THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case No: A345/2013

In the matter between:

VANILLA STREET HOME OWNERS ASSOCIATION **Appellant**

and

BASHEERA ISMAIL **First Respondent**

NADINE GLORIA LEWIS **Second Respondent**

JUDGMENT: 5 MARCH 2014

BOZALEK J:

[1] The appellant, a homeowners' association established in terms of section 29 of the Western Cape's Land Use Planning Ordinance 15 of 1985 ('*LUPO*'), instituted motion proceedings against the respondents, the joint owners of a registered property in the development known as Bardale Village in Kuilsriver, in which it sought an order that they be interdicted and restrained from conducting a business from such property. The application was opposed by the first respondent and was ultimately dismissed per Savage AJ with no order as to costs.

[2] The appellant now appeals against the judgment and order.

[3] The appellant's case is that in terms of the original written sale agreement relating to the property, and a condition of the title deed, the

respondents, as its registered owners, were members of the appellant and were bound by its constitution and conduct rules. Clause 11.1 of the constitution determined that any property in the development (Bardale Village) should, save in limited circumstances, be used solely for residential purposes. In breach of this provision first respondent had been conducting a hair salon from her property since June 2008. Despite repeated demands by the appellant to refrain from doing so and notwithstanding her undertaking in writing that she would cease to do so, the first respondent (whom I shall refer to henceforth as *'the respondent',* except when there is a need to distinguish her from the second respondent) continued to conduct the business and as such the appellant had no alternative but to bring the interdict proceedings.

[4] The respondent's case is a little difficult to discern because the papers which she filed in opposing the application appeared to have been drawn up without legal representation. Her main defence appears to have been that the zoning scheme established for the development in terms of LUPO permitted the conduct of an *'occupational practice'* from the premises and, as such, her running of the hair salon. As a conjoined defence the respondent contended that her operation of the business caused no trouble or discomfort to any neighbour and that the community in Bardale Village was in favour of its retention. Coupled to this defence it was the respondent's case that economic circumstances had forced her to trade from home as opposed to leased commercial premises. The respondent appeared also to contend that by prohibiting the use of the property for anything other than residential purposes, the appellant had effected a non-procedural amendment to its constitution by purporting to override the zoning scheme's provisions.

[5] In addition the respondent appeared to place some reliance upon her allegation that at the time of purchasing the property she had not been informed of the existence of the appellant or the provisions of its constitution. In argument on behalf of the respondent, Ms e Câmara sought to expand these grounds of defence to include the contention that the respondent had concluded the underlying agreement under a misapprehension and was not bound by its terms. Finally, the respondent sought to rely on the fact that the appellant had not utilised the arbitration provisions in its constitution before launching the interdict proceedings.

[6] In dismissing the application the Court a quo found that the appellant had failed to prove a clear right in that LUPO did not grant to the appellant the right to limit or restrict the use rights determined by the zoning scheme by way of a provision of its constitution or its conduct rules. It found further that, on the evidence before it, it was unable to determine whether the appellant had alerted the respondent, prior to her purchase of the property, of the existence of those provisions of the constitution which prohibited the use of the premises for purposes other than residential. The Court a quo found in any event that by virtue of the discreet manner in which the respondent had conducted her business the appellant had failed to prove the existence of an injury or the reasonable apprehension of an injury. Finally, the Court a quo noted that it was not persuaded that there was no alternative remedy available to the appellant other than the interdict proceedings.

[7] On appeal it was contended on behalf of the appellant that the Court a quo had erred in not finding that it had succeeded in proving the requirements

for a permanent interdict namely, a clear right, an injury suffered or reasonably apprehended and the absence of any alternative remedy.

[8] The first and main issue in relation to the question of whether a clear right was established by the appellant is whether the provisions of the zoning scheme, which allows for a property owner to conduct a *'home occupation'* from such property, prevail over the provisions of the appellant's constitution and conduct rules which purport to prohibit such a use.

