ZONING: DOES 'INFORMAL HOUSING' CONSTITUTE 'DWELLING HOUSES'?

Educated Risk Investments 165 (Pty) Ltd v Ekurhuleni Metropolitan Municipality (308/2015) [2016] ZASCA 67 (20 May 2016)

This matter deals with the clash of interests between a developer of a township and the local authority who used a neighbouring (undeveloped) township for informal settlements. The Supreme Court of Appeal was asked to determine whether the informal housing constituted 'dwelling houses' as was prescribed by the relevant zoning scheme. It was also asked to address the question whether the local authority was obliged to comply with all the conditions of approval of the township or the sub-divisional conditions before permitting people to live there. It is a necessary read for all involved in property development.

The Judgment can be viewed here.

FACTS

Payneville Extension 3, on the outskirts of Springs, is an informal settlement. It is roughly triangular in shape and bounded on two sides by a mine dump and a slimes dam and on the third by a railway line and major road. It has no potable water supply, no refuse removal, no sewage reticulation system, no electricity and no tarred roads. The slimes dam gives off radon gas, a source of radiation, at levels that exceed acceptable norms and pose a threat to the health of the residents. The area falls under the responsibility of the Ekurhuleni Metropolitan Municipality (Ekurhuleni).

In order to address the problem, Ekurhuleni proposed to allow some of the residents from Payneville Extension 3 to move temporarily to erven on a nearby township owned by it, Payneville Extension 1. The latter is an approved, but as yet undeveloped, township. Ekurhuleni had provided water and sewerage on the property but was not yet in a position to complete the development by providing roads, lighting and other facilities. Those who moved to Payneville Extension 1 would be permitted to erect informal housing on the erven allocated to them but this would be temporary until the upgrading of Payneville Extension 3.

As originally approved, Payneville Extension 1 consisted of 756 erven, mainly designated as 'Residential 1' in terms of the applicable town planning scheme. The zoning permits the erection of one dwelling house per erf. It also permits the sub-division of an erf in certain circumstances.

In February 2012, a sub-division of a number of the erven in Payneville Extension 1 was

approved to create an additional 363 erven. These additional erven all also fell within the same zoning area and were thus zoned Residential 1.

In June 2011 Ekurhuleni commenced the construction of sewage and water reticulation services on Payneville Extension 1. It also erected toilets on a number of erven. Its intention, once this work was complete, was to permit a number of families from Payneville Extension 3 to move to Payneville Extension 1 and to erect informal dwellings on those erven where a toilet had been provided. (This would enable remedial work to be done on Payneville Extension 3 to which those residents could then return.) Furthermore, as funds became available from various sources, Ekurhuleni intended to undertake the further development of Payneville Extension 1. In the meantime though, the people who moved from Payneville Extension 3 would be living in better and healthier circumstances, until their return to Payneville Extension 3, or until they were allocated houses and elected to remain in Payneville Extension 1.

Educated Risk Investments 165 (Pty) Ltd (ERI) was the owner and developer of an adjacent township and complained that Ekurhuleni's envisaged plans were (i) in conflict with the Town Planning Scheme in that informal housing was not permitted in a Residential 1 Zone, where it was only permissible to erect (brick and mortar) dwelling houses; and (ii) that the further sub-division of the erven in Payneville Extension 1 was unlawful because it was not directed at complying with the scheme, but was a device to circumvent it and to enable the establishment of an informal settlement on the property instead of a residential development. ERI argued that the effect of the sub-division was to rezone the property from Residential 1 to either temporary or special use in respect of which there was no public notice and nor was it preceded by a change of use application or proper process; and (iii) that it would be unlawful for anyone to be permitted to occupy any part of Payneville Extension 1 until there had been compliance with all of the conditions attaching to the initial proclamation of the township and the approval of the further sub-division. These conditions related to the various matters that Ekhuruleni intended to leave until a later date as and when funding became available.

ERI alleged that it was losing its investment in the neighbouring township, as when purchasers noticed the ablution facilities being erected, they no longer wanted to purchase in the vicinity. ERI raised no objection to the development of a formal, fully serviced township with conventional brick and mortar houses on Payneville Extension 1. Their objection was to it becoming, albeit temporarily, an informal settlement lacking such services.

