

SOUTH AFRICA / JUDGMENT

NAD Property Income Fund (Pty) Ltd and Another v City of Tshwane Metropolitan Municipality and Others (89393/2018) [2020] ZAGPPHC 702 (7 December 2020)

[2020] ZAGPPHC 702

COURT

North Gauteng High Court, Pretoria

BEFORE

Ngalwana

CASE / FILE NUMBER

89393/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

REPORTABLE

CASE

NO: 89393/2018

In

the matter between:

NAD

PROPERTY INCOME FUND (PTY) LTD

First

Applicant

RESILIENT

PROPERTIES (PTY) LTD

Second

Applicant

and

CITY

OF TSHWANE METROPOLITAN MUNICIPALITY

First

Respondent

CEDRIC

PATO

Second

Respondent

JAMES

RUPERT BEVERLEY MORGAN t/a OUTDOOR CO
Third
Respondent
FAGIMVUBU
MEDIA (PTY) LTD
Fourth
Respondent

JUDGMENT

NGALWANA AJ

“Courts exist to resolve controversies and not abstract issues. As I see it, for a court to intervene and assist the warring parties, there must be [live] controversy between the parties. The dictionary meaning of the term controversy is a dispute, argument, or debate, especially one concerning a matter about which there is a strong disagreement. Further, the controversy must be a live one. Put differently it must exist between the warring parties. A case would be moot if the parties are not adverse, if the controversy is hypothetical, or if the judgment of the court for some other reason cannot operate to grant any actual relief, and the court is without power to grant a decision. It is moot, if it no longer presents an existing or live controversy or the prejudice or threat of prejudice, which to an applicant, no longer exists”[1].

- [1] I align myself with these sentiments as expressed by Justice Moshwana.
- [2] The salient facts are common cause, as they should be in motion proceedings. Briefly, and to the extent necessary for purposes of this judgment, the first respondent (“the City”) granted permission to the second respondent to establish and erect a billboard on the City’s land pursuant to the City’s

applicable by-laws. The applicants contend that the billboard would, if erected, obstruct the view to their shopping mall. They also complain that the owners of property in the vicinity of the area where the billboard would be positioned (including themselves in that number) were not consulted by the City. They add that there are numerous other jurisdictional facts with which there has been no compliance for the granting of the approval by the City. The applicants secured a final interdict against the second respondent, his agents, consultants and employees in relation to the construction of the billboard. So, the billboard has not been put up. The third and fourth respondents have also since been joined and have, according to the applicants, “conceded to the relief sought by the applicants [and] have removed the billboard that was the cause of the applicants’ complaint”. But the applicants insist that for as long as the City’s decision to approve establishment of the billboard without prior consultation, among other things, remains extant, the decision is binding and has legal effect until it has been set aside by a competent court. They say

“until it has been reviewed and set aside there is a real and live possibility that the second and/or third and/or fourth respondents can at a later stage cede the approval and invoke the City’s approval to build a billboard.”

(emphasis supplied)

[3] They also say in their second supplementary affidavit

“In view of the fact that the relevant approval still exists in fact and in law and that any party who may, eventually, procure this rights [sic], will still be entitled to, as matters stand, erect the applicable advertising

structure, which will result in the impacts experienced [sic] by the Applicants as set out in the Founding Affidavit, the Applicants have no option by to pursue the Review Application and to procure an order from the above Honourable Court in terms of which the unlawful granting of the application in terms of the By-Law, be reviewed and set aside.”

[4] Counsel have identified the issues for determination in their Joint Practice Note as being the following:

4.1 whether the review application (Part A) is moot and/or academic as a result of the final interdict obtained in Part A of the application against the second respondent;

4.2 whether in taking the decision, the City acted in contravention of the Constitution of the Republic of South Africa, the Advertising Outdoor By-laws or any empowering legislation;

4.3 whether the City ought to have taken steps to consult with the public, in particular the property owners around the vicinity where the sign would be positioned – specifically the applicants – during the process of evaluating the second respondent’s application for the sign and prior to such evaluation being finalized.

