

SOUTH AFRICA / JUDGMENT

Smith v Kyaligonza (22/19414)
[2024] ZAGPJHC 273 (14 March 2024)
[2024] ZAGPJHC 273

COURT

South Gauteng High Court, Johannesburg

BEFORE

P Den Hartog

CASE / FILE NUMBER

22/19414

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 22/19414

1.REPORTABLE:

2.EPORTABLE: OF

INTEREST TO OTHER
JUDGES:

3.REVISED.
14 March 2024
In

the application to compel
between:

SMITH,
RUTH
Applicant
and
KYALIGONZA,
ANTHONY
Respondent
In

re: SMITH,
RUTH Applicant
KYALIGONZA,
ANTHONY First
Respondent
THE
CITY OF JOHANNESBURG METROPOLITAN
Second Respondent
MUNICIPALITY

JUDGMENT

DEN HARTOG AJ

1. This is an interlocutory application that came before me on 7 March 2024 in terms of which the Applicant sought an order in the following terms:
 - 1.1. Ordering the Respondent to grant a land surveyor and/or town planner duly appointed by the Applicant, access to the Respondent's property for the purpose of inter alia, taking the necessary measurements and inspecting the building structure/s on the Respondent's property, which would enable the land surveyor and/or town planner to compile an expert report.
 - 1.2. Ordering the Respondent to give the land surveyor and/or town planner access to the Respondent's property within a period of fifteen (15) calendar days from the date of granting of this order.
 - 1.3. Ordering the Respondent to pay the costs of this application on an attorney and own client scale.
2. The original main application brought by the present Applicant sought a demolition order of certain buildings and structures erected by the Respondent on Erf 3[...], G[...] T[...], Gauteng, with street address situate at 5[...] G[...] E[...] R[...], G[...], Johannesburg.
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3. The Second Respondent in this matter is the CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY, but has played no part in any of the two applications.
4. The motivation for the demolition relief sought in the main application transpires from building work that the First Respondent commenced on his property.
5. These building works commenced during or about February 2017 with the Applicant suspecting that the works were illegal in that they were being carried out in an extremely close proximity to the boundary wall between their respective properties.
6. The Applicant also raises certain aesthetic problems with the building works.

7. The Applicant then commenced with an investigation and established that no building plans had been submitted to and/or approved by the Second Respondent and launched an application for the demolition of the illegal building works.
8. The application was initially heard by default and an order was granted in terms the notice of motion as sought by the Applicant. This order was subsequently rescinded by the First Respondent and eventually an answering affidavit was filed by the First Respondent.
9. In the answering affidavit, the First Respondent alleges inter alia:
 - 9.1. "I am advised that even if I had encroached and/or constructed structures outside the approved municipal plans, the municipality would have afforded me an opportunity to apply and/or comply with the By-laws..."
 - 9.2. "I am further aware that prior to the approval of the building plans, the municipality attended to my property and conducted an inspection. On the strength of this, the allegations of encroachment are baseless..."
 - 9.3. "Upon completion of the boundary wall, I proceeded with construction work to renovate the whole property and to rebuild the house. I must place that I only worked on the existing foundation, no additional structures were built. Simply put I maintained the existing building plan..."
 - 9.4. "The construction work and renovations to my property were completed around the year 2022 and no illegal structures were added, the house remains a single structure with a few additions and alterations as detailed in the plan attached hereinabove..."
 - 9.5. "In approaching this Honourable Court, the Applicant in paragraph 30 of her founding affidavit, alleges that I have erected several rooms and structures at the property, which structures were at close proximity to the boundary wall. I deny these allegations as baseless, uninformed and is without merit..."
 - 9.6. "In amplification of the denial, I place that the Applicant never took time to come over to my property and raise these issues with me, and measure the alleged distance she complains about..."
 - 9.7. "I reiterate that the renovations already completed at my property do not constitute several structures as suggested, no new structures were added, only the cottage was demolished and a new wall erected where it used to be, no encroachment towards the boundary wall as suggested by the Applicant exists..."
 - 9.8. "I seek to proceed to further add that the renovations, concluded at my property have not resulted in several numerous structures but rather, one complete structure. This Honourable Court is invited to note that there is one structure, not several structures as alleged..."

