IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

DATE: 23/02/2005 Case No: 21887/2004

REPORTABLE

IN THE MATTER BETWEEN

CITY OF TSHWANE METROPOLITAN MUNICIPALITY Applicant

and

FERDINAND GROBLER First Respondent

ELSIE MARIA GROBLER Second Respondent

EENHEID BEGRAFNISSE CC Third Respondent

JUDGMENT

SOUTHWOOD J

[1] The applicant, the City of Tshwane Metropolitan Municipality, applies for an order that the respondents immediately cease using portion 1 of Erf 414, Wolmer, Pretoria, also known as 621 Stasie Street, Wolmer, Pretoria ('the property') for the purpose of a funeral undertaker and morgue business in conflict with the provisions of the Pretoria Town-Planning Scheme ('the scheme') and an order that the respondents, jointly and severally, pay the costs of this application on the scale as between attorney and client. The applicant did not press for the other relief in the notice of motion.

[2] The applicant is a metropolitan municipality with legal capacity established in terms of Notice 9600 of 2000 published in terms of section 12(1) of the Local Government Structures Act, 117 of 1998. The first and second respondents are married to each other in community of property and are the registered owners of the property. The third respondent conducts business as a funeral undertaker and morgue ('the business') on the property. On 15 March 2002 the first and third respondents entered into a co-operation agreement in terms of which the third respondent was given the right to use the property for the business and the third respondent and first respondent agreed to share liabilities in respect of the business. Since 20 May 2002 the third respondent has conducted the business on the property.

[3] In terms of the scheme the property is zoned 'special residential' (i.e. suitable for one dwelling house, home undertakings in terms of Schedule IX(g) of the Scheme and one additional dwelling house in the areas described in Schedule IX(k), Schedule XII(l), Schedule XIII(m) and Schedule XIIII(n) of the Scheme). Use of the property for the business of a funeral undertaker and morgue is therefore in conflict with the scheme. At no time has the scheme been amended to permit use of the property for the business of a funeral undertaker and morgue.

[4] The property falls within the applicant's area of jurisdiction. In this application the applicant seeks to perform its duty in terms of the Townplanning and Townships Ordinance, 15 of 1986 ('the Ordinance') by enforcing the provisions of the scheme.

[5] The following statutory provisions are relevant -

(1) Section 19 of the Ordinance which states the general purpose of a town-planning scheme -

> 'The general purpose of a town-planning scheme shall be the co-ordinated and harmonious development of the area to which it relates in such a way as will most effectively tend to promote the health, safety, good order, amenity, convenience and general welfare of such area as well as efficiency and economy in the process of such development'

(2) Section 40 of the Ordinance which provides -

> COMMENCEMENT OF APPROVED SCHEME
>
> 40(1) An approved scheme shall come into operation on the date of the publication of the notice contemplated in section 39(1), and from that date the local authority shall observe and enforce the provisions thereof.
>
> (2) Any person who contravenes or fails to comply with a provision of an approved scheme shall be guilty of an offence.

(3) Section 42 of the Ordinance which provides -

POWER OF LOCAL AUTHORITY WHERE TOWN-PLANNING SCHEME IN OPERATION IS CONTRAVENED.

(1) Where any person in conflict with a provision of a town-planning scheme in operation -

(a) undertakes or proceeds with the erection or alteration of or addition to a building or causes it to be undertaken or proceeded with;

(b) performs, undertakes or proceeds with any other work or causes it to be performed, undertaken or proceeded with;

(c) uses any land or building or causes it to be used,

the local authority may direct such person in writing -

(i) to discontinue such erection, alteration, addition or other work or such use or cause it to be discontinued;

(ii) at his own expense -

(aa) to remove such building or other work or cause it to be removed;

(bb) to cause such building or other work or such use to comply with the provisions of the scheme,

and the directive shall state the period within which it shall be carried out.

(5) Any person who contravenes or fails to comply with a directive issued in terms of subsection (1) shall be guilty of an offence.

> (6) Where any person fails to comply with a directive issued in terms of subsection (1), the local authority may, whether or not a prosecution has been or will be instituted, remove the building or other work or cause the building or other work to comply with the provisions of its town-planning scheme and recover all expenses incurred in connection therewith from such person,

(4) Clause 6 of the scheme provides-

> 'Any person who commits or knowingly commits a contravention of any of the provisions of this Scheme or of the requirements of any order or notice issued or conditions imposed in terms of this Scheme shall be deemed to be guilty of an offence,'

[6] It is therefore the duty of the relevant local authority to enforce the provisions of its town-planning scheme. See ***United Technical Equipment* Co *(Pty) Ltd v Johannesburg City*** *Council* 1987 **(4) SA 343 (T)** at 348H-1 and ***Johannesburg City Council v Bernard Lewis Construction* 1991 (2) SA 239 (W)** at 242E-G and the cases there cited. And owners and occupiers of property governed by the scheme are obliged to use the property and any building thereon in conformity with the provisions of the scheme and comply with any lawful directives given to them by the local authority in relation to such use.