[5] It is in my view unnecessary to traverse all the issues raised, cerebrally inviting as some of them are. The basis for the applicants’ review application hinges entirely on a “possibility” or “eventuality” of the right (enjoyed by virtue of the City’s extant decision) to construct and erect a billboard being ceded, at some time in the future, to another party who is not bound by the final interdict. Although the “possibility” is described as “real and live”, no actual evidence of a threat of construction or erection of the billboard has been advanced. That renders the threat merely

hypothetical. A determination of whether or not a dispute between the parties is “live” requires consideration of the evidence placed before a court. It is not something to be plucked dexterously out of thin air.[2] It is not the role of courts to grant relief in anticipation of hypothetical events that may or may not occur. If an unlawful construction or erection of a billboard does come to pass, sometime in the future, the applicants will have their remedy at that time.

[6] Counsel for the applicants invokes the principle against self-help, namely, that a decision – even if unlawful –

“exists in fact and it has legal consequences that cannot simply be overlooked [as] the proper functioning of a modern state would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question.”[3]

- [7] The Constitutional Court has also expressed the same principle in *Kirland Investments*[4] and *EFF*[5]. But the principle is targeted at a particular mischief of ignoring decisions that have legal effect. That is not the issue here. There is no allegation in the pleadings that the City is ignoring the impugned decision. There is not even an allegation that it seeks to implement or act upon the impugned decision. Quite the contrary. The orders that the applicants have secured in Part A include

7.1 an order interdicting the second respondent, his agents, employees and consultants from erecting the billboard contemplated in the City’s impugned approval, or addenda thereto, amendments, substitutions or extensions of the approval until there has been compliance with the requirements identified by the applicants; and

7.2 an order interdicting the City from taking any steps to implement the impugned approval, addenda thereto, amendments, substitution or extensions thereto.

- [8] In addition, in their supplementary affidavit the applicants contend that the City’s impugned approval “is not capable of being transferred or ceded and any attempt to do so is void, alternatively, unlawful and unenforceable”.

- [9] Thus, in terms of a court order granted by a competent court at the instance of the applicants, not only can the second respondent not implement the impugned decision in any form, but neither can the City. What is more, on the applicants’ own version, the impugned approval is not capable of cession or transfer, and any attempt to do so would be unlawful and unenforceable. On these facts, it seems to me, the mischief that the principle in *Oudekraal* and *Kirland Investments* seeks to address does not arise as the applicants have been sufficiently astute to, as it were, cover all bases. An order reviewing and setting aside the impugned decision in these circumstances would thus in my view have no practical effect that the interdict and the applicants’ view on a possible cession of the right springing therefrom already has.

- [10] For these reasons, the review application seems to me to be moot and there is no compelling reason in law or in the interests of justice to entertain it.

- [11] As regards costs, the applicants filed a second supplementary affidavit in which they seek a costs order against the City on an attorney and client scale for opposing this review application because, say the applicants, “the outcome [of this review application] will hold no practical or tangible benefit for the [City]” as the parties in whose favour the impugned approval has been granted do not oppose the application. I cannot agree. Firstly, the procurement of a rule 53 record from the City in relation to a review application that, in my assessment, would serve no higher practical purpose than the final interdict already granted

in the applicants' favour – not only against the second respondent but also against the City – put the City to unnecessary expense. Secondly, the City rightly opposed the application precisely because it serves no practical purpose. I have already explained that the mischief targeted by cases such as *Oudekraal*, *Kirland Investments* and *EFF* does not arise in this case. There is neither palpable danger, nor evidence, of the City or the second respondent ignoring the City's impugned decision because it has effectively been rendered otiose by the final interdict obtained in Part A. The courts exist to resolve live disputes between litigants. There is no live dispute here. The applicants' case hinges on a possibility or eventuality of an event happening sometime in the future. If such event does eventuate sometime in the future – something that on the applicants' own version is unlikely to happen both in light of the sweeping nature of the final interdict and in light of the view they take of the lawfulness of a cession to another person or other persons – they will have a legal remedy then.

