

SOUTH AFRICA / JUDGMENT

Van der Merwe v Coertzen and Others (22623/16) [2017] ZAGPPHC 1219 (8 December 2017) [2017] ZAGPPHC 1219

COURT

North Gauteng High Court, Pretoria

BEFORE

JFD Brand

CASE / FILE NUMBER

22623/16

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
DIVISION, PRETORIA
CASE
NO: 22623/16

DATE: 08/12/2017
In
the matter between
WILHELMINA
VAN DER
MERWE
Applicant
and
HENNIE
COERTZEN
First
Respondent
LOUISA
COERTZEN
Second
Respondent
GERTRUIDA
ELIZABETH VAN DER MERWE Third
Respondent

DAVID
BOTH A
BEKKER
Fourth Respondent
LIZELLE
BEKKER
Fifth
Respondent
LESLIE
JACOBS
Sixth
Respondent
LOUISE
JACOBS
Seventh Respondent

JUDGMENT

BRAND, AJ

- [1] The Applicant, Ms van der Merwe, is a private maths teacher. She teaches extra math lessons to school children from her home, Kiepersol Villa 3, one of four units in the full title complex Kiepersol Villa. She has been doing so since the beginning of 2014 when she and her husband moved there.
- [2] The Respondents are all either owners of and/or residents in other of the four units in Kiepersol Villa.
- [3] For some time the Respondents have been dissatisfied with the Applicant teaching her math lessons from her home inside their complex - or, at least with the extent to which she does so. Accordingly they have sought to dissuade her from continuing as she has.
- [4] The Applicant alleges that the Respondents' efforts in this respect amount to unlawful interference in her lawful business activity and to harassment of her and her pupils, and of their parents. She seeks an order from this court prohibiting them from harassing her so.
- [5] Like all disputes between neighbours, this one is acrimonious and seems to have become intractable, leading even to what has been experienced as veiled allegations of sexual impropriety, prompting furious and indignant responses. Unlike most disputes between

neighbours, however, this one - at least this application as an aspect of it - turns out to be relatively simple to

resolve.

- [6] The order the Applicant seeks from this court is a final prohibitory interdict. The requirements for a final interdict application are trite: an applicant must show 1) a clear right; 2) an injury to that right actually committed or reasonably apprehended; 3) the absence of a satisfactory alternative remedy. [1]
- [7] Obviously, the linchpin of these requirements is the existence of a clear right: only once that has been established as a matter of substantive law and on a balance of probabilities on the facts, can the applicant show an actual injury or one reasonably apprehended to that right and no other satisfactory remedy through which to protect and vindicate that right.
- [8] The clear right that the Applicant asserts in this matter is her right in terms of the applicable provisions of the Tshwane Town Planning Scheme, 2008 (Revised 2014) ('the Town Planning Scheme') to conduct her home business in the manner that she does, with all the activities attendant upon it, such as parking. To succeed in her application she must as first requirement establish the existence of this right as a matter of substantive law and show that she possesses it on the facts, before she can seek this court's protection of that right against interference.

The Applicant's clear right

- [9] The Applicant relies for establishment of her clear right on item 6(1) of Schedule 9 of the Town Planning Scheme, which by implication allows for a dwelling such as the Applicant's, zoned in terms of the Scheme as 'Residential2', to be used as a place of instruction for no more than six persons.
- [10] On the Applicant's own version she gives math classes on week days, mostly to groups of children in the afternoon and early evening (the last class is from 18:30 to 19:30). No one group exceeds six (in fact no groups larger than four children at a time are catered for), but on any given day the Applicant might in total see upwards of 16 children.
- [11] The Town Planning Scheme is silent on whether the 'no more than six persons' referred to in item 6(1) of Schedule 9 is six persons together at any one time, or six persons per day. Should the correct interpretation be the former, the Applicant's activities would fall within the bounds set by the Scheme and would be lawful. However, should it be the latter, the Applicant would clearly be in excess of what is allowed in terms of the Scheme, so that her conduct would be unlawful and she would have no clear right to rely on.
- [12] Both the Applicant and the Respondents obtained reports from town planning firms on whether the Applicant's business was compliant with the provisions of the Town Planning Scheme. Neither of these reports ventured an opinion on which interpretation of the two possible ones proffered above is the correct one. It remains for this court to decide the issue.

[13] In her founding affidavit, the Applicant proceeds on the assumption that the Town Planning Scheme allows for six persons at any given time, so that her classes were inside the Scheme and lawful. Mr Jacobs SC for the Applicant at the hearing of this matter could also offer no more than simply the assertion that item 6(1) is open to this interpretation, so that the Applicant's conduct is lawful.

