

SOUTH AFRICA / JUDGMENT

McKay and Others v Ursiweb (Proprietary) Ltd and Others (3510/2019) [2019] ZAFSHC 232 (5 December 2019)

[2019] ZAFSHC 232

COURT

Free State High Court, Bloemfontein

BEFORE

M.A. Mathebula

CASE / FILE NUMBER

3510/2019

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IN THE HIGH COURT

OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

number: 3510/2019

In

the matter between:

GILLIAN
McKAY 1st
Applicant
JULIANA
SOPHIA
KOCK 2nd
Applicant
MICHELLE
VAN
ZYL 3rd
Applicant
and
URSIWEB
(PROPRIETARY) LTD 1st

Respondent
PERFECT
SLABS (PTY) LTD 2nd
Respondent
MANGAUNG
METROPOLITAN MUNICIPALITY 3rd
Respondent
HEARD
ON: 21 NOVEMBER 2019

JUDGMENT

BY: MATHEBULA, J

DELIVERED ON: 5 DECEMBER 2019

Final interdict – Illegal use of land in contravention of the restrictive conditions and township scheme – Locus standi not limited to property owners but also those who also possess sufficient protectable interest – Restrictive conditions and township schemes conceived in the interest of the community to which it applies – Effective remedy of infringement on a public right is an interdict – Suspension of the operation of the order an extraordinary remedy.

- [1] In simple terms, this is an application brought by the applicants (all residents of Dan Pienaar suburb, Bloemfontein) against the respondents (both corporate entities) interdicting or restraining them or any other person from the illegal use of the property known as erf [...] Bloemfontein Extension 133 (alias [...] L Street). The first and second applicant are property owners while the third applicant is a resident in the neighbourhood of the property in contention. The first respondent is the registered owner of the property which is the subject matter and the second respondent is a construction company conducting its administrative component of the business from the property. Although the third respondent is cited in these proceedings, no order is sought against the third respondent.
- [2] It is common cause that Deed of Transfer Number T 5918/2016 was registered in favour of the first respondent on 16 May 2016 subject to the servitudes as set out in Deed of Transfer Number T 3992/1951. One such restrictive condition on paragraph (a) is that “this erf shall be used for residential purposes only and no trade or business or industry whatsoever shall be conducted thereon”. It is precisely because of this restrictive condition that the first respondent lodged an application with the third respondent on 6 August 2018 to remove them and rezone the property. It stands to reason that the use or continuation to use the property for any business or trade other than for residential purposes constitutes an illegal act. This aspect was correctly conceded by the counsel for the first and second respondent that the property is not used as it is supposed to be.
- [3] It was contended on behalf of the applicants that the restrictive conditions and town planning scheme are binding on the respondents

because there has not been any amendment or suspension. The applicants have the locus standi to bring the application because they possess sufficient protectable interest in the effective and enforcement of the scheme which was enacted in the interest of the owners (residents) in close proximity of the property. The gist of the submission is that they acquired their properties with a keen expectation of the residing in a residential suburb with amenities that are consistent with a residential suburb and with a residential character.

- [4] Despite the concession that the first and second respondents are committing an illegal act, the multi-pronged argument on behalf of the respondents culminates with the submission that in the event the application is granted, that the court use its inherent discretion to suspend the order for a period of time. Although in the papers the contention was that the second respondent was not the owner of any property in the neighbourhood, this point was jettisoned in the oral argument. The all-encompassing argument is that the applicants do not possess the locus standi to bring the application. It was pointed out that none of the applicants lived within fifty metres of the property. They are residing approximately a kilometre away and as such there can be no talk that they lived in close proximity of the property.
- [5] The argument continued that the property was used to accommodate only four (4) staff members of the second respondent who reported for duty at 8H00am and knocked off at 16H30pm on weekdays. They dealt mainly with quotations and orders. No cash exchanged hands between them and client. It was only in exceptional cases that the clients to the property. In a nutshell there was no nuisance generated by the activities of the respondents against the neighbours. The other point is that the suburb of Dan Pienaar has over the years changed in character with various businesses and even one of the biggest shopping malls in the city established in the area. The last point is that the first applicant has applied for rezoning over a year ago and no objection has to date been lodged against the application. The reality is that it is supported by neighbours as evidenced by an affidavit of one D.J. van Straaten. Although it has not been granted/declined, the third respondent is already collecting rates and taxes payable by business and commercial properties.
- [6] It is trite that the requirements for the grant of a final interdict are more stringent than those for the grant of a temporary interdict. This is so because of the far reaching consequences of the order of that kind. The requirements for a final interdict are accepted in our courts as a clear right, injury committed or reasonably apprehended and that there is no other suitable or alternative remedy.[1] These must be demonstrated by an applicant(s) seeking a relief which is final in nature.
- [7] This brings me to the determination of the locus standi that the applicants may possess and whether they have established any clear right as required in our law. It is unquestionable that an owner of land is not permitted to perform activities which contravenes the restrictive title conditions or the zoning restrictions. This being expressly prohibited by law pertinently in the public interest. It conclude that the applicants do possess the necessary locus standi. [2] The test applied throughout the courts in the Republic expressed in BEF (Pty) Ltd v Cape

Town Municipality and Others emphasizes that in order to apply the test laid in *Patz v Greene*, must be examined whether the scheme was introduced for the benefit of the general public or persons falling within a particular class or both.[3] In this case, the conclusion is that the scheme was for the inhabitants of the suburb of Dan Pienaar.