- [12] In any event, costs on attorney and client scale are not there for the asking, even if the applicants were to be successful. It is not necessary to make a finding on this aspect since I have already found that the applicants' review application is moot. But for the sake of completeness, and just in case they may wish to pursue the matter of costs on this scale further, I make the following obiter observations. The Constitutional Court[6] has relatively recently restated the standard for costs on this scale. It said:

"[223] More than 100 years ago, Innes CJ stated the principle that costs on an attorney and client scale are awarded when a court wishes to mark its disapproval of the conduct of a litigant.[7] Since then this principle has been endorsed and applied in a long line of cases and remains applicable.[8] Over the years, courts have awarded costs on an attorney and client scale to mark their disapproval of fraudulent, dishonest or mala fides (bad faith) conduct;[9] vexatious conduct;[10] and conduct that amounts to an abuse of the process of court.[11]"

(footnotes in original text)

- [13] I cannot say the City's conduct in opposing this review application meets the standard of bad faith, fraud, dishonesty, vexatiousness or abuse of the court's process.

- [14] The standard for determining bad faith has been defined by the Constitutional Court as follows:

"The correct approach to determining the existence of bad faith is therefore one that recognises that bad faith exists only when the office-bearer acted with the specific intent to deceive, harm or prejudice another person or by proof of serious or gross recklessness that reveals a breakdown of the orderly exercise of authority so fundamental that absence of good faith can be reasonably inferred and bad faith presumed."[12] [13]

- [15] There is no evidence of any such conduct in this case.

- [16] In the result, costs on attorney and client scale would not have been justified against the City.

[17] I see no reason why costs should not follow the cause.

[18] I thus make the following order:

The review application is dismissed with costs.

V NGALWANA

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 07 December 2020.

Date of hearing: 19 November 2020

Date of judgment: 07 December 2020

Appearances:

Attorneys for the Applicant: Ivan Pauw & Partners (pierre@ippartners.co.za)

Counsel for the Applicant: Adv. M Majozi (082 419 5259)

Attorneys for the 1st Respondent: Kunene Ramapala Inc (Lmuller@kr-inc.co.za)

Counsel for the 1st Respondent: Adv. K Mnyandu (082 922 1979)

[1]

Koko v Eskom Holdings Soc Limited (J200/18)

[2018] ZALCJHB 76 (21 February 2018) at para 21 (“Koko”) .

[1]

Koko v Eskom Holdings Soc Limited (J200/18)

[2018] ZALCJHB 76 (21 February 2018) at para 21 (“Koko”)

.

[2]

Koko (supra) at para 24

[3]

Oudekraal Estates Pty Ltd v City of Cape Town & Others 2004 (6) SA 222 (SCA) at para 26

[4]

MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 574 (CC) at paras 90 & 100-102

[5]

Economic Freedom Fighters v Speaker, National Assembly & Others 2016 (3) 580 (CC) at paras 72-75.

[6]

In Public Protector v South African Reserve Bank (CCT107/18) [2019] ZACC 29; 2019 (9) BCLR 1113 (CC); 2019 (6) SA 253 (CC) (22 July 2019)

[7]

Orr v Solomon 1907 TS 281. See Nel v Waterberg Landbouwers Ko-Operatiewe Vereeniging 1946 AD 597 at 609 where it was held: “Now if a trial judge is satisfied that a defendant's conduct in connection with the subject matter of the proceedings was fraudulent that seems to me a ground on which he may be entitled in a particular case to exercise his discretion in favour of an award of attorney and client costs to the successful party.”

