REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2148/2019

APPEAL CASE NO: A5068/2021

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES / NO

22 March 2023 ……..
DATE SIGNATURE

In the matter between:

CHUNG FUNG (PTY) LTD	First Appellant
ANCHOR PROJECTS CC	Second Appellant

and

MAYFAIR RESIDENTS ASSOCIATION	First Respondent
IMRAAN MAHOMED	Second Respondent
SALEEM EBRAHIM	Third Respondent
EBRAHIM EBRAHIM	Fourth Respondent
FEROZE SAYED BHAMJEE	Fifth Respondent
NAZIRA EBRAHIM	Sixth Respondent
RASHID AHMED MOHAMED VORAJEE	Seventh Respondent
CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY	Eighth Respondent
CITY OF JOHANNESBURG PROPERTY COMPANY SOC LTD	Ninth Respondent

JOHANNESBURG ROADS AGENCY (PTY) LTD Tenth Respondent

Coram: **MUDAU J, MAHALELO J et WANLESS AJ**
Heard: 8 February 2023
Delivered: 20 March 2023 —— This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the CaseLines system of the GLD and by release to SAFLII. The date and time for hand- down is deemed to be 10:00 on 20 March 2023.
Summary: Township — Johannesburg Town Planning Scheme, 1979, and City of Johannesburg Land Use Scheme, 2018 — definition of 'public open space'. Statute — Interpretation.
Nuisance — what constitutes
Application to lead further evidence on appeal- law restated

Order:
Application to lead further evidence dismissed with costs.
Appeal dismissed with costs.

J U D G M E N T

MUDAU, J (MAHALELO J et WANLESS AJ CONCURRING):

[1] This is an appeal against certain parts of the judgment and order of the High Court, Gauteng Division, Johannesburg (Adams J sitting as a court of first instance) coupled with an application to lead further evidence. The appellants, the fourth and fifth respondents in the Court a quo, were interdicted and restrained from inter alia, using or causing, or allowing to be used Erf 56 for any commercial or industrial activity or for the provision of parking and conducting any business or activity on Erf 56 that causes a nuisance. The appellants were also interdicted and prohibited from intimidating or harming the third respondent. Specifically, the evidence that the appellants seek to introduce is that Erf 56 Crown North (the "property"), the property at the centre of this matter, has been rezoned to allow for parking. The appeal is with the leave of that court.

The application to lead further evidence

[2] In terms of s 19(b) of the Superior Court Act[1], this Court is empowered to receive further evidence on appeal. The test for the hearing of further

[1] 10 of 2013.

evidence on appeal is well established. The requirements are: (a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial; (b) There should be a prima facie likelihood of the truth of the evidence; (c) The evidence should be materially relevant to the outcome of the trial.[2]

[3] The general rule is that an appeal court will decide whether the judgment appealed from is correct or erroneous according to the facts in existence at the time it was given, not in accordance with new facts or circumstances subsequently coming into existence. Nonetheless, the Supreme Court of Appeal has previously indicated that the rule is not written in stone. Evidence of facts subsequently arising will be allowed in circumstances that can be described as exceptional and peculiar.[3]There may be exceptional circumstances where it might be able to take cognisance of subsequent events. However, the power to admit evidence on appeal should be exercised sparingly so that there can be finality in cases.[4]

[4] The rezoning of the property is currently the subject of a review application that is pending before this Court. The new factual material is not common cause or otherwise indisputable. It is nothing more than a neutral fact. It is a fact that is conditional on the outcome of the review application. On the contrary, the rezoning may be reviewed and set aside. There is no exceptional reason why this Court should trouble itself with a rezoning decision that is subject to a review application. Accordingly, this development is materially irrelevant in dealing with the current dispute. In the light of this conclusion, it is unnecessary to deal with the other requirements referred to in the *De Jager* matter.[5] In the interests of justice, the appellants cannot be allowed to present the evidence that they seek to introduce. It follows therefore that the application to lead further evidence must fail.

Background facts

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[2] See: *S v de Jager* 1965 (2) SA 612 (A) at 613C-D; *S v Ndweni & others* 1999 (4) SA 877 (SCA) at 880D-E.

[3] See *S v EB* 2010 (2) SACR 524 (SCA) para 5; *Weber-Stephen Products Co v Alrite Engineering (Pty) Ltd and Others* 1992 (2) SA 489 (A) at 507D-E.

[4] *De Jager* at 613A.

[5] Note 2 above.