[9] The precise provisions of the zoning scheme applicable to the property are somewhat complicated by the fact that only after judgment was delivered by the Court a quo was it realised that the original zoning scheme regulations had been replaced by new scheme regulations which came into effect on 1 March 2013[1]. Be that as it may, it was common cause that it was reasonable to assume that the current zoning of the property was *'single residential'* and that clause 5.1.1(b) of the scheme regulations provides that one of the additional use rights that may be exercised by the occupant of a property so zoned is a *'home occupation'*[2] which must be conducted subject to the conditions stipulated in such clause and 5.1.3. The concept of a *'home occupation'* appears to be the equivalent of what was known as an *'occupational practice'* in terms of clause 4.9.1 and 4.9.2 of the pre-existing scheme regulations.

[10] Given the view which I take of this matter it is, strictly speaking, unnecessary to determine whether the respondent's business constitutes a *'home occupation'* within the meaning of and in compliance with the new

[1] Published in Provincial Notice 337 of 2012 appearing in the Provincial Gazette 70578 of 26 November 2012

[2] A home occupation is defined as the practising of an occupation or the conducting of an enterprise from; a dwelling house … by one or more occupants who reside on the property; provided that the dominant use of the property concerned shall remain for the living accommodation of the occupants, the property complies with the requirements contained in this zoning scheme for a home occupation and home occupation does not include a house shop.

scheme regulations. The appellant was prepared to concede that the respondent's use of the premises satisfied that definition. Certainly, that was the view which was taken by the relevant official of the City of Cape Town which, although not a party to the action, responded to the respondent's query about her rights under the zoning scheme regulations in the following terms:

> *'The subject property, namely Erf 20703, Blue Downs (Bardale Village) is situated at 43 Ginger Road and is zoned "Special Zone (Subzone 3)" in terms of the Land Use Planning Ordinance, 1985 (Ordinance 15 of 1985), Section 8 Zoning Scheme Regulations and may mainly be used for single residential purposes as per the aforementioned Scheme. However, in terms of Section 4.9.1(c), a portion of a dwelling unit may be utilised as an occupational practice meaning the practicing of an occupation, or a trade, or the conducting of an enterprise from a dwelling unit by one or more occupants of the dwelling unit concerned and his or their assistants, without disturbances such as noise, traffic congestion, air pollution, the congregation of people, excessive traffic generation or a lowering of aesthetics being caused; provided that a general medical practitioner shall be exempt with regard to occupancy.*
>
> *Further it is imperative to note that the proposed land use activity (namely a small scale hair salon) to be conducted from the subject property conforms to the aforementioned definition of an occupational practice.'*

[11] I approach the question of whether the respondent's use of the property fell within the zoning scheme regulations with some caution not least because the above-cited opinion of the director in the Department of Planning and Building Development Management within the City of Cape Town is not necessarily definitive of this question, notwithstanding its emphatic tone. For one thing, the pre-existing zoning regulations provided that where a portion of the dwelling unit was utilised for purposes of an occupational practice, such premises *'shall not be used for purposes of a shop, business premises, an industry or an noxious trade;*'. Assuming that the new scheme regulations contain similar provisions this raises the question of whether that portion of the

respondent's premises which she used as a hair salon did not constitute *'business premises'* and as such breached the scheme regulations concerning what is now termed a *'home occupation'*.

[12] For these and other considerations I consider that it is not necessary to determine whether the respondent's use of her property fell within the exclusion relating to *'home occupation'* since the prior and real issue between the parties is whether, where the provisions of the homeowners association's constitution and conduct rules are more restrictive than the zoning scheme regulations, which prevail.

[13] The appellant is a body corporate with perpetual succession and its own rights and liabilities duly established in terms of section 29 of LUPO. That section, falling within the chapter of LUPO dealing with the sub-division of land, provides that either the Administrator or the council concerned … *'may impose conditions under s42 as (sic) the granting of an application for sub-division in terms of s25(1) in relation to the compulsory establishment by the applicant for sub-division of a homeowners' association'*.