[7] In their answering affidavits the respondents raised two defences-

(1) They were issued with a fitness certificate (geskiktheidssertifikaat) which certifies that the property complies with the regulations made in terms of the Health Act, 63 of 1977 in respect of premises for funeral undertakers: and

(2) They have applied for the property to be rezoned from special residential to business, the application for rezoning is pending and accordingly this application is premature.

In her heads of argument the respondents' counsel relied on both defences. In oral argument however she made no submissions in support of these defences. Both are plainly untenable.

[8] A certificate which states that premises comply with the requirements of regulations made in terms of the Health Act does not affect the zoning of the property in terms of this scheme. It is clearly not a consent by the local authority to the use of the premises on the property contrary to the provisions of this scheme. It is simply a certificate issued for the purposes of the Health Act. It may be a requirement for an application for rezoning. But it is unrelated to the lawfulness of the use of the property before the property is rezoned.

[9] The fact that the respondents have applied for the property to be rezoned does not legitimise the use of the property. Before the respondents commenced use of the property for the business of a

funeral undertaker and morgue they should have made sure that this was permissible in terms of the scheme. While the respondents are in contravention of the scheme they are acting unlawfully and committing a crime and the applicant is duty-bound to prevent them from so acting. The respondents' use of the property for the business of a funeral undertaker and morgue before the scheme was amended to permit such use is and was premature - not the applicant's application to prevent such use.

[10] Costs

The applicant seeks a costs order on the scale as between attorney and client.

The applicant has a statutory duty to enforce the provisions of the scheme to ensure that development within its area is co-ordinated and harmonious and takes place in accordance with the scheme. The applicant issued contravention notices to the respondents in terms of section 42 of the Ordinance on 15 November 2002, 4 March 2003 and on 1 December 2003. In each notice the applicant notified the respondents that their use of the property was a contravention of the scheme and they were directed to cease such use. At no stage did the respondents simply discontinue such use. Purporting to act on advice the respondents continued to use the property for the business while apparently seeking to rectify the position. In June 2003 the respondent

lodged an application for rezoning of the property but the papers do not show to what extent the applicant complied with the Ordinance or whether the application has any realistic prospect of success. The applicant says it does not support the conduct of an undertaking business in residential areas. This indicates that the chances of success are remote. However whatever the respondents did, it did not legitimise their use of the property for the business. They continued to contravene the scheme and commit an offence. They also committed an offence by not complying with the applicant's directives. The fact that they acted on advice of a town-planner is no excuse, certainly not for the purpose of an interdict which is aimed at prohibiting unlawful conduct.

[11] In ***United Technical Equipment* Co *v Johannesburg City Council supra*** the full court of this division summarised the position as follows at 348I-J (the respondent being the City Council):

> 'The respondent has not only a statutory duty but also a moral duty to uphold the law and to see 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. A lenient approach could be an open invitation to members of the public to follow the course adopted by the appellant, namely to use the land illegally with a hope that the use will be legalised in due course and that pending finalisation the illegal use will be protected indirectly by the suspension of an interdict.'

[12] This deliberate flouting of the law in the face of lawful attempts by the applicant to perform its statutory duty warrants a special costs order.

To permit such conduct would result in anarchy particularly in a city where it is notorious that contraventions of the scheme in circumstances such as the present are widespread. The applicant's position regarding costs may be compared to that of the Law Society in disciplinary matters - see ***Prokureursorde van Transvaal v Landsaat*** **1993 (4) SA 807 (T)** at 815I-816D. There is no good reason why the applicant should be out of pocket when it performs its statutory duty to enforce the scheme. Had the applicant requested costs on the scale as between attorney and own client I would have given serious consideration to such an order.

[13] I make the following order:

1. An order in terms of prayer 1 of the notice of motion is granted;

2. The respondents are ordered to pay the costs of this application, jointly and severally, the one paying the other to be absolved, on the scale as between attorney and client.

B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

CASE NO: 21887/2004

HEARD ON: 18 February 2005

FOR THE APPLICANT/PLAINTIFF: ADV. L.G.F. PUTTER

INSTRUCTED BY: MS P ZIETSMAN OF ROESTOFF VENTER AND KRUSE

FOR THE RESPONDENT/DEFENDANT: ADV F.M.M. SNYMAN

INSTRUCTED BY: MR HENN OF HENN INCORPORATED

DATE OF JUDGMENT: 23 February 2005