

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 00829/2022

- | | |
|-----|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | NO |

September 2023 _____

SIGNATURE

In the matter between:

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY

Applicant

and

MANACK AISA

First Respondent

ADAM MOHAMMED BULE

Second Respondent

ORDER

- [1] The first respondent's causing of the use of the property, fully described as Erf 1092 Mayfair situated at stand number 48 Church Street, Mayfair, Registration division I.Q, Gauteng province, title deed number T23776/1988, 2092 ("the property") as a place of instruction for religious purposes (the prohibited purposes) by the leasing out of the property to a close corporation with registration number 2012/175245/08 known as *Markaz Inbu Qayim* Islamic Centre ("the organization") is declared to be in contravention of the relevant statutory and zoning provisions and thus unlawful.

- [2] The first respondent is interdicted from leasing out the property for the prohibited purposes and in any other manner permitting such prohibited purposes to take place.
- [3] The first respondent is ordered to take all steps necessary to prevent the property from being used for the prohibited purposes.
- [4] Should the first respondent fail to take such steps within a period of 14 days of this order the applicant or the sheriff is authorised to take all reasonable steps to bar entry to the property for the prohibited purposes at the cost of the first respondent.
- [5] The application against the second respondent is dismissed.
- [6] The first respondent is to pay the costs of the application.

JUDGMENT

Fisher J

Introduction

- [1] This is an application brought by City of Johannesburg (“COJ”) in the exercise of its duties and function under the applicable zoning provisions including City of Johannesburg Land Use Scheme of 2018 (“the Scheme”), the City of Johannesburg Municipal Planning By-Law of 2016 and the National Building Regulations and Buildings Standards Act.¹
- [2] It seeks in essence that the respondents be interdicted from using the property owned by the first respondent in Mayfair as a school for religious purposes.
- [3] The COJ also seeks ancillary relief including that the respondents stop the operation of the school.

¹ 103 of 1977.

[4] It is sought that if the operation does not stop, the sheriff be requested to take all reasonable steps to stop such operation including the removal of materials and demolition of structures used in the operation.

Material facts

[5] The first respondent, Ms Manack, is the owner of the property and the second respondent, Mr Bule is the principal of the religious school which is run from the property.

[6] The founding affidavit is made by Mr Tempele Theo, the Assistant Director of Development Planning at the COJ. He indicates that the zoning of the property does not allow the operation of a place of religious instruction and that such operation is thus unlawful. The zoning of the property is “residential”.

[7] Clause 23(1), (2) and (3) of the Scheme provides as follows:

“1. The Council shall not grant its consent to any religious purposes where there is any interference with the amenities of the neighbourhood with regard to noise, parking, traffic, etc.

2. All applications shall be accompanied by a Traffic Management Plan to address peak hour operations.

3. No Religious Purposes shall be permitted within residential complexes.”

[8] The COJ alleges that Mr Bule is physically in charge of the operations of the school. It alleges further that between sixty to one hundred children attend the school.

[9] A notice of intention to oppose was filed on behalf of both respondents by the same attorney, Ayoob Kaka Attorneys. A later notice indicated the withdrawal of the notice of opposition on behalf of the owner. The notice indicates that the notice was served in error in respect of the owner.

[10] Accordingly, it is only the principal of the school who formally opposes this application. Thus, any relief against the owner is by default.

