

**IN THE HIGH COURT OF SOUTH AFRICA**



**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: 26108/17**

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
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In the matter between:

**EKHURHULENI MUNICIPALITY**

Applicant

and

**SIBANDA**

Respondent

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**JUDGMENT**

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**KATHREE-SETILOANE J:**

[1] The Ekurhuleni Municipality ("the Municipality") seeks interdictory relief, in this application, to prevent the respondent, the owner of the immovable property located at Erf no. 505 Delville, IR Gauteng ("the property") from utilising the property for purposes other than permitted by the zoning of the property as "Residential 1" in terms of the Ekurhuleni Town Planning Scheme, 2014 ("the Scheme").

## **Background**

[2] On 14 June 2016, Ms. Fikile Mdlalose ("Ms. Mdlalose"), a Development Planning Inspector employed by the applicant conducted an inspection of the respondent's property. Her inspection revealed that the property is being used for "rooming and lodging" which, according to the applicant, is contrary to the zoning of the property and therefore in contravention of the Scheme.

[3] The respondent's property is currently zoned "Residential 1" in terms of the Scheme. A property that is zoned "Residential 1" under the Scheme may only be used for dwelling house and private roads. It may, however, be used for certain secondary purposes such as a place of worship, place of instruction, social hall, child care facility, guesthouse, home care facility; cattery, and special uses only with the special consent of the applicant.<sup>1</sup>

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<sup>1</sup> Section 45(1) read with section 56(1) of the Ordinance provide for the procedure to be followed when an owner of property intends to use it for any purpose other than the one for which it is zoned.

- [4] The applicant alleges in its founding affidavit that “[t]he respondent has “used and allowed the property to be used for rooming and lodging for business purposes and or related activities” which is not for the purposes permitted in terms of the Scheme.
- [5] The respondent took occupation of the property during 2015 and has been living on the property with his five children, aunt and her husband, since then. He contends, in his answering affidavit that, he is not using the property for rooming and lodging but that the property was purchased, on 10 August 2015, from Mr Mannie Neto (“Mr Neto”) who, due to financial constraints, could not afford alternative accommodation for himself and his daughter. Thus upon transfer of the property, he asked them to remain on the property and reside in the cottage with his daughter. The applicant acceded to the request by allowing Mr Neto to live, rent-free, in the cottage (on the property) as he had no alternative accommodation nor the means to pay rental.
- [6] The respondent explains further that in 2016 he was dismissed from his employment as a boiler maker. After his dismissal he took on odd jobs to enable him to pay his mortgage instalments, but he still struggled to provide for his children. He, therefore, supplemented his income in 2017, by renting out one room in the main house to a tenant on a month to month basis to assist with the income to support his family. At the date of deposing to the answering affidavit, this tenant had been occupying the room for three months.

- [7] The respondent says that when he took occupation of the property in 2015, it consisted of a main house and a separate cottage. There were no informal structures on the property and to date there are no informal structures on the property. During 2016, he modified the property by closing off the verandah to create an additional room within the structure of the main house.
- [8] There are no confirmatory affidavits from Mr Neto and/or his daughter and the applicant's aunt or her husband confirming the respondent's version in so far as their occupation of the property is concerned. After the point was taken by the applicant in its replying affidavit, the applicant filed a supplementary answering affidavit in which he attached confirmatory affidavits from Mr Neto and his aunt, Mrs Monyake, confirming his version. The respondent also appended their identity documents together with those of his five children to his supplementary affidavit.
- [9] The respondent filed an answer to the applicant's supplementary answering affidavit in which it states that its' inspector, Ms. Mdlalose, visited the property again on 15 May 2018 to conduct a further inspection. On this occasion she was advised by Mr Smangaliso Dolo that he is the respondent's cousin and resides on the property rent-free. Ms. Mdlalose furthermore discerned that the woman who cleans the property, lives on it rent-free as well. She apparently also found out that a Mr Menir (who according to the respondent, is Mr Nteto) pays rental in the amount of R3400.00 per month to the respondent, and that a person by the name of "Chris" pays rental in the amount of R1200.00 a month to the respondent.