[7]

Orr v Solomon 1907 TS 281. See Nel v Waterberg Landbouwers Ko-Operatiewe Vereeniging 1946 AD 597 at 609 where it was held:

“Now if a trial judge is satisfied that a defendant's conduct in connection with the subject matter of the proceedings was fraudulent that seems to me a ground on which he may be entitled in a particular case to exercise his discretion in favour of an award of attorney and client costs to the successful party.”

[8]

Limpopo Legal Solutions v Eskom Holdings Soc Limited [2017] ZACC 34; 2017 (12) BCLR 1497 (CC) at paras 35 and 37; South African Liquor Traders' Association v Chairperson, Gauteng Liquor Board [2006] ZACC 7; 2009 (1) SA 565 (CC); 2006 (8) BCLR 901 (CC) at para 48; and Swarthbooi v Brink [2003] ZACC 25; 2006

(1) SA 203 (CC); 2003 (5) BCLR 502 (CC) at para 27.

[9]

MEC for Economic Affairs, Environment and Tourism v Kruisenga [2010] ZASCA 58; 2008 (6) SA 264 (SCA) at paras 77–80; Law Society, Northern Provinces v Mogami [2009] ZASCA 107; 2010 (1) SA 186 (SCA) at para 31; Davis above n 30 at para 28; Nordbak (Pty) Ltd v Wearcon (Pty) Ltd 2009 (6) SA 106 (W) at 117H; Bernert v Swanepoel 2009 (4) All SA 440 (GSJ) at 443b–d; Spieth v Nagel 1997 JDR 0375 (W) at 18; Friederich Kling GmbH v Continental Jewellery Manufacturers; Speidel GmbH v Continental Jewellery Manufacturers 1995

- (4) SA 966 (C) at 975I-976E; BEF (Pty) Ltd v Cape Town Municipality 1990 2 SA 337 (C); Jooste v Minister of Police 1975 (1) SA 349 (E) at 356–7; Simmons v Gilbert Hamer & Co Ltd 1962 (2) SA 487 (D) at 496H-498C; Van Dyk v Conradie 1963 (2) SA 413 (C) at 418E; and Suzman Ltd v Pather and Sons 1957 (4) SA 690 (D) at 690G-691A.
- [10] Thunder Cats Investments 49 (Pty) Ltd v Fenton 2009 4 SA 138 (C) at paras 33–4; Page v ABSA Bank Ltd t/a Volkskas Bank 2000
- (2) SA 661 (E) at 667A-F; SA Droëvrugtekoöperasie Bpk v SA Raisins (Edms) Bpk 1999 3 All SA 245 (NC) at 254-7; Ernst & Young v Beinash 1999 (1) SA 1114 (W) at 1148D-G; Van Deventer v Reichenberg 1996 (1) SACR 119 (C) at 129B-D; and Delfante v Delta Electrical Industries Ltd 1992 (2) SA 221 (C) at 233B-G.
- [11] Law Society of SA v Road Accident Fund 2009
- (1) SA 206 (C) at paras 21-6; Alton Coach Africa CC v Datcentre Motors (Pty) Ltd t/a CMH Commercial 2007
- (6) SA 154 (D) at para 40; Hudson v Wilkins 2003 (6) SA 234 (T) at para 20; Rhino Hotel & Resort (Pty) Ltd v Forbes 2000 (1) SA 1180 (W) at 1184J-1185B; Lourenco v Ferela (Pty) Ltd (No 1) 1998 (3) SA 281 (T) 300C-H; Mahomed & Son v Mahomed 1959 (2) SA 688 (T) at 692B-693B; and Hayes v Baldachin 1980 (2) SA 589 (R) at 595D.
- [12]
- Public Protector v SARB, at para 72 (minority judgment) which the majority did not fault
- [13] Réjean Hinse v Attorney General of Canada 2015 SCC 35 at paras 48 and 53. The Supreme Court of Canada adds at para 52 that “[a] simple fault such as a mistake or a careless act does not correspond to the concept of bad faith”.

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