

SOUTH AFRICA / JUDGMENT

**Midstream Home Owners Association and Others
v Shoprite Checkers (Pty) Ltd and Others,
Heritage Hill Home Owners Association v
Shoprite Checkers (Pty) Ltd and Others (424/2011,
435/2011) [2012] ZASCA 65 (21 May 2012)**

[2012] ZASCA 65

COURT

Supreme Court of Appeal

BEFORE

Mthiyane DP, Nugent JA, Ponnann JA, Malan JA,
Ndita AJA

CASE / FILE NUMBER

424/2011, 435/2011

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 424/2011

In the matter between:

MIDSTREAM HOME OWNERS ASSOCIATIONFirst Appellant

MIDFIELD HOME OWNERS ASSOCIATIONSecond Appellant

MIDLANDS HOME OWNERS ASSOCIATIONThird Appellant

MIDSTREAM COLLEGE (PTY) LTDFourth Appellant

RETIRE @ MIDSTREAM HOME OWNERS

ASSOCIATIONFifth Appellant

BONDEV MIDRAND (PTY) LTDSixth Appellant

MARTHINUS JOHANNES DU TOITSeventh Appellant

and

SHOPRITE CHECKERS (PTY) LTDFirst Respondent

CITY OF TSHWANE METROPOLITAN

MUNICIPALITYSecond Respondent

HERITAGE HILL HOME OWNERS ASSOCIATIONThird Respondent

GAUTENG PROVINCIAL GOVERNMENT,

MEMBER OF THE EXECUTIVE COMMITTEE

OF AGRICULTURE & RURAL DEVELOPMENTFourth Respondent

Case No: 435/2011

In the matter between:

HERITAGE HILL HOME OWNERS ASSOCIATIONAppellant

SHOPRITE CHECKERS (PTY) LTD and OTHERSRespondents

Neutral citation: Midstream Home Owners Association v Shoprite Checkers (424/2011); Heritage Hill Home Owners Association v Shoprite Checkers (435/2011) [2012] ZASCA 65 (21 MAY 2012)

Coram: Mthiyane DP, Nugent, Ponnan and Malan JJA and Ndita AJA

Heard: 02 May 2012

Delivered: 21 May 2012

Summary: Tswane Town Planning Scheme 2008 – line of no access – revocation by Municipality

ORDER

On appeal from: The North Gauteng High Court, Pretoria (C Pretorius J sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel.

MALAN JA (Mthiyane DP, Nugent and Ponnan JJA and Ndita AJA concurring):

- [1] This is an appeal against the order of Pretorius J dismissing with costs the application of the appellants for a final, alternatively, an interim interdict, prohibiting the first respondent (Shoprite Checkers) from constructing, completing or utilising an access point on Brakfontein Road, Centurion, giving entry to Shoprite Checkers' distribution centre, allegedly in breach of what was called a 'line of no access' imposed in terms of approved amendment scheme 945, an amendment to the then Centurion Town Planning Scheme, 1992, now the Tshwane Town Planning Scheme, 2008. (I explain presently the meaning of that phrase.) The interim relief was sought pending an application to review and set aside any approval that may have been granted to Shoprite Checkers to construct the access point;

an application for a final interdict prohibiting any development or construction in breach of the environmental authorisation; an appeal to the Townships Board; and an application for a mandamus against the second respondent (the Municipality) compelling it to procure suitable orders against Shoprite Checkers. The appeal is with the leave of the court below.

- [2] The first five appellants¹ in the main appeal (424/2011) all form part of Midrand Estates which was developed by the sixth appellant. The seventh appellant is a resident of Midstream Estates and owns a stand there. Midrand Estates is a township development known colloquially as Midstream Estates. Midstream Estates will when completed comprise a land area of approximately 1000 hectares with 5 000 residential dwellings. Shoprite Checkers' distribution centre is situated on Louwlandia Extension 25 Township, Centurion within the industrial

corridor on both sides of the Ben Schoeman highway (N1) linking Johannesburg and Pretoria. Brakfontein Road runs east to west towards

the N1 and the distribution centre is located south of it with Olievenhoutbosch Drive on its western border. The Heritage Hill

residential development lies north of Brakfontein Road, opposite the distribution centre. To the east of it is Midstream Estates entry to which is also from Brakfontein Road. A number of corporations have established distribution centres or head offices in this industrial area from as early as 1999 or 2000.

