

RUNNING A BUSINESS IN CONTRAVENTION OF ZONING PROVISIONS

McKay and Others v Ursiweb (Proprietary) Ltd and Others (3510/2019) [2019] ZAFSHC 232 (5 December 2019)

What are your rights as an owner in a residential area where another owner runs a business from his property in contravention of the relevant zoning and title deed conditions? Does it matter that the culprit is not your immediate neighbour but an owner living roughly a kilometre away? And can the culprit defend himself by arguing that he is not the only one in breach and he should therefore not be ordered to stop his business activities? This judgment is a case in point and highlights the respective owners' rights in these circumstances.

The Judgment can be viewed [here](#).

FACTS

McKay, Kock and Van Zyl ("the complainants"), all residents of the Dan Pienaar suburb in Bloemfontein, brought an application against Ursiweb (Pty) Ltd ("Ursiweb") and Perfect Slabs (Pty) Ltd ("Perfect Slabs") for an order interdicting or restraining them from the illegal use of the property. McKay and Kock were both owners of properties in the suburb, situated approximately a kilometer away from the property owned by Ursiweb. Van Zyl was a resident in the neighbourhood.

Perfect Slabs is a construction company that conducted the administrative component of its business from Ursiweb's property.

In Ursiweb's title deed, there was a restrictive condition to the effect that the property may be used "for residential purposes only and no trade or business or industry whatsoever shall be conducted thereon". It is precisely because of this restrictive condition that Ursiweb had lodged an application with the local authority some 18 months earlier to remove the restrictive condition and rezone the property.

The complainants contended that the restrictive conditions and town planning scheme are binding on Ursiweb and Perfect Slabs because there has not been any amendment or suspension of the restrictive condition or town planning scheme. They argued further that they acquired their properties with a keen expectation of residing in a residential suburb with amenities that are consistent with a residential suburb and with residential character.

The essence of Ursiweb and Perfect Slabs' argument was that the complainants did not have the necessary locus standi as none of them lived within fifty metres of Ursiweb's property and they therefore did not live "in close proximity" to the relevant property. The argument continued that the property was used to accommodate only four staff members of Perfect Slabs who reported for duty at 8h00 am and knocked off at 16h30 on weekdays. They dealt mainly with quotations and orders - no cash exchanged hands between them and clients and only in exceptional cases did clients visit the premises. There was thus no nuisance generated by these activities. The other point was that the suburb of Dan Pienaar has over the years changed in character with various businesses. And lastly, they argued that they have applied for rezoning over a year ago and that no objections have to date been lodged against the application. Although it has not been granted or declined yet, the local authority was already collecting rates and taxes on the basis of the property being zoned for business and commercial use.

HELD

Requirements for the granting of a final interdict

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- The requirements for the granting of a final interdict are more stringent than those for the granting of a temporary interdict because of the far reaching consequences of an order of its kind. The requirements are: (i) there must be a clear right; (ii) an injury committed or reasonably apprehended; and (iii) there is no other suitable or alternative remedy.

Locus standi and clear right

- It is unquestionable that an owner of land is not permitted to perform activities which contravenes the restrictive title conditions or the zoning restrictions. This being expressly prohibited by law pertinently in the public interest. The test in our law asks the question whether the scheme was introduced for the benefit of the general public or persons falling within a particular class or both. In this case, the conclusion is that the scheme was for the inhabitants of the suburb of Dan Pienaar and, as such, the complainants do have the necessary locus standi.
- The clearest indication that a land owner does have both *locus standi* and a clear right to approach the Court in the matter of this nature was stated in *Walele v City of Cape Town and Others* in the following words: “*The result of a zoning scheme is ... to restrict the rights of all owners in an area. Yet zoning schemes also confer rights on owners, because owners are entitled to require that neighbouring owners comply with the applicable zoning scheme. Where an owner seeks to depart from the scheme, the rights of neighbouring owners are affected and they are entitled to be heard on the departure. Owners in the area are also entitled to be heard when land is re-zoned. A zoning scheme is therefore a regulated system of give and take: it both limits the rights of ownership but also confers rights on owners to expect compliance by neighbours with the terms of the mutually applicable scheme. The result is that where an owner seeks to use his property within the terms of the zoning scheme, it cannot be said that the rights of surrounding owners are affected materially or adversely.*”
- The courts have repeatedly pronounced that the essence of town planning schemes is conceived in the interest of the community to which it applies. This means that it does not matter whether an individual in this special class does own a property there or not.

Close proximity

- The complainants stay approximately one kilometre away from Ursiweb's property. This is adequately close. There was in any event no authority of what is meant by 'close proximity' in the circumstances of such a title deed condition. Generally the decisions of the courts refer to all owners in an area affected by an applicable zoning scheme. There was thus no merit in this argument.

Injury

- It is not necessary to deal with this aspect as it has been established that Ursiweb and Perfect Slabs are not compliant with the restrictive conditions and town planning scheme. This is both an illegality and an offence.

Suspend the order?

- Ursiweb and Perfect Slabs suggested that the Court exercise a discretion to grant the order and suspend its operation, pending the application to the local authority. The answer to this had to be in the negative (and it did not come to their aid that they are not the only ones in contravention of the law). They must be brought into line immediately: It stands to reason that the use or continuation to use the property for any business or trade other than for residential purposes constitutes an illegal act.

CONCLUSION

The application was therefore successful.