## **Anlaysis**

[10] As alluded to, the applicant's core contention is that the respondent is conducting rooming and lodging for business on the property in contravention of the Scheme. The respondent contends, to the contrary, that the Scheme does not define the term "rooming or lodging" and nor does that term appear in any of the provisions of the Scheme or the Ordinance, hence it is not an offence under the Scheme. In retort, the applicant argues that the respondent is renting (or providing occupation of) portions of the property to various persons and that by doing so, he is in contravention of the Scheme. It argues that the label "rooming and lodging" which it uses in its founding papers to describe the conduct complained of is of no consequence as its complaint is that the respondent is using the property in a manner not permitted by its zoning, and is therefore in contravention of the Scheme.

[11] The letting of a dwelling house is, however, not per se prohibited for a Residential 1 zoning under the Scheme. Significantly, in this regard, section 13(2)(b) of the Scheme which deals with automatically permitted uses of the Scheme, provides that a dwelling house may be let in such a manner that not more than one household together with four other persons or guests are to reside therein, and if any additional persons and guests are to be accommodated, "the use of the property concerned will be construed as that of a guest house, boarding house or residential building and the relevant permissions therefore must be obtained".

[12] Fundamental to the question of whether the respondent is in contravention of the Scheme, is a determination of whether the individuals who are living on the property are a part of the respondent's "household".

[13] "Household" is defined in section 6 of the Scheme as "an individual or a couple with or without their family and may also include a group of not more than 4 (four) unrelated persons living together as a family".<sup>2</sup> The respondent contends that the words "and may also include" in the definition of household must be read disjunctively. On the respondent's interpretation, a "household" is an individual or couple with or without their family and up to four additional unrelated persons living together as a family. The applicant on the other hand contends for a disjunctive reading of the words "and may also include" where a "household" is either an individual or couple with or without their family or a group of four unrelated persons living together as a family.

[14] The interpretation contended for by the applicant is consistent with a contextual interpretation of the definition of "household". Properly construed, the words "and may also include" in the definition of the "household" must be read disjunctively. On this reading, a "household" is either "an individual or couple with or without their family" or "a group of not more than four unrelated persons living together as a family". The phrase "and may also include" is meant to extend the definition of "household" to include "an unrelated group of not more than 4 persons living together as a family". The words "and may include" have no bearing on the words "an

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<sup>2</sup> Section 6 of the Scheme.

individual or couple with or without a family". In other words they do not extend the definition of this form of household to include "4 unrelated persons living together as a family". There are only two kinds of households contemplated in the definition: (a) a family in the form of an individual or couple with or without a family or "a group of not more than four unrelated persons living together as a family". The definition makes no provision for a household that consists of an individual or couple with their families and four additional unrelated persons.

[15] Read in context, a disjunctive reading of the words "and may include" in the definition of household is consistent with the provisions of section 13(2) (b) of the Scheme which permits the letting of a "dwelling house" in such a manner "that not more than one household, together with 4 (four) other persons or guests may reside therein". The clear intention of the Scheme is that those persons who may reside on property fall into two categories - "a household" (of which there may only be one) or "other persons and guests". The section distinguishes groups of persons who do not live together as a family as "other persons and guests".

[16] The overarching intention of the Scheme is that a dwelling house must be occupied by a single family whether, for want of a better term, "a traditional family" or a "non-traditional family" comprising four unrelated persons who live together as a family. By affording this category of unrelated persons

the status of a "family", the definition of "household" caters for a wider definition of family.<sup>3</sup>

[17] On a contextual interpretation of the definition of the term "household" read with section 13(2)(b) of the Scheme, a property zoned residential 1 property may be used to accommodate a maximum number of persons equal to either:

17.1 an individual or couple, together with their family (irrespective of the size of the family), and up to four additional persons or guests; or

17.2 Up to four unrelated persons living together as a family, together with up to four additional persons or guests.

[18] Should the owner of a property zoned residential 1 under the Scheme, however, intend to accommodate any additional persons or guests (over and above one household and four other persons or guest), section 13(2) (b) provides that "the use of the property concerned will be construed as that of a guesthouse, boarding house or residential building and the relevant permissions therefore must be obtained." In other words, should the number of persons accommodated on the property exceed a single

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<sup>3</sup> In accordance with the caution raised by O'Regan J regarding the term "family" in *Dawood and Another v Minister of Home Affairs and Others*, *Shalabi and Another v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 at 131(CC)



household and four other persons and guests, without the requisite consent from the Municipality, the owner will be considered to be in contravention of the Scheme.