[14] Section 29(2), a key subsection, reads as follows:

> *'A home owners' association coming into being by virtue of the provisions of subsection(1)*
> *a) shall be a body corporate;*
> *b) shall have a constitution which –*
> *i) has as its object the control over and maintenance of buildings, services and amenities arising from the sub-division concerned;*
> *ii) provides for the implementation of the provisions of (c), and*
> *iii) has been approved by the council concerned in order to ensure that the provisions of sub-paragraphs (i) and (ii) are being complied with, and*

c) shall have as it members the owners of land units arising from the sub-division concerned, who shall be jointly liable for expenditure incurred in connection with the association.'

[15] In its founding papers the appellant stated that in terms of the sale agreement under which the respondents became the owners, and also in terms of a condition of the property's title deed, they became members of the appellant for so long as they remained the registered owner of the property. The objects of the appellant are defined in clause 3 of its constitution and include *'the promotion, advancement and protection of the communal and group interests of the members generally in regard to the development'* and *'to generally do all such things as may be necessary or requisite to give effect to and implement the objects of the Association and to do all such things ancillary or incidental to the objects'*.

[16] Further the clauses of the appellant's constitution relevant to the present matter include the provisions that:

'10.5 Each member undertakes to the association to comply with the provisions of this Constitution and any rules or other regulations made in terms of this clause 10.'

'10.7 Any erf and dwelling shall be used solely for residential purposes, save as otherwise expressly stipulated by a special resolution and, during the development period, approved in writing by the developer, provided that any use of the dwelling shall always comply with the local zoning scheme regulations.'

Also relevant is clause 11.1 of the appellant's conduct rules which state *inter alia* as follows:

'11.1 No owner of occupier of a home shall be entitled to use his or her home for any purposes other than residential purposes.'

[17] The respondent did not dispute the existence or relevance of these provisions explicitly, stating only, without elaboration, that *'within the time of purchasing the house …, were we, First and Second Respondents never informed of a Constitution or a Body Corporate'.* I regard this as a bald denial, one which does not make it clear whether the respondent disputed that both the deed of sale and the title deed made it clear that property owners became members of the appellant and thus bound by the terms of its constitution and conduct rules. The respondent's denial, such as it was, was not in my view one such as to raise a real, genuine or *bona fide* dispute of fact in relation to this aspect of the appellant's case as was envisaged in *Plascon Evans Paint v Van Riebeek Paint*[3].

[18] Nor, in my view, did the respondent's denial or assertions regarding her alleged lack of knowledge of the appellant's constitution create any basis for her to escape being bound by its relevant provisions. She did not assert that there was any bi-lateral mistake. Any suggestion that she might be entitled to rely on a unilateral mistake was not well-founded since no case was made out by the respondent that her error was *justus* i.e. that she was the subject of an innocent or fraudulent misrepresentation and that she had not led the appellant, acting

[3] 1984 (3) 623 (AD)

reasonably, to believe that she was nonetheless binding herself to the agreement of sale[4].

[19] The Court a quo reasoned that LUPO did not grant to the appellant, or other associations like it, the right to limit or restrict the use rights determined by a zoning scheme by way of a provision in its constitution or conduct rules. In reaching this conclusion it relied on what it regarded as the clear and unambiguous wording of section 29(2) of LUPO which, it held, did not expressly state that a homeowners' association enjoyed the right to *'determine or restrict the usage of property in circumstances in which a zoning scheme has determined use rights'*. It held further that in order to exercise such a right the relevant stipulation would have to have expressly granted that power, clearly and unambiguously.