9.9. “Following from the plan and the evidence I have adduced, I submit the Applicant’s case has no merit, on the fact that the structure at my property is approved by the municipality...”

9.10. “... There is no encroachment to the Applicant’s property...”

9.11. “...There are no illegal structures at my property, I have a valid building plan in relation to the structures build at my property, that has been approved by the City of Johannesburg Metropolitan Municipality...”

9.12. “No additional structures were added, I only made renovations to the existing structure and extended the existing structure, all this was done in line with approved building plan...”

9.13. “... save to deny that no building works were done close to the boundary wall, and that the municipality would not have approved the plans if ever they were encroaching on any neighbour including the Applicant...”

9.14. “... I only renovated my property. I did not commence a new structure from the ground up. The allegation that I have built close to the

boundary wall is untrue as I built on top of the previous foundation and did not move my property any closer to the wall. The positioning

of my property has not changed and is still as it was before the renovations were undertaken...”

9.15. “... The entertainment area is nowhere closer to the Applicant’s property and these are simply unsubstantiated allegations...”

9.16. “...There are no illegal building works...”

9.17. “...My building plans have been approved by the requisite entity with such authority and no illegal structures exist at my property to warrant a demolition...”

10. The aforesaid allegations prompted the present application, the Applicant alleging that she is not in a position to respond to these allegations as she has no access to the property and requires the appointment of a town planner to do the necessary measurements to enable her to draft and file a replying affidavit.

The First Respondent’s contentions

11. The First Respondent contends that the main application was premised on the fact:

11.1. that there were no building plans; and

11.2. ancillary to that, there was an encroachment.

12. The production of the building plans annexed to the answering affidavit as annexure “FA4” resolves the matter in that the First Respondent now has building plans, which was the Applicant’s main cause of complaint and consequently the

Applicant should withdraw her application.

13. The First Respondent rejects the Applicant's contention that her case is premised on illegal structures and that the allegation of illegality is linked to the lack of building plans. The First Respondent further contends that by the presentation of an approved building plan, the causa for the application falls away.

Applicant's contention

14. The Applicant contends that the production of approved building plans does not mean that the structures are now legal, but it is for the First Respondent to show that the construction work was done in accordance with the approved building plans. For this contention the Applicant relies on the allegations in her founding affidavit, namely that:

14.1. there were no building plans at the time of the launching of the application (this is common cause);

14.2. the motivation for the investigation to establish whether there are building plans was as a result of a suspicion that certain by-laws and provisions, title deeds etc. had not been complied with and consequently the structures were illegal;

14.3. there was a direct encroachment into the borderlines of the structures; and

14.4. according to a due diligence report by Urban Ideas Development Planners (Pty) Limited:

"1.5.2 Some amendments and additions have not been approved between the time stamps of 2015 and 2022."

15. I interpose to deal with this report in that the First Respondent alleges that this report constitutes new material

introduced in a replying affidavit and does not form part of the Applicant's original cause of action.

16. In my view this is a presentation of facts supporting the founding affidavit wherein the suspicion is raised that there has been non-compliance with by-laws and/or regulations.

17. The First Respondent in any event had other remedies at his disposal to deal with this contention and did not utilise them.

18. Although the First Respondent did not raise as an issue my power to grant an order as sought in these interlocutory proceedings by the Applicant, I raised the issue with counsel for the Applicant. Counsel for the Applicant pointed out that Rule 36 of the Uniform Rules of Court applies merely to actions and not to applications.

19. Counsel for the Applicant however pointed out that in term of Section 173 of the Constitution, No 108 of 1996 confers inherent powers on the High Court to protect and regulate their own process, and to develop the common law, taking into account the interest of justice.

