zoning certificate) can only be entertained under the definition of “truck stop”. Therefore, the zoning certificate must be read with the definition of “truck stop”.

[17] The aforesaid argument however might be problematic insofar as the definition of a “truck stop” in the Town Planning Scheme is as follows:

“‘truck stop’ means a facility where the use of land includes to the following:

- (a) parking of trucks and busses;
- (b) ablution facilities, rest areas for truck and bus drivers and storage facilities;
- (c) service station and fast food / shop facilities;
- (d) office and/or administration facilities;
- (e) caretaker and security housing;
- (f) overnight facilities for bus and truck drivers;

and any use considered by the Council to be ancillary to the uses referred to in (a), (b), (c), (d), (e), (f) above or likely to encourage the use of the land for a truck stop.”

- [18] In this regard the Respondents (the Di-Thabeng Group) relies upon the expert evidence of a certain Mr Peter John Dacomb who is a professional town and regional planner, in whose opinion the Di-Thabeng Group are within the zoning scheme if the zoning scheme makes provision for the parking of trucks insofar as the only provision therefor in the zoning scheme is that under the definition of a truck stop.
- [19] The Applicants' view on this is that an expert witness in this regard cannot interpret the By-laws and/or Regulations. That is an interpretation that the Court should make. The Di-Thabeng Group's counsel, Adv Rip SC agrees therewith, although argues that the expert witness is only there to assist the Court in coming to an interpretation.
- [20] If I go back to the zoning certificate read with the title deed, it is clear that the property concerned is zoned for agriculture and agricultural activities, with an extension according to the title deed of the parking of trucks. It does not seem that the title deed makes any further specific extensions other than the parking of trucks. The restaurant and filling station referred to in the title deed are indeed a restaurant and filling station on an adjacent property. Although there is a confirmatory document by a Ms Christine De Jager (apparently from the adjacent property) to give consent to the Di-Thabeng Group to do the business that they are presently doing, including that of a Truckstop, the Applicants pointed out that such consent form is not in the form of an affidavit, is therefore hearsay evidence and not to be allowed. It is furthermore clear that Ms De Jager is not at liberty to give consent contrary to the specific zoning of the property. She has no authority to do so. Be that as it may, it is in my view not possible for such an owner of an adjacent property to consent to the extension of the zoning of the property concerned insofar as the extension of the zoning in my view does not go further than the parking of trucks.
- [21] To say that "the parking of trucks" is a category which is not provided for in the Town Planning Scheme of the Maluti-A-Phofung Municipality and therefore the fact that it falls under a "truck stop" means that the Respondents can conduct business on the zoned property as if the zoning is one of a truck stop, is in my view too far stretched in the circumstances. Where the extension made provision for the parking of trucks, it certainly did not make provision for ablution facilities, rest areas, service station, fast food / shop facilities, office and/or administration facilities, or even overnight facilities for bus and truck drivers.
- [22] The only extension, if it falls under the definition of "truck stop", can be that taken up in paragraph (a) of the definition of "truck stop".
- [23] In my view therefore the present zoning of the property being "Gedeelte 5 van die plaas Franshoek 1861, distrik Harrismith, Provinsie Vrystaat" does not make provision for anything else than paragraph (a) under the definition of "truck stop" and if the Di-Thabeng Group (the First to Fifth Respondents) need or needed an extension as to the zoning to make provision for their present activities, they should do so through the normal channels by way of an application for the rezoning of the property, alternatively an extension of the present

zoning to entertain or counter for further facilities or business activities under the definition of

“truck stop”.

[24] On the aforesaid basis I am of the view that, as the Notice of Motion presently stands, the Applicants are entitled to an interdict against the First to Fifth Respondents only as far as paragraph 2, read with paragraph 2.2, is concerned.

[25] As far as the costs of the application is concerned, the Applicants are partially successful which will usually mean that the Respondents are to be ordered to pay the costs of the Applicants. In my discretion however, it seems to me that the Applicants were throwing the proverbial book at the Di-Thabeng Group in the hope that one of the chapters will hit. The aforesaid approach can sometimes be compared and is known as a shotgun approach. Therefore, I exercise my discretion on the basis that each party shall be liable for its own costs in the matter.

I THEREFORE MAKE THE FOLLOWING ORDER:

1. The First to Fifth Respondents are interdicted and/or restrained from using the property, known as Portion 5 of the Farm Franshoek No 1861, Swinburne, Free State Province, for any uses other than agricultural, and the parking of trucks, until:

1.1 the use of the land had been changed in terms of the provisions of the Spatial Planning and Land Use Management Act, 16 of 2013 and/or the Municipal Planning By-law of 2015 read with the Town Planning Scheme 51969.

2. Each party to pay its own costs.

P ZIETSMAN, AJ

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