[20] I find myself in respectful disagreement with this conclusion. The scheme surrounding, and the wording employed in, section 29 contemplates, in my view, the homeowners' association having reasonably wide powers, certainly wide enough to provide that ownership or occupation of the properties forming part of the development might involve a derogation from the land use rights otherwise accruing to those properties in terms of the zoning or zoning scheme regulations. Such a step falls well within the ambit of a constitution which, to quote from section 29(2)(b), *'has as its object the control over and maintenance of buildings, services and amenities arising from the sub-division concerned;'.* In this regard it is important to note that the Administrator or the council concerned enjoys the ultimate power to approve the provisions of a homeowners' association's constitution in order to ensure that it gives effect to the objects aforementioned. Had the City of Cape Town been of the view that the relevant

[4] See *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) at 471 B – D

provisions of the constitution, namely, that the properties in Bardale Village could only be used for residential purposes were unlawful or *ultra vires*, nothing prevented it from withholding its approval of the constitution until it mirrored the provisions of the zoning scheme as far as land use rights were concerned. That it evidently did not do.

[21] Furthermore, it is a premise of the respondent's argument (and the Court a quo's reasoning) that the appellant was assuming powers which it did not have, namely the power to alter the zoning of the property from the terms of use permissible by virtue of the applicable zoning scheme. This is to confuse two different concepts. The appellant did not purport to change the zoning scheme as it applied to the properties within the development. That remained intact. What the appellant sought to do was to create a dispensation where, by agreement, every property owner forfeited whatever right it might otherwise enjoy, in terms of the zoning scheme or otherwise, to utilise the land in certain limited respects i.e. for anything other than residential purposes. This understanding of the limit of its power is reflected in Clause 11.1 of the appellant's constitution where, under the heading **Use of the Dwelling**, provision is made for the passing of a special resolution allowing a property owner to use his/her property for non-residential purposes subject to the proviso that *'any use of the dwelling shall always comply with the local zoning Scheme Regulations'*. To further illustrate this point, the appellant could hardly have purported, acting in terms of its constitution and/or conduct rules, to stipulate that one or more property owners within the development could use their property for uses not permitted by the zoning scheme regulations, for example, for industrial purposes.

[22] In my view, therefore, upon a proper analysis of the provisions of LUPO, it falls within the powers of a homeowners' association to establish a constitution which provides that, upon purchase, every property owner becomes a member of the association and forfeits, by agreement, certain land use rights. In the present instance, when the respondent purchased the property she became aware, or is deemed to have become aware, that she forfeited her right to conduct a *'home occupation'* from her property except in specified circumstances, namely, where the homeowners' association was persuaded to pass a special resolution allowing a property to be used for purposes other than residential.

[23] In reaching this conclusion I place some reliance on *dicta* from *New Garden Cities Inc Association Not for Gain v Adhikarie* 1998 (3) SA 626 (CPD) notwithstanding that it is not all fours with the present matter. In that case the property developer sold an erf in one of its developments to the respondent, the contract of sale containing terms restricting the use of the property for residential purposes only. These terms coincided with the zoning scheme regulations. The respondent, however, utilised the property for the purposes of conducting a general dealer's business and was in the process of seeking a temporary departure from the scheme regulations from the municipality so as to enable him to operate a shop on the property. When the developer brought proceedings to interdict his use of the property for such purposes, the respondent/owner did not dispute that he was in breach of the relevant clause in the contract of sale but sought on various grounds to escape these provisions. Thus a material difference between that case and the present is that the zoning scheme regulations did not permit the use which the applicant sought to interdict.

Referring to the term of the contract of sale that the property should be used only for residential purposes, Rose-Innes J stated as follows at 629 H – I:

> *'Similar terms were included in the other contracts of sale of erven in the township. This was for the mutual benefit of all the property owners in what was intended to be a residential township, described by the applicant as having the character of a garden village. It is also common cause that the property has at all material times been subject to the provisions of a town planning scheme and that it is specifically zoned for single residential purposes.'* I

and at page 633 E – J

> *'Clause 13 of the contract of sale restricts the use of the property to residential purposes in accordance with the relevant town planning scheme. The applicant and the various purchasers of property in the township, including the respondent were entitled to agree to such a term. … A third argument which Mr Möller sought to advance was that the contract of sale or at least clause 13 thereof was illegal or unenforceable, on an application of the principle that a contract which deprives the owner of the property of the free right of dealing with his property is of no effect unless the stipulation serves some useful purpose to the owner (Paiges v Van Ryn Gold Mines Estate Ltd 1920 AD 600 at 615). This argument too cannot succeed. A term in a contract of sale which restricts the use of properties in a township to residential purposes is in the interests of all property owners in the township. It ensures that the residential nature of the area is preserved, without interference by industry or businesses. The applicant, who developed the township, as well as the purchasers of property have a real interest in the terms of clause 13.'*

[24] In the result I consider that there is nothing in LUPO which prevents an association, such as the appellant, from limiting or restricting the usage of the properties of its members in the manner adopted in the present matter.

Secondly, there is nothing contained in our law which prevents a property owner from agreeing to a limitation of its rights as happened in the present matter. Accordingly, I consider that the Court a quo erred in finding that the prohibition on anything other than residential use contained in the appellant's constitution or conduct rules was unlawful or unconstitutional. It follows in my view that the Court a quo erred when it found that the appellant had failed to establish a clear right.

[25] As mentioned earlier, the Court a quo found in any event that the appellant had failed to establish that it had suffered or reasonably apprehended an injury. In this regard the Court placed reliance on indications and assertions in the respondent's papers that she conducted the business discreetly in that she operated by appointment only, without signage, that her clientele included residents within the village and the lack of any evidence that the business was noisy or disruptive.

[26] This approach confuses a breach of rights with the manner of the breach or its consequences. It was common cause that the respondent was in breach of her obligations in terms of the appellant's constitution and the conduct rules in operating the business, that this had been carrying on for a substantial period of time and, for good measure, that she had reneged on an undertaking to the appellant that she would cease conducting the business. These facts alone constitute proof that the appellant had suffered an injury, namely, the respondent was using her property for purposes other than residential and which departure the appellant, as representative of all other property owners, was not prepared to condone. Whether the respondent did so discreetly or otherwise and the extent to which her clientele was drawn from the development itself is, in this context, irrelevant. The appellant was well within its rights to seek

to preserve the residential character of the development. Were it to overlook the respondent's breach it could hardly be heard to object at some later stage were other property owners within the development to use their properties for commercial purposes, whether in a discreet fashion or not.

[27] A further finding challenged on appeal was that the appellant had failed to establish the absence of similar protection by any other ordinary remedy; more particularly in that the Court a quo found that the appellant was entitled seek an amendment to the zoning scheme, presumably to the effect that no property owner within the development could utilise his or her property for the purposes of a *'home occupation'*.

[28] This approach misconstrues the nature of the inquiry at this stage of interdict proceedings. The third requisite for a final interdict is the absence of another adequate remedy which must, *inter alia,* be adequate in the circumstances, be ordinary and reasonable, be a legal remedy and grant similar protection[5]. In the context of the present matter any right on the part of the appellant to seek an amendment to the zoning scheme meets none of these requirements. In the first place it presupposes, incorrectly, that the derogation from the zoning scheme regulations provided by the constitution and conduct rules was unlawful and of no force and effect. Secondly, the remedy falls short of being ordinary and reasonable or granting similar protection in that it rendered the appellant a supplicant for a special dispensation through an administrative process rather than allowing it to stand on its pre-existing rights.