[5] The background facts are briefly as follows. The subject matter in this appeal Erf 56, lies between the industrial portion of Crown Mines to the South and the residential areas of Crown North and Mayfair to the North. Erf 56 is owned by the City, the first respondent in the court a quo. The first appellant ("Dragon City") is the owner of the Dragon City Wholesale Mall across the road (Park Drive) to the East of Erf 56, and the second appellant ("Anchor Projects") owns the property immediately adjoining Erf 56 to the South. The City has not participated in the proceedings and has not appealed against any part of the order granted by the Court a quo.

[6] The appellants are related companies. They have the same shareholders and directors. Dragon City have leased Erf 56 from the Municipality since 2012 for a period of three years from 1 September 2012 to 31 August 2015. Erf 56 was leased for parking purposes only and the first appellant was not entitled to use it for any other purpose, unless otherwise agreed to in writing by the City. It is not in dispute that, simultaneously with the conclusion of the agreement of lease, Erf 56 temporarily closed as a "public open space". The Municipality was sanctioned to close the open space in accordance with the relevant laws.

[7] Erf 56 has since been paved arising from a written request of the first appellant, after grass, shrubbery and all other greenery were removed from the land surface. It has been fenced off; and is being used for, among other things, the parking of vehicles, including heavy vehicles and trucks; the keeping of commercial shipping containers and the storage of commercial goods and construction material; and the letting and operation of retail shops, which are prohibited activities on land zoned as a public open space. The lease agreement expired by effluxion of time on 31 August 2015, but was thereafter renewed on a month to month basis. In terms of an agreement the second appellant was conditionally permitted to use Erf 56 for commercial purposes.

[8] The respondents are residents that reside adjacent to, or near Erf 56, as well as by the Mayfair Residents Association, a voluntary association comprising, among others, the residents of Crown North. They are members of the community that is directly affected by the manner in which Erf 56 is used. The respondents successfully launched an application for an order, inter alia,

interdicting the respondents from using the property for the purpose other than for what it is zoned, that being to be used as a “public open space”.

[9] The court a quo also concluded that, the nuisance suffered by the respondents arises from Erf 56 being used by the appellants “as a parking lot for their shopping mall, as well as from the operation of shops, which, in turn, result in noise and fumes and smells of vehicles moving unlawfully on and off Erf 56, and idling on the property during the day and at night”. The Court a quo as indicated, interdicted the use of Erf 56 for parking and storage purposes on the added basis that such uses gave rise to an actionable nuisance, which fell to be abated by the grant to the respondents of a final interdict.

[10] The respondents contended that the character of Crown North, and in particular where they reside, is residential in nature. It was contended that among the purposes of maintaining Erf 56 as a public open space is the fact that it creates a natural break between the residential area of Crown North and the commercial and industrial areas to the South as further evidenced from the space left open between Crown North and the nearby Makro retail outlet just west of Dragon City.

[11] Erf 56 was at all material times zoned as a "public open space" in terms of the Johannesburg Town Planning Scheme of 1979. At the time that the application was brought the Town Planning Scheme, 1979, was in force. It has afterwards been replaced by the Town Planning Scheme, 2018, which came into operation on 1 February 2019. The zoning of Erf 56 as a public open space was not affected, but retained. The definition of a public open space was amended, but it remains substantively the same.

[12] Section 1(li) of the Town Planning Scheme,1979 defines a public open space as follows:

> "land zoned public open space which is used by the public as open space, park, garden, square, or for any game, sport, recreation or cultural activity or other uses as may be permitted by the City Council and includes restaurants, cafes, refreshment rooms, and any apparatus, facility, structure or building

which in the opinion of the City Council is necessary or expedient for the purposes of such open space."

[13] The definition of a public open space in the Town Planning Scheme, 2018 was amended, but remains essentially the same. It reads as follows:

> "Means the use of a building/s and/or land which is under the ownership of the Council or other public authority, with or without access control, and which is set aside for the public as an open space for recreation, place of assembly, games, sport or cultural activity; including a park, playground, public square, picnic area, public garden, nature reserve, outdoor or indoor sports stadium, and includes associated buildings and uses as permitted by the Council, including restaurants, cafes, golf course, and any apparatus, facility, structure or building which in the opinion of the Council is necessary or expedient for the purposes of such open space."

[14] The appellants contended in the court of first instance as they did in this appeal, that “public open space” should be interpreted broadly so as to mean that the City may put any public open space to such use as will serve the best interest of the area, a so called “public good” use. They contend, inter alia, that the grant by the City of the right to use Erf 56 for the purposes of parking and storage in all events fell within the ambit of the words “other uses...facilities, structures or buildings” as used in the definition of a public space in the Johannesburg Town Planning Scheme of 1979. The appellants contend that the City was thus perfectly entitled to let Erf 56 for the purposes of parking and the storage of containers. It is the appellants’ contention as they did in the court a quo that the use of Erf 56 for the purposes of parking and the storage of containers has throughout been lawful.