- [3] The third respondent in the main appeal, the Heritage Hill Home Owners Association, was cited as a respondent in the court below. It did not take part in those proceedings except to file an affidavit associating itself with the application. On dismissal of the application it was ordered to pay the costs of the application jointly and severally with the other applicants. It seeks to appeal (in appeal 435/2011) against the judgment of the court below only on the basis that should the main appeal of the other appellants be upheld, the order for costs against it should be reversed.

History

- [4] The Shoprite Checkers distribution centre was constructed on land approximately 49,9159 hectares in extent halfway between the N1 highway in the west and Midstream Estates in the east. Some R3 billion was spent on construction of the centre, acquisition costs and professional fees and a further R2 billion on vehicles, equipment and stock. The distribution centre was designed as part of the Shoprite Checkers 1999 development plan. It was originally envisaged that there would be three access points, or entrances, to the centre, two in Brakfontein Road and one in Olievenhoutbosch Drive. However, because a phased development was planned, only one access point in Brakfontein Road was at first necessary. The second one on that road was indicated on the development plan as a 'Future Access Road'.

- [5] For the first phase of the development of the distribution centre a floor space ratio of only 0,21 was required allowing for the construction of a building with a floor space of approximately 105 000 m². Future expansion required an increase in the floor space ratio to 0,4 allowing the construction of a structure with a floor space of approximately 200 000 m². The Municipality was presented with the 1999 development plan when the township on which the centre was constructed was established during 2001.
- [6] Clause 7(2) of the Tshwane Town Planning Scheme, 2008, which I deal with more fully below, permits the municipality to 'prohibit the entrance to or exit from a property to a public street from any boundary of such property, this boundary is indicated by the following symbol on the map'. The symbol is reflected as a broken line. Where such a prohibition has been imposed that line is drawn on Map B of the scheme along the relevant boundary of the property concerned. It is that line that has been referred to in the proceedings as a 'line of no access'.
- [7] In approving the township the Municipality imposed, with the exception of a certain portion 58 metres wide, a line of no access along the entire northern boundary of the property along Brakfontein Road. This limited access point was to be used by motor vehicles attending the offices of Shoprite Checkers at the distribution centre. A second line of no access was also imposed along the entire western boundary of the property along Olievenhoutbosch Drive with the exception of a certain portion some 85 metres wide. Within this portion Shoprite Checkers constructed an access point or entrance for trucks which is some 37 metres wide. Only these two points of access were approved in terms of the approved amendment scheme 945, which is the operative town planning scheme relating to the property. The access points were reflected on the approved B series maps following approval of scheme 945.
- [8] The application for the establishment of the township, envisaging a floor space ratio of 0,4, was approved on 12 September 2001. The township was proclaimed on 4 September 2002. However, because Shoprite Checkers did not want to incur liability for taxes on the property based on a floor space ratio of 0,4 (which was not needed for the first phase of the development), it was recorded in condition 4(2)(c) of the conditions of the township approval that the floor space ratio would be restricted to 0,21, but that it could be increased to a maximum of 0,4 with the written consent of the local authority. A services agreement between Shoprite Checkers and the Municipality was concluded on 16 August 2001 in terms of which Shoprite Checkers' contribution to external engineering services relating to the establishment of the township was calculated at the higher floor space ratio.
- [9] The fresh produce warehouse on the property was constructed and came into operation towards the end of 2001. The dry goods warehouse of 55 000 m² was built and became operative in

2002. The distribution centre, however, had to be enlarged and, on 11 April 2008, Shoprite Checkers applied for the increase of the floor space ratio from 0,21 to 0,4. The application was approved on 9 October 2008. The Municipality imposed the following conditions when approving the increase:

‘1.1 City Planning and Development

(1) The height of buildings on the erf shall be 2 storeys, but may be increased with approval of the local authority.

...

(3) The floor area ratio (FAR) shall not exceed 0,4.