- [11] Mr Bule states that the operation of the school takes place by virtue of a lease concluded between the organization that conducts the school – which is according to him a close corporation with registration number 2012/175245/08 known by the name *Markaz Inbu Qayim* Islamic Centre. (“the organization”). This lease was concluded he says in 2012.
- [12] The COJ’s attorneys, on receipt of the answering affidavit, sought a copy of the lease. The answer to this request was that “[t]he lease is a verbal agreement between the parties”.
- [13] Mr Bule states that he is aware of negotiations between the organization and the owner for the purchase of the property. He states further that once the property is registered in the name of the organization it will be able to take steps to comply with the Scheme by obtaining the necessary approval.
- [14] Mr Bule raises that the organization should have been joined as it is the tenant. He claims to be merely an employee of the organization. He claims further that he has no knowledge of the notifications and demands made by the COJ, being only an employee.
- [15] On this basis Mr Bule argues that he has been misjoined in the proceedings. He raises also that there has been a material non-joinder of the organization.
- [16] He does not deny however that he operates the school as principal and neither does he argue that the activity conducted is lawful.
- [17] Essentially, the defences raised are technical in nature. The factual case is for the most part dealt with on the basis that Mr Bule bears no knowledge thereof.

Non-joinder

- [18] This is a dilatory point. The argument is that the matter cannot proceed against the owner without the joinder of the tenant. This is not a point which is properly raised by Mr Bule in that he does not speak in defence of the owner. I will however deal with the point for the sake of completeness.

- [19] Section 26(1)(a) of the Spatial Planning and Land Use Management Act,² provides that an adopted and approved land use scheme “has the force of law, and all land owners and users of land” are bound by it.
- [20] Thus, an owner may not lease the premises to a tenant on the basis that it is allowed to use the property for an unlawful purpose. Furthermore, the tenant in its own right may not conduct the illegal activity. The COJ is entitled to sue either or both in relation to the interdicting of the unlawful activity.
- [21] The right to demand joinder is limited to specified categories of parties such as joint owners, joint contractors and partners, and where the other party(ies) has (have) a direct and substantial interest in the issues involved and the order which the court might make.³
- [22] In the present context, the succinct question is thus whether the organization can be said to have a “direct and substantial interest” in the outcome of the proceedings.
- [23] The organization version derives its right to occupy the property and conduct the unlawful activity through the alleged verbal lease. As such, it is in a similar position to that of a sub-tenant.
- [24] A sub-tenant at common law does not have the required interest in ejectment proceedings against a tenant. A sub-tenant may acquire statutory rights under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (“PIE”),⁴ but this is not as a result of the sub-lease.
- [25] As explained by Corbett J in *United Watch & Diamond Co (Pty) Ltd v Disa Hotels Ltd*,⁵ the reason why a sub-tenant is said not to have the required interest in ejectment proceedings is because his right of occupation is a derivative one.
- [26] The simple fact is that the owner may not let out the property for the purposes of conducting a school and the COJ is obliged to interdict such position

² 16 of 2013.

³ *Kock & Schmidt v Alma Modehuis (Edms) Bpk* 1959 (3) SA 308 (A).

⁴ 19 of 1998.

⁵ *United Watch & Diamond Co (Pty) Ltd v Disa Hotels Ltd* 1972 (4) SA 409 (C) at 417B-C.

regardless of the fact that this may have an impact on others including the organization and its pupils.

[27] I now move to the question of misjoinder.

Misjoinder

[28] The case of Mr Bule is that he is but an employee of the organization. He thus argues that he should not have been joined and any interdict should operate against his employer. He argues that it is not he but the organization that is the user of the land under the lease.

[29] In light of the fact that the interdict is properly against the owner or the tenant this argument finds favour.

[30] However, this is a matter of costs rather than relief. The owner did not oppose. There is no apparent defence. Thus, the interdict must follow and the activity must thus cease.

[31] Mr Bule's argument is that he is an innocent, who cannot be called upon to perform the extensive *mandatums* required as to the submission of building plans, the removal of materials and the demolition of buildings at his own expense. He argues that it is for this reason that he was obliged to oppose the application.

[32] But as set out above he does not raise only this defence but purports to raise defences on behalf of the organization. I will come back to this aspect of the defence when I deal with costs.

[33] Counsel for the COJ conceded in any event that a proper case is not made out on the papers for the broad *mandamuses* sought as to removal and demolition.