[15] The appellants submitted that, despite the then zoning of Erf 56 as a "public open space" under the 1979 Town Planning Scheme of the City of Johannesburg, the City acquired the competence in terms of Section 66(3) of the Local Government Ordinance 17 of 1939, as read with Section 66 (1) (a) thereof, to lawfully let Erf 56 for the purposes of parking of vehicles, the storage of containers and the conducting of warehousing and storage.

[16] The appellants lament that the Court a quo failed to consider the appellants' tender to erect a five-meter boundary wall, which in its terms was designed to abate any nuisance which the impugned activities might have given rise to. Reliance was in this regard made to a specialist report in which it said that:

> "it is anticipated that the construction of a wall would reduce the overall impact of low level exhaust emissions from vehicles in the carpark towards the residences, perhaps by as much as 50% and will be a positive step to mitigate the impact. The 50% is an estimate based on my experience, as there is no measured air pollutant data available specific to the site. More accurate information would be the subject of a detailed measurement and/or modelling exercise".

From the above, as the respondents also contended, the tender made by the appellants was by their own admission insufficient: and would not bring the nuisance to an end but would only reduce the nuisance. To make the appellants' proposal an order of court had the potential to infringe the Land Use Scheme and would therefore authorise the appellants in breaking the law as the respondent also contended.

[17] The Town Planning Scheme defines a "zone" as "any area of land in respect of which in terms of this scheme, specific rights, obligations and restrictions have been imposed on the erection or use of buildings or on the use of land; such as rights, restrictions and obligations in regard to the use, density, height, coverage and parking provisions." Zoning, as the respondents contended, pertains to the manner in which land is used, and not the acquisition or extinction of rights the land itself. Accordingly, the lease of the land in this case, is of no material consequence, but its use. The appellants, as tenants or occupiers, are obligated to comply with the applicable zoning laws.

[18] In this regard, the trite position in our law is that a city or municipality is bound by the provisions of its land use or town planning schemes. In *United Technical Equipment Co (Pty) Ltd v Johannesburg City Council*[6], the court on appeal stated:

[6] 1987 (4) SA 343 (T) at 348H-J. see also See also *Johannesburg City Council v Bernard Lewis Construction (Pty) Ltd and Another* 1991 (2) SA 239 (W) at 242E - G and the cases there cited; *City of Tshwane Metropolitan Municipality v Grobler* 2005 (6) SA 61 (T).

> "The respondent [Municipality] has not only a statutory duty but also a moral duty to uphold the law and to see to due compliance with its town planning scheme. It would in general be wrong to whittle away the obligation of the respondent as a public authority to uphold the law."

[19] Whether the city is bound by a town planning or land use scheme was discussed in detail by Rogers AJ (as he then was) also relied upon by the court a quo in *Intercape Ferreira Mainliner (Pty) Ltd and Others v Minister of Home Affairs and Others* [7], who held the following:

> "The purpose of town planning would, in my view, be frustrated if the State as a significant user of land were free to disregard zoning restrictions. Even if only a few pieces of land in a particular area were free to be used by the State contrary to the zoning for that area, the character of the area and the welfare of the members of the community in that area would be jeopardised and the planning objectives of the local authority (as approved by the province) frustrated."

Reliance on Section 66 of the Local Government Ordinance 17 of 1939 by the appellants is therefore untenable.

[20] The interdict granted is also consistent with section 24(a) of the Constitution, which provides that the respondents have a right to an environment that is not "harmful to their health or well-being; to have the environment protected for the benefit of present and future generations through… reasonable measures that prevent pollution… while promoting justifiable economic and social development". Accordingly, the City of Johannesburg exceeded its legislative competence when it authorised the land use complained of. The interpretation proposed by the appellants, "public good" use, is without any valid foundation and cannot be sustained. It follows, accordingly, that what may be permitted is therefore limited only to what is permissible in terms of section 1(li) of the Scheme. Reliance by the appellants on the provisions of section 66 of the Local Government Ordinance 17 of 1939 ("1939 Ordinance") is thus unhelpful. It is silent about zoning or the use of land.

[7] 2010 (5) SA 367 (WCC) at paragraph 105.