(4) A site development plan and a landscape development plan, unless otherwise determined by the Municipality, compiled by a person suitably qualified to the satisfaction of the Municipality, shall be submitted to the Municipality for approval prior to the submission of building plans.

(5) The building lines shall be in accordance with the site development plan.

...

(8) Entrances to and exists from the erf shall be located, constructed and maintained to the satisfaction of the Municipality.

2.1.2.1 Infrastructure Planning and Management

1. A complete Site Development Plan must be submitted before any building construction may commence, at the cost of the applicant, for the approval of the Division: Roads and Storm Water. Engineers Drawings with details regarding access, parking layout and storm water drainage must be submitted with the Site Development Plan.’

[10] Following this approval, the Municipality requested a comprehensive Traffic Impact Study in order to motivate the proposed access points including the disputed access point in Brakfontein Road. The study was submitted in February 2009. The Public Works and Infrastructure Development Department of the Municipality on 28 April 2009 approved the Traffic Impact Study but imposed certain conditions, among others that –

‘1.6 Access:

The proposed extended warehousing facilities will have the following accesses:

Access 1 from Brakfontein Road, proposed new access 570m to the east of the Olievenhoutbosch Drive/Brakfontein Road intersection: This access will be used only for inbound heavy vehicle traffic. [This is the access point in dispute]

Access 2 from Brakfontein Road, 300m to the east of the Olievenhoutbosch Drive/Brakfontein Road intersection: This existing access to the office building will only be a leftin, leftout access in the future for the office park in the northeast corner of the development and to the parking area for the personal cars of the truck drivers of the Shoprite Distribution Centre.

Access 3 from the Olievenhoutbosch Drive: This is a proposed new access approximately 225m south of Brakfontein Road. This access will be a leftin, leftout for light vehicles to the office park only.

Access 4 from the Olievenhoutbosch Drive: This existing access will in future only be used for all outbound heavy vehicle traffic and for light vehicle traffic to and from the fresh market.

Access 5 ...

1.7 (i) Access 1: Brakfontein Road/Heavy vehicle access to Shoprite DC

2010 Proposed Upgrades:

Introduce traffic signal control (when warranted)

Exclusive left and exclusive right turn lanes on southern approach

Exclusive left turn lane on eastern approach

Exclusive right turn lane on western approach

Future planning for the road includes two through lanes in the eastwest direction, but one lane is sufficient for the development traffic demand. (Hence, doubling of Brakfontein Road will not be implemented by Shoprite).'

[11] The site development plan, showing the new access point (access 1 referred to in the previous paragraph), was approved by the Municipality on 29 September

2009. On 25 January 2010, the Municipality authorised Shoprite Checkers to commence with the road widening activities to construct the new access. Construction began in February 2010 and the design for the traffic signal was approved during June 2010, and its installation on 15 July 2010. The new access point was completed by the time Shoprite Checkers' answering affidavit was filed in October 2010. The traffic signal was installed in January 2011. The additional facilities including the extension of the warehouse and new access were completed at a cost of R345 million and have become fully operational.

[12] In the June 2010 Shoprite Checkers financial report Mr JW Basson, chairman of the group, described the distribution centre as the largest of the group

'where distribution facilities have virtually doubled from 80 000 m2 to 145 000 m2. The main building of 114 000 m2 will be the largest distribution centre under one roof on the continent.

On completion at the end of the 2010 calendar year the facility will serve as the distribution point for about 90% of ambient products delivered to approximately 380 stores in the Gauteng area and beyond.

More than 1,100 suppliers will be delivering their products to the centre where they are stored, collated, and then distributed to retail stores on a highfrequency basis.

The new Centurion distribution centre was developed in a responsible manner using environmentfriendly approaches to construction. This was followed through with further investment in environmentfriendly design that includes treatment of waste water and an ability to recycle waste. Central reclamation forms part of the Group's safety and recycling programme, for the removal of damaged stock at the earliest opportunity, to avoid possible contamination of other products and control waste.'

