

SOUTH AFRICA / JUDGMENT

Marx and Others v Gray and Others (3632/2019) [2020] ZAFSHC 46 (5 March 2020)

[2020] ZAFSHC 46

COURT

Free State High Court, Bloemfontein

BEFORE

Mhlambi

CASE / FILE NUMBER

3632/2019

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IN

THE HIGH COURT OF SOUTH AFRICA,
FREE

STATE DIVISION, BLOEMFONTEIN

Case number: 3632/2019

In

the matter between:

HENDRIKA
MARX
1ST Applicant
MARYNA
JACOBS
2ND
Applicant
GAVIN
GLEN HARTMAN
3RD Applicant
and
SIMON
FRANCIS PAUL GRAY
1ST
Respondent
SIMON
GRAY SWIM ACADEMY
2ND Respondent
MANGAUNG
METROPOLITAN MUNICIPALITY
3RD Respondent

JUDGMENT

BY:

MHLAMBI J,

HEARD ON:

05 DECEMBER 2019

DELIVERED ON:

5 MARCH 2020

MHLAMBI, J

[1] Some of the residents in Dan Pienaar are up in arms against businesses conducted in their residential area on private properties or dwellings as they allege that they do so illegally without adhering to the letter of the law relating to the zoning prescripts. Such businesses or the persons allowing them to be so conducted, they opine, should be interdicted and restrained from doing so.

[2] In this application, the applicants, all three of them being residents of Dan Pienaar, are unhappy about a business known as Simon Gray Swim Academy trading as a swim academy at 100 Albrecht Street, Dan Pienaar, Bloemfontein. It is cited in these proceedings as the second respondent while the registered property owner is cited as the first respondent. The applicants seek an order interdicting and restraining the first and second respondents from conducting or allowing any person to conduct a business from the said premises and to pay the costs of the application, jointly and severally, the one paying the other to be absolved.

[3] The respondents' opposition of the application is based on the following:

3.1 The applicant's addresses, though within the suburb of Dan Pienaar, none of them can be described as in "close proximity" of 100 Albrecht Street Dan Pienaar. Albrecht Street is a busy artery totally separated from all three applicants who are all situated deeper in the quite area of Dan Pienaar. None of the neighbours of this property: either at the sides, back or even at the other side of the street, have ever complained about the swimming academy.

3.2 There are several workers (swimming instructors) involved who have a direct and substantial interest in this application as they view it as an attempt by the applicants to put them out of jobs and their families without income in a country and province with a scarcity of jobs.

3.3 Though cited, no order is sought against the third respondent.

[4] The first respondent denied that he conducted a business in his personal capacity, but traded as the second respondent in the name and style of Simon Gray Swim Academy[1]. He lived at 100 Albrecht Street since 1998 and the second respondent conducted the indoor swimming academy on the premises since 2012[2]. He has adapted the house so that the

second respondent could comply with the provisions of section 18 (3)(b) of The Bloemfontein Town Planning Scheme of 1954. The first respondent applied to the third respondent for permission in terms of that section and is waiting for the outcome of the application[3]. He is therefore not running a business but giving swimming lessons and exercises indoors.