[21] In any event, paragraphs (1) and (2) of the order of the Court a quo, which is not appealed against, obliges the City of Johannesburg Metropolitan Municipality ("the City") to take the necessary steps to enforce its own Land Use Scheme in respect of Erf 56, and also to take the necessary steps to prevent the appellants from utilising Erf 56 for any commercial or industrial activity or as a parking lot. The respondents contend, correctly, in this regard that, in light of the limited scope of the appeal brought by the appellants, even if the appellants succeed, the appeal will have no practical effect: the above orders remain enforceable against the City, which is the owner of Erf 56; and that the appeal should be dismissed on this basis alone in accordance with section 16(2)(a)(i) of the Superior Courts Act 10 of 2013.

[22] As for the interdict whereby the appellants were prohibited from intimidating or harming the third respondent in any manner whatsoever; appellants' counsel submitted that, since there are factual disputes with regard to the incident giving rise to the interdict, the court a quo ought to have accepted the evidence of the appellant in accordance with the principles stated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd.*[8] Whilst the judgment of the court a quo does not pertinently deal with the relevant evidence, the evidence in summary is as follows.

[23] On 3 October 2018 at approximately 14:15pm, the third respondent went home in the company of his driver to No 8 Langerman Street, Crown Mines and upon his arrival in the area, he saw three Chinese workers erecting a palisade fence outside the properties that are described as erven 43 and 44 Crown North. The fence was being erected on the municipal pavement. He asked the Chinese workers what they were doing as they were not allowed to erect a fence on the municipal pavement.

[24] A certain Mr Mazibuko, whom he knew as one of the permanent bodyguards with Dragon City, approached the passenger side of his vehicle and started swearing at him. He and his driver left the scene. Hardly fifteen minutes later, upon exiting his yard, he realised he had been followed for his motor vehicle was surrounded by approximately 15 Congolese security guards from Dragon

[8] 1984 (3) SA 623 (A) at C 634-5.

City, who appeared to be taking instructions from Mr Mazibuko and from a Chinese man whose identity was later established as Mr Pak Man Lam. Both Mr Mazibuko and Mr Pak Man Lam walked up to him swearing and threatening not only him but his family as well.

[25] Mr Mazibuko had approached in an aggressive and threatening manner, which made him believe that he was going to assault him. He then placed his hand on his concealed weapon. Mazibuko noticed this and immediately backed off but continued threatening and swearing at him. Mr Pak Man Lam made a telephone call and 15 more security guards arrived who proceeded, on the instructions of Mr Pak Man Lam, to swear and threaten him. They were later joined by a private security vehicle in the employment of the appellants driven by a Mr Winston who approached him with an LM 5 automatic rifle. Winston warned him to be careful, which the latter perceived to be a threat. The police officers who later arrived warned Winston that he was not allowed to exit the Dragon City premises with a high powered rifle as it was contrary to the conditions of his security company's firearm permit.

[26] In their answering affidavit, the appellants confirm that Mazibuko and a Mr Pak Man Lam followed the third respondent allegedly with the intent to see where he resided because they intended to open a criminal case with the South African Police Services arising out of the incident which had transpired. The deponent to the answering affidavit confirmed that, Security from the appellants arrived on the scene and were followed shortly thereafter by two members of the South African Police Services.

[27] However, Mr Mazibuko and Mr Lam did not have to follow the third respondent to his place of residence in order to open any criminal case or to call for extra security guards. The allegation by Cassim that the employees of the appellants conducted themselves in a threatening manner as a result of which he felt his life was at risk by virtue of the fact that there were another 15 security guards from Dragon City who were following Mr Mazibuko and Mr Pak Man Lam's instructions is justified by the objective facts: The presence of the guards one of whom held a high calibre firearm, was no doubt intended to intimidate him.

[28] What is lost sight of is that, the matter is to be considered on the basis that the appellants' allegations are true subject to the exceptions mentioned in the *Plascon-Evans* judgment. The appellants' version consists of uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible and far-fetched or so clearly untenable that the court a quo was justified in rejecting them merely on the papers and would have been alive to this.

[29] It follows that the appeal must fail for all these reasons with costs following the result.

Order

[30.1] The application to lead further evidence is dismissed with costs.

[30.2] The appeal is dismissed with costs.

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T P MUDAU
[Judge of the High Court,
Gauteng Division,
Johannesburg]

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B M MAHALELO
[Judge of the High Court,
Gauteng Division,
Johannesburg]

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BC WANLESS
[Acting Judge of the High Court,
Gauteng Division,
Johannesburg]

Date of Hearing: 8 February 2023

Date of Judgment:	22 March 2023

APPEARANCES

For the Appellants:	Adv. G FARBER SC & Adv JL KAPLAN
Instructed by:	Ian Levitt Attorneys
For the Respondent:	Adv. 0 BEN-ZEEV
Instructed by:	WEBBER WENTZEL