Clear right

[13] In their application for an interdict the appellants allege that the new access point in Brakfontein Road was constructed in breach of the line of no access imposed by the Municipality when the township was originally approved pursuant to amendment scheme

945. The main issue, the deponent to the founding affidavit stated, was the 'unlawful' use by Shoprite Checkers of their property in constructing the disputed new access point in Brakfontein Road. The appellants, despite inquiries made at the Municipal offices, could find no formal application for approval of the new access point nor for the revocation of the line of no access. In addition, the deponent to the founding affidavit referred to the zoning certificate relating to the property, dated 21 September 2010, annexure 3 of which reflected access to the property as set out in the B series maps, in other words, only the two originally approved access points – one in Brakfontein Road and the other in Olievenhoutbosch Drive.

[14] Section 20 of the Town Planning and Townships Ordinance 15 of 1986 regulates the provisions which may be contained in a town planning scheme such as the Tshwane Town Planning Scheme, 2008. The general purpose of a town planning scheme is the coordinated and harmonious development of the area so as to promote its health, safety, good order, amenity, convenience and welfare (s 19).² The Municipality's power to prepare a town planning scheme derives from s 18 of the Ordinance. Section 20(1)(a) provides that the local authority may in its discretion and on conditions as it may determine consent to the use of any land or building for a particular purpose. It may also, in its discretion and on such conditions as it may determine, grant exemption from the provisions of the scheme or relax its requirements (s 20(1)(b)).

[15] Clause 7 of the Tswane Town Planning Scheme deals with the 'prohibition of access' and provides –

'Entry to or exit from any property to or from a public street, shall be subject to the following conditions:

- (1) Entrances to and exists from such property, “Residential 1” and “Residential 5” excluded, shall be located, constructed, drained and maintained to the satisfaction of the Municipality, and if required by the Municipality, constructed with a dustfree surface, internal driveways included: Provided that entrance gates to such property shall be located at least 6,0 m from the edge of the tar of a street or road.
- (2) The Municipality may prohibit the entrance to or exit from a property to a public street from any boundary of such property, this boundary is indicated by the following symbol on the map: [symbol shown]

With the proviso that the Municipality may revoke such access prohibition on receipt of a written application for its permission, subject to any conditions that the Municipality may impose, except in the case of access restrictions in respect of National or Provincial Roads.’ (My emphasis.)

[16] Clause 15 of the Tshwane Town Planning Scheme, 2008 provides –

‘The permission of the Municipality to use land and buildings or to relax certain conditions stipulated in this Scheme, its Schedules and Annexures, where such permission is explicitly stated, shall be subject to an application procedure as required by the Municipality

and such application shall be subject to the following:

documents as prescribed by the Municipality shall be submitted with the prescribed fee;

the prescribed advertisement procedure shall be complied with and the Municipality may waive this requirement wholly or partly if it is satisfied that such noncompliance is not of such a material nature that it is likely to affect anyone detrimentally;

the Municipality may approve or refuse such application subject to such conditions the Municipality deems necessary to regulate such permission; and

the Municipality may require that a contribution in respect of engineering services is payable in terms of Section 20 of the Town Planning and Townships Ordinance, 1986 (Ordinance 15 of 1986) as and when required by the Municipality.’

[17] It is not in dispute that clause 15 regulates the relaxation of a line of no access. The reference in clause 15(2) to the ‘prescribed advertisement procedure’ is not a reference to the advertisement procedure specified in clause 16(2) to (9). Clause 16 deals with ‘consent use procedure’. The revocation of a line of no access does not fall into the field of application of clause 16 as it is formulated in clause 16(1).

[18] The Tshwane Scheme does not contain a definition of ‘application’ as used in clauses 7 and 15 but, instead, defines ‘permission of the Municipality’ as ‘the permission or approval granted by the Municipality in terms of Clause 15 to use land and buildings for a specific use or to relax certain conditions applicable to the use of land and buildings’. Clause 15(1) states that the ‘permission’ of the Municipality to use land or to relax certain conditions stipulated

in the Scheme, 'where such permission is explicitly stated', shall be subject to an application procedure. Clause 7(2) expressly refers to 'a written application' for the Municipality's permission to relax a line of no access. Clause 15 provides that the permission of the Municipality shall be subject to an application procedure 'as required by the Municipality'. It is further provided that the application shall be subject to the submission of documents as prescribed and that the 'prescribed advertisement procedure' shall be complied with, although the Municipality may waive 'this requirement wholly or partly if it is satisfied that such non compliance is not of such material nature that it is likely to affect anyone detrimentally'.

