
SOUTH AFRICA / JUDGMENT

Labuschagne and Another v Global Air Brakes CC and Another (5539/2019) [2022] ZAGPJHC 597 (25 August 2022) [2022] ZAGPJHC 597

COURT

South Gauteng High Court, Johannesburg

BEFORE

Bester

CASE / FILE NUMBER

5539/2019

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 5539/2019

REPORTABLE: NO

OF INTEREST TO OTHER

JUDGES: NO

REVISED YES

25 August 2022

In

the matter of: LABUSCHAGNE,
 SHARON DOROTHY
 First Applicant
 LABUSCHAGNE,
 HENDRIK TJAART JACOBUS
 Second Applicant
 and
 GLOBAL
 AIR BRAKES CC
 First Respondent
 THE
 CITY OF EKURHULENI METROPOLITAN
 MUNICIPALITY
 Second Respondent

JUDGMENT

BESTER AJ

- [1] The applicants, a retired couple, live in the residential neighbourhood of Ravenswood in Boksburg. On the adjacent property, the first respondent, Global Air Brakes CC, conducts a vehicle repair workshop. Immediately across the road from these properties, which are owned by their respective occupants, lies a light industrial area.
- [2] Over a period of several years the applicants and the first respondent have been at odds regarding the first respondent's use of the property. The dispute culminated in this application, wherein the applicants seek to interdict the first respondent from using the property as a vehicle repair workshop and preventing the first respondent from making excessive noise at the property. In addition, they also seek an order for the demolition of a structure on the first respondent's property.
- [3] Although the first respondent delivered opposing papers, it failed to deliver heads of argument, even after an order compelling it to do so had been granted, and it did not have representation on the day of the hearing. The second respondent, the City of Ekurhuleni Metropolitan Municipality, did not oppose the application.
- [4] Originally the applicants contended that the structure is illegal on the basis that no building plans had been approved for the structure. After delivery of the application in February 2019, the first

respondent submitted building plans to the second respondent, which was approved two days later. The first respondent relied on the approval in its subsequently delivered answering affidavit. This led the applicants to supplement their papers, claiming that, even if the building plans had been approved, the structure itself is not constructed in accordance with the plans, and therefore remains illegal.

- [5] In addition, the applicants brought an interlocutory application, as they termed it, in which they seek substantive relief of a nature that was described by both the applicants' and the second respondent's counsel in argument as a review. This application is opposed by the second respondent, but not by the first respondent.

The use of the property

- [6] The first respondent conducts business as specialists in air brake systems on trucks and trailers. Services provided by it include reconditioning of valves, boosters and clutch systems; reconditioning of complete air systems; air brake installations; realignment; and reconditioning of clutches.

- [7] The Ekurhuleni Town Planning Scheme of 2014 ('the Scheme')

regulates use of land and buildings in the second respondent's area of jurisdiction. The Boksburg Town Planning Scheme, 1991 has been incorporated into the Scheme in its entirety. According to its zoning certificate of 7 November 2012, the first respondent's property is zoned as "business 3", including "service industry".

- [8] The Scheme allows for properties zoned 'business 3' to be used as offices, medical consulting rooms and dwelling houses. With the special consent of the municipality, this may be extended to include service industries. A 'service industry' is defined in the scheme as "buildings used for the repair and maintenance of household or office goods and equipment or appliances on a small scale, as determined by the municipality and includes a confectionary, but excludes a motor workshop, fitment centre and light industry."

- [9] The Scheme provides definitions for each of the excluded activities mentioned in the definition of a service industry:

- a) "FITMENT CENTRE: Buildings used for the fitting of exhausts, towbars, radios, shock absorbers, tyres and other vehicle parts, but

excludes Motor Workshops and Panel Beaters."

- b) "LIGHT INDUSTRY: land or buildings used for, inter alia, bakeries, dry-cleaners, carpet cleaners, joinery workshops, laundries, lawnmower workshops, plumber's workshops, publication works, and any other such industries, workshops or yards which, in the opinion of the Municipality, do not cause a nuisance to the environment."

- c) "MOTOR WORKSHOP: land or buildings used for the servicing, maintenance and repair of motor vehicles and/or the sale and/or fitment of motor vehicle parts but excludes a Panel Beater."

- [10] The first respondent's member, Mr Malan, states in the answering affidavit that the municipality has conducted inspections at the property and had confirmed that the first respondent's use of the property complies with its zoning certificate. He specifically referred to an email from a Mr Grobler on 26 January 2018, addressed to the first respondent and the

second applicant, wherein he states that “it is understood that the zoning allows the owner of the property to operate this type of business.” Mr Grobler is an environmental health practitioner in the City of Ekurhuleni’s Department of Health and Social Development. Not only is the statement rather noncommittal, but no basis is also set out by the either Mr Malan or Mr Grobler for this contention.