[19] But that is not the applicant's case as set out in its founding affidavit. Its case is squarely that the respondent is carrying on the business of rooming and lodging. Nowhere in its founding papers does the applicant allege that the respondent is in contravention of the Scheme because the number of persons residing on his property exceeds that contemplated in section 13(2)(b) of the Scheme and that, as a result of his failure to apply for consent to house this number of persons on the property, his property is construed as that of a guesthouse, boarding house or residential building. This is impermissible in law as the applicant would have been aware of the nature of the respondent's purported contravention of the Scheme at the time that the founding affidavit was prepared. However, no such case is made out in the founding affidavit. For this reason alone, the applicant is not entitled to the relief sought in its notice of motion.

[20] This notwithstanding, on the applicant's version he lets his property on a month to month to one tenant for a monthly rental of R1200.00. This in itself does not mean that the applicant is running a business in contravention of the Scheme. However, as I see it, the only possible relevant category of occupation that could give rise to a justifiable complaint against the respondent is that he is conducting the business of a guest house. I say this because in the Specialized land use table for

Residential 1<sup>4</sup>, a "guest house" is a category of use that requires special consent of the Municipality. "Guest house" is defined as follows in the Scheme:

**"GUEST HOUSE:** buildings with communal dining and kitchen facilities used for temporary paid accommodation, for a maximum of 8 (eight) rooms, including: back-packers, bed and breakfast establishments and other similar facilities, but excludes Hotels, Conference Centres, self-catering units, chalets and boarding houses."<sup>5</sup>

[21] Notably, a key element of the contravention that would arise from the conducting of a guest house is that accommodation is provided on a "temporary" basis.<sup>5</sup>

[22] The respondent's version is that there is one paying occupant who is in occupation on a month-to-month basis and as at the date of deposition of the answering affidavit, had been in occupation for three months. Since this application was heard some six years after the answering and supplementary affidavits were deposed to by the respondent, it must be assumed that this tenant is still in occupation. It can hardly be said, in the circumstances, that this single occupant is being housed on the property on a temporary basis<sup>6</sup> as envisaged in the definition of "guest house".

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<sup>4</sup> The Scheme, Part 3: Table C - Land Uses.

<sup>5</sup> Section 6 of the Ekurhuleni Town Planning Scheme.

<sup>6</sup> Claassen's Dictionary of Legal Words and Phrases refers to temporary as "*existing of continuing for a limited time*". Another meaning of the word is "*not permanent*" *Mithal v Principal Immigration Officer* 1947 (1) SA 811 (AD) at 812

As indicated, this person occupies on a permanent basis subject to one month's notice.

[23] This is very different from the typical Guest House type accommodation where a person will occupy for a specified short number of days with a definite agreed date of departure. There is nothing in the allegations made by the applicant which justify the conclusion that the nature of the accommodation enjoyed by this one person falls into this category.

[24] Even if I were to accept the contents of the applicant's supplementary affidavit to the effect that Netto (or Nteto or Mr Menir, if this is the same person) pays R3 400.00 per month; and "Chris" pays R1 200.00 per month, their occupation still does not fall within the definition of a Guest House as there is no basis to conclude that their occupation is temporary.

[25] Applying the definition of household referred to above, the respondent and his children, his aunt (Palesa Monyake) and her husband, who are all related, form a household. Section 13(2)(b) of the Scheme then allows for 4 additional persons who are unrelated, who are at "worst" Netto, his daughter, Nteto and the tenant - only 3 persons. Hence there is no contravention, even before *Plascon Evans* is applied.