[19] The Municipality's council resolved on 29 November 2007 to approve the procedure for permission under clause 15 of the Tshwane Scheme. In so far as clause 7 is concerned the procedure 'as required by the Municipality' is set out in annexure 5 to the resolution:

'Written application must be submitted to City Planning and shall contain the following:

A motivating memorandum;

Power of attorney if the applicant is not the owner;

Copy of the title deed;

Site plan indicating the access required;

Zoning certificate and/or Annexure B/Annexure T/Annexure or Schedule or Consent use.

Application fee.

Advert not necessary

Circulate to Transport Engineers and Traffic section.' (My emphasis.)

This resolution was passed to provide for a 'streamlined' manner in which application could be made for the Municipality's permission and 'a more simplistic method for advertisement if so required' (para 4.4.21 of the resolution). The council resolved not to require applications under clause 7 to be advertised. In other matters, however, such as where application is made for permission to erect a second dwelling on a property, an advertisement in the form of a placard on site is required (clause 14(10) of annexure 5) and also where permission is sought to establish a spaza shop in a dwelling (Schedule 9 to annexure 5).

[20] The consent that was granted to increase the floor space ratio (dated 11 April 2008) was conditional upon '[a] complete Site Development Plan [being] submitted... at the cost of the applicant, for the approval of the Division: Roads and Storm Water. Engineers Drawings with details regarding access, parking layout and storm water drainage must be submitted with the Site Development Plan.' The Traffic Impact Study was approved on 28 April 2009 and the site development plan on 29 September 2009.

'Revocation' of line of no access.

- [21] The appellants contended that there was no revocation of the line of no access and the new point of access was thus not permitted. Clearly there was no express revocation of the line of no access. But it was submitted on behalf of Shoprite Checkers that it was revoked by implication on 9 October 2008 when the Municipality informed their town planner that the application for the increase of the floor space ratio to 0,4 had been successful. In terms of condition 1.1(4) of the approval a site development plan had to be submitted prior to the approval of building plans. Condition 1.1(8) required Shoprite Checkers to locate, construct and maintain the entrances to and exists from the property to the satisfaction of the Municipality. It was submitted that from this condition it followed that the Municipality expressly, alternatively, by necessary implication, revoked the line of no access in approving the new access points.
- [22] The appellants have submitted that the decision by the Municipality could not have been taken by implication because in its approval of the increase on the floor space ratio the Municipality stated that '[t]he requirements of the Centurion Town Planning Scheme, 1992 remain applicable'. Since the line of no access was a condition of the approval of amendment scheme 945, so the argument went, the express condition referred to had the effect of retaining the line of no access originally imposed, notwithstanding the approval of the development plan. They submitted further that the rules of natural justice and administrative law would be rendered nugatory if a decision constituting administrative action could be taken by implication.
- [23] In my view the submissions made on behalf of the appellants attach undue significance to the use of the word 'revocation' in clause 7(2) of the Scheme. The submission suggests that the depiction alone of the line on Map B constitutes the prohibition, which remains in place until such time as the line is physically erased from the map, whether wholly or in part, which in my view is not correct. The prohibition upon access emanates from the decision by the Municipality to prohibit it. It is clear from clause 7(2) that what may be prohibited may also be permitted by a decision to permit. When read together with clause 7(2), properly construed, the line that is drawn on Map B is no more than a physical depiction of a decision to prohibit, but subject to any decision to permit. The clause does not require the decision to take the form of a physical erasure of the line. It requires no more than that permission be granted as a fact.
- [24] A person who seeks that permission is required by clause 15 to do so according to the application procedure required by the Municipality. The required procedure was laid down in the resolution that I have referred to in paragraph 17, which lists the 'documents as prescribed by the Municipality' (clause 15(1)) when such an application is made. Clearly that prescription of the documents to be submitted when permission is sought is solely for the benefit of the Municipality and it is entitled to waive the requirement. So far as clause 15(2) subjects an application to compliance with 'the prescribed advertisement procedure' it is apparent from the resolution that no advertisement procedure has been prescribed.