20. In my view the fact that Rule 36 of the Uniform Rules of Court merely applies to actions, does not preclude me from granting an order in these terms. As stated however, the First Respondent did not raise this as an issue in any way.
21. I also deal with Section 14 of the National Building Regulations and Building Standards Act, No 103 of 1977 in terms of which a certificate of occupancy is to be issued to the owner of the building in which an erection has taken place, which certificate of occupancy shall provide therefore that the renovations and alterations are in accordance with the approved building plans.
22. This section goes further to make it an offence for somebody to occupy such premises unless a certificate of occupancy has been issued.
23. The First Respondent has failed to present any such certificate of occupancy.
24. Upon questioning the First Respondent's counsel as to what the objection is against an inspection in light of the allegation that all the building works have been concluded in terms of the approved building plans, counsel responded that there was no obligation on the First Respondent to allow such an inspection and that the Applicant had never engaged with him. In fact, the Applicant had approached the Court by default behind the First Respondent's back and consequently there is no obligation on the First Respondent to engage with the Applicant.
25. In addition, it is stated in the papers that the Applicant is a difficult neighbour and the First Respondent does not want his privacy to be violated by the Applicant going through the property.

CONCLUSION

26. In my view, the Applicant has not shifted the goal posts. The Applicant could not at the outset commence with an application based on the fact that the buildings had not been erected in accordance with approved building plans, because there were simply no building plans.
27. As submitted by counsel for the First Respondent, the application was brought on a two-pronged approach, namely:
 - 27.1. there were no approved building plans; and
 - 27.2. there was an encroachment of the Applicant's property in that the buildings were too close to the boundary line.

28. I furthermore find that the Applicant clearly commenced with investigations and instituted the main application as a result of her suspicions that there had been non-compliance with by-laws and/or regulations, the inference being that because the structures were illegal, there would be no building plans. Her investigations then established that there had indeed been no approved building plan.
29. It is only when the application was launched, that the First Respondent hurriedly approached the Second Respondent for the approval of building plans.
30. On the evidence presented by the Applicant together with the town planner's report, I am of the view that the Applicant has established prima facie that there has been non-compliance with the approved building plans and is entitled to have the property inspected. This view is strengthened by the Respondent's failure to put up an occupancy certificate.
31. I have considered the various arguments and I am of the view that an independent town planner be appointed in these proceedings.
32. Counsel for the Applicant impressed upon me to grant a punitive cost order due to the First Respondent's obstructive conduct. I am of the view that costs are to be reserved for argument at the hearing of the main application.
33. Once a town planner has conducted his inspection, the proof will be in the pudding of that report and the Court dealing with the main application will be in a much better position to adjudicate whether the costs of this application are to be borne by the First Respondent and on what particular scale it is to be born.
34. I make the following order:
 - 34.1. The First Respondent is ordered to grant a land surveyor and/or town planner duly appointed by the South African Association of Consulting Professional Planners to the First Respondent's property for the purpose of inter alia, taking the necessary measurements and inspecting the building structure/s on the First Respondent's property, which will enable the said land surveyor and/or town planner to compile a report.
 - 34.2. Ordering the First Respondent to give the land surveyor and/or town planner access to his property within a period of fifteen (15) calendar days from being provided proof of his appointment by the South African Association of Consulting Professional Planners.
 - 34.3. Costs of the application are reserved.

A P DEN HARTOG

ACTING JUDGE OF THE HIGH COURT

OF SOUTH AFRICA GAUTENG DIVISION

JOHANNESBURG

Electronically submitted

Delivered: this judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date of the judgment is deemed to be 14 March 2024

HEARING DATE:

7 MARCH 2024

DELIVERED:

14 MARCH 2024

Counsel for the Applicant:

N Lombard

Attorneys for the Applicant

Bregman Moodley Attorneys

Inc

Ref: S Moodley/BB/PMS118

Counsel for the Respondent: B

Ndlovu

Attorneys for the Respondent

Precious Muleya Attorneys

Ref: adv/civ/resc/kyaligonza

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