[14] By contrast, Mr du Plessis SC for the Respondents submitted that item 6(1) should be interpreted in light of the Scheme as a whole and in particular in light of the purpose with which it was enacted - stated differently, in light of the mischief it is intended to prevent.

[15] In this respect he referred me to item 1(7) of Schedule 9, where the permitted use of a dwelling for a 'Place of Child Care' is outlined. Here also, the permitted use is limited to a number of six: 'a maximum of six (6) pre-school

children'. Mr du Plessis submitted that in this instance, given that children are typically left at a pre-school for the whole day, the maximum of six children clearly refers to a total of six per day and does not allow for an unlimited number of sessions of care with six children in any particular session. In this light he submitted further that it would make little sense, if a pre-school is limited to six children per day, to allow an unlimited number of children per day to attend a place of instruction in terms of item 6(1), as long as there are at any given time no more than six present.

[16] This is so, he continued, because the mischief both items 1(7) and 6(1) are intended to address is a constant and heavy flow of human traffic in and out of the dwelling in question, with the resultant disturbance that would inevitably cause neighbours - disturbance that is incidentally also prohibited by item 5 of Schedule 9.

[18] I find this persuasive. It seems to me to make no sense that in seeking to limit the number of persons receiving instruction at a home business so as to ameliorate any nuisance impact the business might have on neighbours, the Scheme would allow for a situation where, as long as no more than six persons are present at any given time, as many sessions as the owner of a home business may care to have, may be fitted into a day. That would be no limitation on numbers at all. To illustrate: on the Applicant's own version she teaches groups, usually of four at a time on weekdays from after school to 19:30 in the evening (one hour sessions). This would mean that she potentially sees 20 children per day - had she taught mornings also, at least 40.

[19] I conclude on this issue by holding that indeed item 6(1) of Schedule 9 should be read to mean that at a home place of instruction no more than six persons per day may be catered for. This means that the Applicant's current practice falls foul of item 6(1) and is unlawful, so that she has no clear right to continue with it undisturbed.

[20] Should I be wrong on this, the Applicant faces another hurdle in establishing a clear right. The Town Planning Scheme is prescriptive also with respect to parking that must be provided for a home business in the form of a place of instruction. Schedule 4 of the Town

Planning Scheme requires that, in a complex such as Kiepersol Villa, at least 2 parking places must be provided per unit in the ordinary course of events. Should a unit be used for a home business, as in this case, an additional parking space must be provided - that is three in total.

- [21] On the Applicant's own version only two parking places are provided inside the complex for her unit. Should those two parking spots be occupied, parents of her pupils will park either next to the servitude entrance and egress road to the complex (this is unlawful), or outside on the pavement next to a public park. Also in this second respect (failure to provide the required third parking place) is the Applicant in contravention of the Town Planning Scheme, so that her current conduct is unlawful and she has no clear right to continue with it undisturbed.
- [22] In sum, the Applicant has failed to establish as a matter of substantive law and on the facts that she possesses the clear right she seeks to rely on. Her current conduct is unlawful and she has no right to continue with it in the manner that she has up to now - she also has no recourse to this court to have this unlawful conduct protected against interference. However, should she elect to reduce her numbers and to rectify the parking problem, she would then be entitled to continue undisturbed (unless her conduct, of course, quite apart from the prescriptions of the Scheme, constitutes nuisance).
- [23] In this light it is unnecessary for me to deal with the remaining two requirements for a final interdict - indeed, in the absence of a clear right it is not really possible to do so.
- [24] What remains is the issue of costs. The Respondents have not prayed for any special order as to costs, asking simply that costs,

including the costs for employment of senior counsel should follow the result. I find no reason to depart from this, which is in any event the usual course. It is after all the Applicant who initiated and persisted with this application.

[25] Accordingly, I order as follows:

The application is dismissed with costs, including the costs of employing Senior Counsel.

JFD Brand

Acting Judge of the High Court

Appearances :

For the Applicant:

Mr HF Jacobs SC

Instructed by DP du Plessis Inc

For the 1st,2nd 4th and 5th Respondents: Mr J du Plessis SC

Instructed by Fourie Fisser Inc

[1] Setlogelo v Setlogelo 1914 AD 221 at 227.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2017/1219.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/van-der-merwe-v-coertzen-and-others-unknown-topic-agpphc-2017>

Prepared on 14 October 2026 · Esheria