- [5] The respondents argued that the applicants have no standing and or locus standi to enforce, through the application of an interdict, the provisions of paragraph 1(a) of the Deed of transfer T3843/2011. That paragraph referred to the servitudes in favour of the Premier of the province who was not joined as a party in the application. The locus standi is reserved for the Local Municipality/ the third respondent in terms of section 32 of the Spatial Planning and Land Use Management Act (SPLUMA). The third respondent has a constitutional duty to promote social and economic development which the applicants wish to circumvent by storming like bulls in a china shop with ulterior, undisclosed agendas. The court should defer to section 32 of the SPLUMA and chapter 8 of the Municipal Land Use Planning Bylaw of 2015 so that the closing down of businesses and destroying of jobs and families can be prevented.
- [6] The third respondent's zoning scheme and or alleged zoning pertaining to Dan Pienaar, has no effect whatsoever regarding Albrecht Street. Albrecht Street is a busy route with heavy traffic throughout the day which has the effect of eroding the residential character of the area. The few businesses conducted out of abandoned houses in the suburb did not lead to the suburb's change in character but the noisy and busy streets. The applicants are conservatively balking against change and progress in Dan Pienaar and are using lawfare to resist change, progress and transformation.
- [7] The initiation of criminal prosecutions, the employment of the provisions of both the Municipal bylaws and SPLUMA, provide adequate rights and remedies for the property owners.
- [8] This application served with two others before me on the same day and the agreement between the parties was that they be adjudicated upon simultaneously because of their similar circumstances. As indicated in my judgment under case number 3512/2019, which will be delivered simultaneously with this one, the condonation application for the late filing of the applicants' reply was not pursued and I do not deal with it as it is also not relevant to the issue at hand.
- [9] Three main issues were identified by the respondents for determination as follows:
 - 9.1 Whether the respondents really conduct a business as contemplated in paragraph 1 of the notice of motion;
 - 9.2 Whether the applicants have the necessary locus standi to bring the application and specifically whether, statutorily, the third

respondent should have brought such applications;

9.4 Whether the applicants meet the final interdict requirement of having no alternative remedy.

[10] Whether the respondents conducted a business on the premises

The respondents contended that no business in the proper sense of the word is conducted on the premises save for an indoor swimming pool where swimming classes are presented.[4]

[11] In the opposing affidavit, it is stated that “the second respondent is me trading as Simon Grey Swimming Academy”[5] and the second respondent is in the processes of getting permission from the third respondent to conduct the swimming academy[6]. Despite the advertising board affixed to the outer walls of the premises[7] displaying the name, contact details and the extent of the services offered, the respondents maintain that none of the neighbours have ever complained and that the applicants were all living far away and could not be influenced by those quiet indoor activities[8].

[12] The meaning of business is described as, inter alia, action demanding time and labour, serious work, a habitual occupation, a profession, a trade[9]. Besides, the respondents concede that several workers may lose their employment and their families left without an income should this application succeed. It is therefore obvious that, on the respondents’ own papers, a trade or business was conducted on the premises. The respondents were fully aware of this position, acquiesced therein for a number of years since 2012 before initiating a process to comply with the provisions of the Town Planning Scheme. I am satisfied that the respondents conducted a business on the premises.

[13] 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 100 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 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*[10]: “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.

[14] The applicable law.

It is obvious that the grounds relied upon by the respondents’ in this case in thwarting the application are similar to those under case number 3512/2019. 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; Esterhuysen 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^[11] where 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.
- ^[15] In two similar cases in this Division^[12], the legal position set out above was emphasised or 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 have the necessary locus standi to seek interdictory relief against the respondents.

^[16] Alternative remedy

In the light of the above authorities, 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.

^[17] It is trite that the successful party is entitled to the award of costs.

^[18] 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 100 Albrecht Street, Dan Pienaar, Bloemfontein described as Erf 6104, Dan Pienaar, Bloemfontein;
2. The first and second respondents are ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved.

MHLAMBI, J

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Instructed by: Blair Attorneys

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Counsel for Respondents: Adv Benade

Instructed by: Kuhn & Kuhn

123 Albrecht Street

Dan Pienaar

[1] Opposing affidavit para 7.1

[2] Opposing affidavit para 7.2

[3] Opposing affidavit para 7.3

[4] Paragraph 2.5 Respondents' Heads of Argument.

[5] Paragraph 7.1

[6] Paragraph 10.1 of the Opposing Affidavit.

[7] Paragraph 5.3: Founding Affidavit and para 10.1: Opposing Affidavit.

[8] Paragraphs 11.1 and 12.2: Opposing affidavit

[9] The New Shorter English Dictionary

[10] 2010 (5) SA 367 (WCC) at 401 B

[11][11] 2013 2 All SA 679 (SCA); Chapman's Peak Hotel v O'Hagan's 2001 (4) All SA 415 (C) at para 18

[12] 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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