[26] However, if I were to accept the applicant's version which is that Ms. Palesa Monyake cannot be the respondent's aunt because she is substantially younger than him, and for that reason neither her or her husband fall within the term "family" as contemplated in the Scheme, and would have to be regarded as two additional persons or guests over and

above Mr Neto and his daughter and the single tenant, then there would be five persons/guests living on the property over and above the single household. This would exceed the permissible number of persons that can occupy the property without special consent from the applicant. It is not clear on the papers whether the single tenant referred to by the respondent in his answering papers is the same person as Chris whom the applicant's inspector determined also lives on the property and pays a monthly rental. There are also two additional people that live on the property, namely Mr Dlodlo who is apparently the respondents cousin and a domestic worker, neither of whom pays rental. It is not clear whether the domestic worker works for the respondent or whether Mr Dlodlo lives in the respondent's household or whether he is a guest.

[27] Were the court to find that as a result of accommodating all or some of these people whether for rental or not, the respondent is in contravention of the Scheme, he would be required to forthwith rehabilitate the property, by amongst other things ensuring that some of the existing occupiers vacate the property. This will obviously impact on each of their rights to housing under section 26(3) of the Constitution.

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<sup>12</sup> Scheme, Part 3: Table C - Land Uses

[28] Significantly, in this regard, the applicant seeks the following relief in its notice of motion:

“1.Ordering the Respondent to forthwith cease the use of ERF No.505 Delville, IR Gauteng for purposes which are not permitted under the zoning of “Residential 1”, such as for example, inter alia, using the property for rooming and lodging for business purposes.

2.Restricting and interdicting the Respondent from permitting the use of the PROPERTY, through or by any other person or persons, for purposes which are not permitted under the zoning of “Residential 1” for inter alia rooming and lodging business which is being operated in the property for as long as such use is prohibited on the PROPERTY, in terms of the EKHURHULENI TOWN PLANNING SCHEME, 2014 (“The SCHEME”) and as long as the PROPERTY remains zoned “Residential 1”.

3. Restraining and interdicting the Respondent from using and permitting the use of the PROPERTY for any other purpose than for the use as permitted and prescribed in terms of the zoning “Residential 1” in terms of the SCHEME for so long as the PROPERTY is zoned as such.

4. Ordering the Respondent to forthwith remove from the PROPERTY all items which relate to the use of the PROPERTY for purposes of offices business, or similar activities for so long as the PROPERTY remains zoned “Residential 1”.

5. Ordering the Respondent to stop using the PROPERTY for rooming and lodging for business for so long as the PROPERTY remains zoned “Residential 1”.

6. Ordering the Respondent to forthwith rehabilitate the PROPERTY to conform to the zoning "Residential 1" in terms of the SCHEME.

7. That should the Respondent fail to comply with orders 1 to 6 above within 30 days after date of service of this order at the PROPERTY, then, and in such event:

7.1 The Sheriff of the above Honorable Court is authorised and directed to take all reasonable steps for purposes of giving effect to 4, 5 and 6 above and in particular, the Sheriff is authorised to seize and take into custody, all movables found at the PROPERTY which are used in relation to the use of the PROPERTY for purposes other than permitted under the zoning "Residential 1" such as inter alia of using the property for rooming and lodging for business purposes, and to keep such movables in his possession pending compliance with 7.2 hereunder; and

7.2 The Respondent shall be liable for payment of the Sheriff's reasonable fees and disbursements, including storage costs, incurred for purposes of 7.1 above, which sums shall become due, owing and payable on demand, supported, in so far as necessary, by vouchers.

8. Ordering the Respondent to pay the Applicant's costs of this application."

[29] Relying for support on a recent judgment of this Court in *City of Johannesburg Metropolitan Municipality v K2016498847 (Ply) Ltd*<sup>7</sup> ("K2016"), the respondent submits that the application should be dismissed, as the relief sought by the applicant would result in the eviction

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<sup>7</sup> *City of Johannesburg Metropolitan Municipality v K2016498847 (Ply) Ltd* JDR 2523 (GJ)

of persons living on his property in circumstances where they have not been joined as respondents to the application.<sup>8</sup>

[30] In *K2016*, Wilson AJ held that the granting of a town planning type interdict to prevent the use of property as an "*accommodation establishment*" and orders permitting the sheriff to enforce and give effect to the interdict and further seize "*all that is found at the property*" would result in an order which sanctioned the eviction of the occupiers of the property which could not be permitted for want of compliance with 26(3) of the Constitution, and which necessitated the joinder of the occupiers of the property.