[34] If Mr Bule felt put upon by his joinder in the matter it was open to him to communicate his position to his employer and to the COJ before engaging in opposition.

[35] In essence, the answering affidavit consists of the points *in limine* and a bare denial. There is a studious avoidance of any information relating to the organization. He does not state who the members are and the extent of his involvement in the organization. It seems that it is not in dispute that he has been a point of contact when investigations by the COJ were taking place.

[36] As I have said he purports to raise defences on behalf of the organization and to speak on behalf of the organization. He says the following at paragraphs 22 to 23 of the answering affidavit:

“22. The content of the paragraphs above should not be construed as a refusal by the centre to comply with the applicable laws. The centre has every intention of abiding by any applicable laws. The difficulty is that the centre has no mandate to delve into the issues raised by the applicant.

23. What the applicant can do, and plans to do, is to continue negotiating with the 1st respondent in regards the conclusion of a purchase and sale agreement. Once an agreement is reached and the property transferred into the name of the centre, then the centre will have the necessary standing to investigate and address issues that exist, if any.”

[37] This purported involvement on behalf of the owner suggests that he does not act at arm's length from the organization but knows more about it than he seeks to convey by his opposition. The indications are either that he is an alter ego of the organization or allowing himself to be used by it.

[38] This notwithstanding, on the application of *Plascon Evans*,⁶ the matter must be decided on the version of Mr Bule.

Costs

[39] The application would not have been necessary had the first respondent acted lawfully as a responsible owner. She was supine in the face of the application, leaving it to the second respondent to oppose on the points raised.

⁶ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (AD).

- [40] It seems that the attorney acting for the second respondent believed initially that he had instructions from the first respondent, but he then withdrew on her behalf. No admissible explanation was provided for this change of heart.
- [41] The withdrawal as attorneys of record for the owner took place on the same date that the answering affidavit of the second respondent was delivered.
- [42] There is no doubt that the organization and the first respondent have a symbiotic relationship which spans in excess of 12 years. Both the organization and the owner have benefitted from Mr Bule's opposition which in fact took up the cudgels on behalf of the owner.

Conclusion

- [43] There is no basis for the opposition of the interdictory relief against the first respondent and the first respondent does not oppose the application. A case is not made out on these papers for the relief claimed as to the removal of materials and demolition of structures in that such materials and structures are not defined.

Order

- [44] In the circumstances I make the following order:

- [1] The first respondent's causing of the use of the property fully described as Erf 1092 Mayfair situated at stand number 48 Church Street, Mayfair, Registration division I.Q, Gauteng province, title deed number T23776/1988, 2092 ("the property") as a place of instruction for religious purposes (the prohibited purposes) by the leasing out of the property to a close corporation with registration number 2012/175245/08 known as *Markaz Inbu Qayim* Islamic Centre ("the organization") is declared to be in contravention of the relevant statutory and zoning provisions and thus unlawful.

- [2] The first respondent is interdicted from leasing out the property for the prohibited purposes and in any other manner permitting such prohibited purposes to continue.
- [3] The first respondent is ordered to take all steps necessary to prevent the property from being used for the prohibited purpose.
- [4] Should the first respondent fail to take such steps within a period of 14 days of this order the applicant or the sheriff is authorised to take all reasonable steps to bar entry to the property for the prohibited purposes at the cost of the first respondent.
- [5] The application against the second respondent is dismissed.
- [6] The first respondent is to pay the costs of the application.

D FISHER
JUDGE OF THE HIGH COURT
JOHANNESBURG

Delivered: This Judgment was handed down electronically by circulation to the parties/their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 28 September 2023.

Heard: 21 August 2023

Delivered: 28 September 2023

APPEARANCES:

For the applicant: Adv T Mosikili

Instructed by: Mphoke P.K Magane Inc Attorneys

For the second respondent:

Adv M Karolia

Instructed by:

Ayoob Kaka Attorneys