- [8] The clearest indication that a land owner does have locus standi and a clear right to approach the court in the matter of this nature was stated in *Walele v City of Cape Town and Others*. O'Regan J stated the following:

"The result of a zoning scheme is thus to restrict the rights of all owners in an area. Yet zoning schemes also confer rights on owners, because owners are entitled to require that neighbouring owners comply with the applicable zoning scheme. Where an owner seeks to depart from the scheme, the rights of neighbouring owners are affected and they are entitled to be heard on the departure. Owners in the area are also entitled to be heard when land is re-zoned. A zoning scheme is therefore a regulated system of give and take: it both limits the rights of ownership but also confers rights on owners to expect compliance by neighbours with the terms of the mutually applicable scheme. The result is that where an owner seeks to use his property within the terms of the zoning scheme, it cannot be said that the rights of surrounding owners are affected materially or adversely."[4]

- [9] The courts have repeatedly pronounced that the essence of town planning schemes is conceived in the interest of the community to which it applies.[5] This means that it does not matter whether an individual in this special class does own a property there or not. This is specifically dealt with because the respondents argued that the third applicant does not have locus standi on the basis that she does not own a property in the suburb. As it appears in the papers, she is a resident in the neighbourhood staying with her parents. There can be no talk that she does not have a protectable interest. She does have the necessary locus standi.

- [10] The last leg of the argument that the applicants do not reside within close proximity of the property does not find favour with me. They stay about one (1) kilometre away. I was not directed to one (1) authority with a detailed explanation of what is meant by close proximity. The decisions of the courts refer to all owners in an area affected by an applicable zoning scheme. There is no merit in this argument.

- [11] I shall not deal with the requirement that an injury has actually been committed or reasonably apprehended. It has already been conceded that the applicants are not complying with the restrictive conditions and town planning scheme.

- [12] Writing for the undivided bench in *Chapman's Peak Hotel v O'Hagans*, Griesel J said the following:-

"Once it is accepted that the nature of the right in question is a public right, then it must follow, in my view, that for continuing

infringements of that right the only effective remedy is an interdict, all the more so where such infringements amount to an offence."[6]

I agree.

[13] Counsel for the respondents implored me to exercise my discretion to grant the order and suspend its operation. That is an extraordinary remedy which requires a compelling case to be made out before it is granted. I am of the view that in this matter, it is appropriate to adopt the stricter approach. It does not come to the aid of the respondents that they are not the only ones in contravention of the law. They must be brought into line immediately when such matters are brought to the attention of the court.

[14] There are no convincing reasons advanced that such an order should be granted. The applicants have been continuing to act in an unlawful manner at least for fifteen (15) months. It appears that they are hell-bent to do so without the necessary relaxation of the restrictive conditions. To act otherwise will be to support or approval to an ongoing illegality which is also a criminal offense. This will be tantamount to the subversion of the doctrine of legality and undermining of the rule of law.[7]

[15] I now turn to the issue of costs. In his opening address counsel for the applicants remarked that the facts were straightforward. I agree with him. There is nothing intricate in this matter to justify employment of two (2) counsel. While in the exercise of my discretion I am of the view that the respondents are liable to pay the costs given the outcome of the matter, such should not include the costs of two (2) but one (1) counsel.

[16] The order of the Court is as follows: -

16.1 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 [...] L Street, Dan Pienaar, Bloemfontein described as Erf [...], Dan Pienaar, Extension 133, Bloemfontein.

16.2 The first and second respondents are ordered, jointly and severally to pay the costs of this application.

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M. A. MATHEBULA, J

On behalf of applicant: Adv. N. Snellenburg SC

Assisted by: Adv. C.D. Pienaar

Instructed by: Blair Attorneys

BLOEMFONTEIN

On behalf of 1st & 2nd respondent: Adv. S.J. Reinders

Instructed by: Van Wyk & Preller Inc.

[1] Setlogelo v Setlogelo 1914 AD 221; Pilane v Pilane and another 2013 (4) BCLR 431 (CC) at para 39

[2] Patz v Greene 1907 TS 427 at 433

[3] 1983 (2) 387 (C) at 400 H

[4]

[2008] ZACC 11; 2008 (6) SA 129 CC at para 130

[5] Pick and Pay Stores Ltd v Teezers Comedy and Revue CC 2000 (3) SA 645 (WLD) at 653 H

[6] 2001 (4) All SA 415 (C) at para 18

[7] Hotz v City of Cape 2016

(4) All SA 723 (SCA) at para 23

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