- [11] On the common cause facts, the first respondent conducts a motor workshop at the property. This activity is expressly excluded from permitted activities at the property. The first respondent’s use of the property clearly contravenes its zoning permission.
- [12] An interference with the property rights of another is actionable if it is unreasonable. It will be unreasonable if it is conduct that is not to be expected in the circumstances and which does not have to be tolerated under the principle of ‘give and take, live and let live’.[1]
- [13] There is no dispute that the activities of the first respondent at the property causes traffic congestion, regular blocking of access to the entrances of the properties and obstructions in the public street along which the properties are situated as a result of the movements of the trucks, and noise from air-operated tools, idling trucks, reverse sirens, and a siren regulating work shifts. The applicants also complain that their privacy is interfered with. They can no longer use their swimming pool with comfort, as the height of the vehicle cabins allows drivers line of sight into their property.
- [14] It is clear that the disturbances are real and in effect continuous, commencing before five o’clock in the morning and continuing as late as ten or eleven o’clock at night.
- [15] The applicants presented the findings of a noise and acoustics expert, Mr Bodenstein. His expertise was not challenged, and his evidence was not seriously challenged by the first respondent, who, for instance, challenged the calibration of the measuring instruments, in the face of calibration certificates, without establishing any factual basis for the challenge.
- [16] Mr Bodenstein took various measurements and compared them with the ratings allowed in terms of National Standard SANS 10103 of 2008. He concluded that the noise at the property is at least 15dBA higher than allowed by the regulations and national standards. The analysis in his report satisfied me that his measurements indeed show that the noise is excessive.
- [17] The facts show that the applicants are disturbed in their use and enjoyment of their property. The disturbances are unreasonable – they are not expected at the property, because the property is not zoned for such activities.
- [18] To obtain a final interdict, the applicants have to show (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the lack of an adequate alternative remedy. [2] The applicants have met these requirements and are entitled to an interdict prohibiting the first respondent from using the property as a motor workshop as defined in the Scheme and prohibiting the noise disturbance flowing therefrom.

The structure

- [19] At the time when the application was launched in February 2019, the second respondent had not approved building plans for the structure that had been erected on the property and from which the first respondent operates its business. In these circumstances, the applicants sought an order for the demolishing of the structure as having been illegally erected.
- [20] A few weeks later, on 25 March 2019, the first respondent submitted plans for the building to the second respondent, who, with amazing efficiency, approved the plans two days later. When the first respondent delivered its answering affidavit shortly thereafter, it relied on the approved plans to oppose the order for the demolition of the structure. This prompted the applicants to carefully consider the plans and the actual built structure, whereafter they applied to supplement their papers to set out the basis for their contention that the structure, as built, does not comply with the approved plans.
- [21] This evidence could not have been presented earlier. In fact, the first respondent delayed the delivery of its answering affidavit until it had obtained approval of the building plans. The supplementary papers seek to bring about a change in the cause for the relief for demolition of the property and introduce twin reasons for a demolition order.
- [22] The applicants show that the structure does not comply with the building plans. This has been conceded by both respondents at an inspection in loco arranged by the applicants' attorney and held on 29 November 2019. The applicants thus contend that they are entitled to a demolition order. As a consequence of the concession, the respondents agreed that the structure must be demolished at the inspection. This agreement the applicants proffer as a second basis for a demolition order.
- [23] It is apparent that the new evidence is material to the relief sought, as the original basis for the relief sought no longer exists, but has been replaced by a new basis, flowing directly from the way the first basis was sought to be resolved by the first respondent. It seems to me just to allow the further evidence, having regard to the various relevant considerations.[3] There is also no opposition to the admission of these papers. In the result, the supplementary affidavit deposed to by the first applicant on 15 December 2020, as well as the confirmatory affidavits by the second respondent and the applicants' attorney, Ms Lagarto, of the same date, are admitted. As there were no further papers delivered by either of the respondents, the supplementary evidence stands uncontested.
- [24] In their founding papers, the applicants rely on section 21 of the National Building Regulations and Building Standards Act 103 of 1977, which provides as follows:

“21. Order in respect of erection and demolition of buildings

Notwithstanding anything to the contrary contained in any law relating to magistrates' courts, a magistrate shall have jurisdiction, on the application of any local authority or the Minister, to make an order prohibiting any person from commencing or proceeding with the erection of any building or authorising such local authority to demolish such building if such magistrate is satisfied that such erection is contrary to or does not comply with the provisions of this Act or any approval or authorisation granted thereunder."

[25] It is thus apparent that only the second respondent, or the responsible minister, may approach a court for a demolition order in terms of this section. The relief is not available at the behest of the applicants.[4] The applicants do not contend that the structures on the first respondent's property encroach upon their property, and the common law remedy of demolition for encroachment can thus not be considered here.[5]

[26] Mr van der Merwe, for the applicants, submitted that an agreement was reached at the inspection that the structure will be demolished, and that the applicants are on this basis entitled to a demolition order. In this regard, he relied upon an email recordal of the discussions and agreement at the inspection by the applicants' attorneys on 2 December 2019, and specifically paragraph 4 thereof.