- [25] I cannot see how the submission of the site development plan for approval, depicting the proposed access, can be construed as anything other than an application for permission from the Municipality to have that access. An 'application' as ordinarily understood in this context is, after all, nothing more than a request. That the Municipality did not insist upon the prescribed application form being completed, nor upon the documents specified in the resolution accompanying the development plan, does not seem to me to be material. I said earlier that the requirement that those documents be submitted when an application is made is solely for the benefit of the Municipality and it is not obliged to insist upon it.
- [26] For those reasons I think it is clear that Shoprite Checkers has indeed been granted permission to have the disputed access, as the Municipality was entitled to do. For so long as that permission stands Shoprite Checkers is not acting unlawfully and the relief that was sought in that regard was properly refused.

Interim interdict

- [27] The appellants sought interim relief against the respondents prohibiting Shoprite Checkers from constructing, completing or using the new access point pending finalisation of the following proceedings: the appeal to the Townships Board in terms of s 139 of the Ordinance against the revocation of the line of no access; the application to review and set aside of the decision to revoke the line of no access; a final interdict against Shoprite Checkers to stop any development or construction in breach of any existing environmental authorisation; and the obtaining of mandamus against the Municipality to procure suitable orders against Shoprite Checkers relating to its alleged illegal conduct. In argument counsel limited his address to the prospects of success of the intended application to review and set aside the decision to revoke the line of no access.
- [28] I have already found that Checkers Shoprite has been granted permission as a fact to have access, as the Municipality was entitled to do, and is not acting unlawfully. Nonetheless, the interim interdict was sought on the basis that permission ought in law not to have been granted, and is liable to be set aside.
- [29] I think it is fair to say that the true complaint by the appellants is that they were not given an opportunity to oppose the request to the Municipality for permission to access the property. In that respect the submission was that the decision by the Municipality constituted administrative action and they were entitled to be heard before the decision was made. Once more I do not think that is correct.
- [30] Where the Municipality prescribes an 'advertisement procedure' as contemplated by clause 15(2) it might be inferred that it invites objections from interested parties as part of its procedure and will grant objectors a hearing. But the clause does not demand that the Municipality must prescribe such a procedure and in this case it chose not to do so.

[31] Nonetheless, so it was submitted, the decision constituted ‘administrative action’ under the Promotion of Administrative Justice Act 3 of 2000, which was subject to a fair administrative procedure, which includes giving a reasonable opportunity for interested parties to be heard. Section 3(1) of the Act, read with s 3(2), prescribes an opportunity to make representations being given only to persons whose ‘rights or legitimate expectations’ are materially and adversely affected by the administrative action. I do not think that the appellants have demonstrated any right that was affected by the decision to allow the access. Clearly the members of the appellants – like other members of the public – have no right to use the road without any impediment. Nor was anything done by the Municipality to induce in the appellants an expectation that they would be heard before access from the road was permitted.

[32] It follows that the appellants have not shown that they would be successful on review and there are no grounds for granting interim relief.

[33] The main appeal should therefore be dismissed. As a result no order need be made on the appeal of the third respondent. The following order is made:

The appeal is dismissed with costs, including the costs of two counsel.

F R MALAN

JUDGE OF APPEAL

APPEARANCES:

For Appellant: N G D Maritz SC and

M P van der Merwe

J W Schabort (Case 435)

Instructed by:

Tim du Toit Attorneys

Pretoria

Naudes Inc

Bloemfontein

For Respondent: S J Grobler SC (1st Resp) and

A Liversage (1st Resp)

Werksmans Inc (1st Resp)

c/o Weavind & Weavind

Strauss Daly (1st Resp)

Hugo & Ngwenya Attorneys (2nd Resp)

(2nd Respondent does not oppose the Appeal)

Jarvis Jacobs Raubenheimer Inc (3rd Resp)

Rossouws Attorneys (3rd Resp)

The State Attorney (4th Resp)

1Midstream Home Owners Association, Midfield Home Owners Association, Midlands Home Owners Association, Midstream College (Pty) Ltd, and Retire @ Midstream Home Owners Association.

2Baron & Jester v Eastern Metropolitan Local Council 2002 (2) SA 248 (W) para 45.

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