[31] The applicant submits that the court should not follow Wilson AJ's judgment in *K2016* as he incorrectly assumed that the Sheriff would carry out an eviction of persons, who are not permitted to occupy the property in terms of 13(2)(b) of the Scheme, without a court order specifically authorising him or her to do so. The applicant argues that the Sheriff has no authority to carry out an eviction of any of the occupiers of the property without a court order expressly authorising such eviction.

[32] The interdictory relief sought against the respondent in prayers 1, 2 and 3 of the notice of motion coupled with the relief prayed for in prayers 4,5,and 6 read together with the relief prayed for in prayer 7.2, which seeks to

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<sup>8</sup> During the pre-hearing conference the respondent inquired from the applicant whether the relief sought in this application would result in the eviction of undefined persons living at the property and whether such persons should have been cited. This is recorded in the Joint Practice Note of the parties.



authorise and direct the Sheriff, in the event that the respondent fails to comply with the interdictory relief granted, to take all reasonable steps for purposes of giving effect to prayers 4, 5 and 6 of the order sought, and to seize and take into custody, all movables found at the property which are used in relation to the use of the property for purposes other than permitted under the zoning "Residential 1", by implication sanctions the eviction of existing occupiers of the property who exceed the permissible number contemplated in terms of section 13(2)(b) of the Scheme. As in the *K2016* case, this plainly envisages the eviction of the occupiers in contravention of section 26(2) of the Constitution.

[33] Although the applicant argues that the Sheriff has no authority to carry out an eviction, it is clear from the far-reaching formulation of prayer 7, in particular, that it will effectively deprive any persons living on the property who exceed the number allowed to reside there, of their possessions and right to occupy the property. Significantly in this regard, whilst not specifically spelt out in prayer 7.2 of the notice of motion, the prayer authorising the Sheriff to take all reasonable steps for purposes of giving effect to prayers 4,5 and 6 would entail depriving any persons living on the property, who exceed the number of persons allowed in terms of section 13(2)(b) of the Scheme, of all their possession and their right of occupation of the respondent's property. To deprive people living on property of all their possessions which the order contemplates, would render such persons homeless as they would be forced to vacate the

property. This would be tantamount to an eviction without a court order which would be in contravention of section 26(3) of the Constitution.

[34] Thus, in so far as the rights and interests of the occupiers of the respondent's property will be affected by the outcome of the relief sought by the applicant in the notice of motion, it was obliged to join the potentially affected individuals in order to give them the opportunity to become engaged in the dispute and to file affidavits in opposition, or to take whatever steps each respective individual may consider necessary to protect his or her rights. This is particularly so because the individuals who occupy the respondent's property enjoy rights that have been accorded to them by the respondent.

[35] This being the case, the applicant was obliged to cite and serve all the directly interested and affected individuals who are in occupation, each one of whom has a direct and substantial legal interest in the outcome of the relief sought by the applicant. The applicant's failure to do so, is fatal to its case.<sup>9</sup> This is a further basis on which to dismiss the relief which the applicant seeks in its notice of motion.

## **Order**

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<sup>9</sup> *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 660-661; and *Rosebank Mall (Pty) Ltd v Cradock Heights (Pty) Ltd* 2004 (2) SA 353 (W) at 3668-C/D ; K2016 at para 14.

[36] In the result, I make the following order:

1. The application is dismissed with costs.

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**F KATHREE-SETILOANE AJA**

*Counsel for the applicant:* Mr N Felgate

*Instructed by:* KK MMUOE ATTORNEYS

*Counsel for the respondent:* Mr KJ Van Huysteen

*Instructed by:* Fluxman's Incorporated

*Date of hearing:* 27 February 2022

*Date of Judgment:* 3 May 2022

(Handed down electronically by email to the parties' legal representative and by being uploaded to *CaseLines*).