[27] I do not agree that such an agreement was reached. Paragraph 4 of the email records observations made by one of the second respondent's representatives at the inspection, who expressed the view that the structure was illegal and must be demolished. The paragraph does not record an agreement. Rather, paragraph 5 as follows:

"5. Between the attorneys it was agreed as follows:

- a. That it is necessary for a written confirmation / undertaking from the City confirming that the structure would be demolished and would comply with the approved building plans as mentioned above. The confirmation would also include an approach to the construction of the fire wall. The purpose of this is to clarify and manage the expectations, alternatively perceptions of our client so that all the parties can be on the same page.
- b. That an independent person (not Ayanda in other words) is to review the plans and zoning of the property and that we would be presented with a written decision by the council. The time is to be confirmed by Moeketsi but it was indicated that given the sensitivity and current delay in the matter, that this must be done as soon as possible.
- c. Once the process has been completed, the parties will revisit possible settlement of the matter."

- [28] 'Ayanda' is the official who expressed the views recorded in paragraph 4 of the email, and 'Moeketsi' is a reference to the other City official who attend the inspection. It is clear from the recordal that only a process was agreed upon, and not an agreement that the structure will be demolished. The applicants cannot rely on the events at the meeting as establishing a basis for a demolition order. In fact, they agreed to adhere to a process to be followed at the meeting, which precludes their current approach.
- [29] In the result I conclude that the applicants are not entitled to a demolition order.
- [30] Overall, the applicants have been successful against the first applicant, and they are entitled to their costs. They seek costs on the attorney and client scale. In my view, this is warranted. The first respondent has opposed this application without any reasonable grounds, and it should not have forced the applicants to come to court for this relief.

The application to review the approval of the building plans

- [31] As mentioned, the applicants also launched an interlocutory application, styled by both the applicants' and the second respondent's counsel as a review. However, the nature of the relief sought in terms of the notice of motion in the interlocutory application is not a review. The first applicant, in her founding affidavit to this application, states that the purpose of the application is so seek an order compelling the second respondent to take a decision under the provisions of section 62 of the Local Government: Municipal Systems Act, 32 of 2000, alternatively under section 5 of the Promotion of Administrative Justice act, 3 of 2000.
- [32] The application is ill-conceived. Section 62(1) provides in relevant parts as follows:
- "A person whose rights are affected by a decision taken by a ... staff member of a municipality ... may appeal against the decision by giving written notice of the appeal and reasons to the municipal manager within 21 days of the notification of the decision"*
- [33] The decision the applicants are dissatisfied with, is the approval of the building plans. However, they have not followed the procedure set out in section 62. Thus, the applicants are seeking an order compelling the second respondent to review the approval, in circumstances where they did not lodge an appeal against the approval. As Mr Memani, for the second respondent, points out, the application is doomed to fail.
- [34] Mr van der Merwe stated that, as the applicants may rely on the agreement that the structure must be demolished, the applicants do not need to pursue the review. However, he did not withdraw the application. As shown above, the agreement does not exist.
- [35] In the result, this application should be dismissed with costs.

Conclusion

- [36] In the circumstances I make the following order:

- (1) The first respondent is interdicted from using the property described as Erf 205, Ravenswood Extension 9, situated at 117 Thirteenth Avenue, Ravenswood, Boksburg (“the property”) for the business of a motor workshop and from creating noise exceeding the ratings allowed at the property in terms of National Standard SANS 10103 of 2008.
- (2) The first respondent shall pay the applicants’ costs of the application on the attorney and client scale.
- (6) The interlocutory application dated 28 August 2019 is dismissed.
- (7) The applicants shall pay the second respondent’s costs of the interlocutory application.

A Bester

Acting Judge of the High Court of South Africa

Gauteng Division, Johannesburg

Heard on:

22 November 2021

Judgment

date: 25 August 2022

Counsel for the applicants: Adv C van der Merwe

Instructed by: Lagarto Bhana Attorneys

No appearance for the first respondent.

Counsel for the second respondent: Adv FR Memani

Instructed by:

Maema Attorneys

- [1] PGB Boerdery Beleggings (Edms) Bpk v Somerville 62 (Edms) Bpk 2008
- (2) SA 428 (SCA) in [9], approving of LAWSA Reissue Volume 1 paragraph 189.
- [2] Masstores (Pty) Ltd v Pick n Pay Retailers (Pty) Ltd 2017
- (1) SA 613 (CC) in [7], approving Setlogelo v Setlogelo 1914 AD 221 at 227.
- [3] See inter alia Porterstraat 69 Eiendomme (Pty) Ltd v PA Venter Worcester (Pty) Ltd 2000 (4) SA 598 (C) at 617 B – F.
- [4] BSB International Link CC v Readam South Africa (Pty) Ltd and Another 2016
- (4) SA 83 (SCA) in [23].

[5] BSB supra in [24].

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