[5] Chapman's Peak Hotel (Pty) Ltd v Jab and Annelene Restaurants cc t/a O' Hagan's [2001] 4 All SA 415, 420

ARBITRATION

[29] Respondent's counsel did not press in argument the contention made by in her papers that the dispute should have been referred to arbitration before the interdict proceedings were launched. For the sake of completeness I note that the appellant's constitution does indeed contain an arbitration clause which covers any *'dispute, question or difference relating inter alia to matters arising out of the Constitution'* or its interpretation. It was open to the respondent to refer the matter to arbitration but she chose not to. In fact it is also questionable whether there initially was any such dispute between the parties given that the respondent appeared, initially at least, to acknowledge that she was in breach of the constitution and/or the conduct rules and undertook to cease conducting her hair salon business. In any event clause 32.7 of the appellant's constitution provides that, notwithstanding anything to the contrary contained in the balance of the clause, the trustees shall be entitled to institute legal proceedings on behalf of the appellant *'by way of application, action or otherwise in any Court having jurisdiction for the purposes of restraining or interdicting breaches of any of these provisions'*. In the circumstances the appellant was entitled to proceed directly to this Court, as it did.

[30] In the result, and for these reasons I consider that the Court a quo erred in not granting an interdict. There remains the question of costs and whether any relief should be afforded against the second respondent.

SECOND RESPONDENT

[31] The second respondent, in her capacity as co-owner of the property, filed a *'Notice of Defence'* supported by an affidavit in which she advised that she did not reside at the premises in question, that she had provided only financial

support to her sister to purchase the property and that she had no interest in the hair salon business which was solely owned by the first respondent. In these circumstances and notwithstanding that the Notice of Defence gave notice of intention by the respondents to seek an order allowing the property to be used also for the purposes of working from and at home, it seems reasonably clear that the second respondent was not opposing the interdict. In the circumstances Mr Van Der Merwe for the appellant fairly conceded that his client would not be entitled to a costs order against the second respondent who took no further part in the proceedings after filing the Notice of Defence.

COSTS

[32] The appellant sought both the costs of the application as well as the costs of the appeal on the scale as between attorney and client, in so doing relying on clause 13.2 of its constitution. That clause provides that should the trustees of the appellant institute any legal proceedings against any member pursuant to a breach by that member of the constitution, the said trustees shall be entitled to recover all legal costs incurred by them or the association, including attorney and client charges.

[33] A court is, generally, bound to give effect to an agreement to pay attorney and client costs and such a provision is not prohibited by the common law. The court undoubtedly retains a residual discretion to refuse to enforce such an agreement in certain circumstances since costs are in the discretion of the Court, a discretion which must be judicially exercised whenever the need arises[6]. In the present case, however, I can see no compelling reasons why any costs order should not be made on the attorney and client scale as provided by the appellant's constitution. It must be borne in mind that to the extent that an

[6] See *Sapirstein v Anglo African Shipping Co (SA) Ltd* 1978 (4) SA 1 (A) at page 14.

ordinary costs order will not meet the costs incurred by the appellant, the shortfall will have to made up from contributions or levies paid by all the members of the association. I can see no reason why they should be out of pocket or why they should have to fund litigation in the case such as this. It is also relevant that the respondent gave an undertaking in an early stage of the dispute that she would cease conducting the business but then failed to give effect thereto.

[34] As mentioned earlier the respondent was represented in this appeal by Adv e Câmara on a *pro bono* basis, thanks to the intervention of the *pro bono* committee of the Cape Bar. We are indebted to counsel for her contribution to the cause of access to justice in representing the respondent.

[35] In the result the following order is made:

1. The appeal is upheld;
2. The judgment and order of the Court a quo of 22 March 2013 is set aside and replaced with the following order;
   2.1 The first respondent is interdicted and restrained from conducting the business known as Fehmi's Hair Salon and Barbershop from erf 20703, Blue Downs, more commonly known as 43 Ginger Road, Bardale Village, Kuilsriver, Western Cape ('the property') or to use the property for any other purpose other than strictly residential purposes;
   2.2 The first respondent must pay the costs of the application on the scale as between attorney and client
3. The first respondent must pay the costs of the appeal including the costs of the application for leave to appeal on the scale as between attorney and client.

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B O Z A L E K , J

I a g r e e

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G A M B L E , J

I a g r e e

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C L O E T E , J