Various court skirmishes followed, but ultimately the application was dismissed by the Gauteng High Court. The present matter deals with the appeal thereto.

HELD:

Zoning

- There may be difficulty in reconciling the formal nature and content of town planning schemes with the housing needs of so many South Africans. Town planning schemes are, generally speaking, directed at the medium to long-term development of an urban environment and rarely, if ever, make express provision to accommodate the incremental development of housing for the disadvantaged in our society as it becomes increasingly urbanised.

- A rigid interpretation of such schemes, viewing them through the prism of a developed society in which these problems are largely absent, is unsuited to South African circumstances.

- Informal housing of the type Ekurhuleni intended to permit in Payneville Extension 1 consists of homes constructed of various materials, in particular wood, corrugated iron and fibreglass sheeting, that provide shelter to the occupants thereof.

- Against this background, the definitions used in the zoning scheme must be evaluated.

  1) Clause 11.4 of the scheme defines a 'dwelling house' as 'a single, free-standing dwelling unit and can include a second dwelling unit.' In turn a 'dwelling unit' is defined as an 'interconnected suite of rooms which does not include more than one kitchen, designed for occupation and use by a single family and which may also include such outbuildings and servants quarters as are ordinarily incidental thereto.'

  2) According to the definition of 'dwelling house' in the Scheme it must be a free-standing unit. That implies a single building or structure and reinforces the notion, flowing from the words 'dwelling house', that residential premises such as maisonettes, flats or townhouse complexes may not be constructed in a Residential 1 use zone. The informal houses that Ekurhuleni contemplates, satisfy this criterion. They also satisfy the requirement for a dwelling unit that they will consist of 'an interconnected suite of rooms which does not include more than one kitchen, designed for occupation and use by a single family'.

- Thus on the ordinary meaning of 'dwelling house', and on an application of the definitions in the zoning scheme, there is nothing that would preclude informal housing from being 'dwelling houses' as defined in the scheme.

- It was argued also that in referring to 'dwelling houses', the scheme contemplated

structures having a degree of permanence as opposed to informal housing. Whilst there was force in this contention - as the scheme is broadly directed at situations of medium to long-term development of urban areas rather than dealing with the massive housing problems that confront the poorest in our country - the fact was that the definitions used in the zoning scheme did not specify that the dwelling house had to be a permanent structure, a building or immovable.

- Any doubt in this regard is dispelled by applying the constitutionally mandated rule of interpretation in section 39(2) of the Constitution. To disqualify from our understanding of dwelling houses the structures, sometimes sturdy and complex and sometimes rudimentary, in which a vast number of the poorest citizens of this country are compelled by their circumstances to live, is not in accordance with the spirit, purport and objects of the Bill of Rights.

This leg of ERI's claim therefore failed.

Non-fulfilment of conditions

- ERI's further argument was that it would be unlawful for Ekurhuleni to permit people to occupy erven in Payneville Extension 1 until all the conditions attached to the original approval of the township and the further sub-division thereof had been fulfilled.

- When Payneville Extension 1 was approved the approval was made subject to a number of conditions which included, amongst others, the requirement to construct and maintain the streets in the township until that task was taken over by the council and the latter required the township developer to fulfil the obligations in respect of the provision of water, electricity and sanitary services and the installation of systems therefor as agreed between it and the council.

- In addition, when the further sub-division was undertaken a number of additional conditions were imposed, to which the approval was made subject. These related to the provision of various services, such as electricity and water; the provision of roads and steps for dealing with storm water runoff; and conditions dealing with dolomite risk management.

- While Ekurhuleni had provided water reticulation and sewerage disposal in Payneville Extension 1, it had not formed or surfaced the roads and sidewalks. Its approach was to provide for these matters incrementally as and when finance became available.

- ERI's argument was incorrect as it conflated the obligations of Ekurhuleni when it develops the township of Payneville Extension 1 and disposes of lots in that township, and its present entitlement to use the property as it stands before such development takes place.

- Although permission to lay out and develop a township on the property known as Payneville Extension 1 had been granted and the township had been declared to be an approved township, Ekurhuleni is not under any obligation to proceed with that development. It is perfectly entitled to allow the land to lie idle, or to change its intentions and propose a different development entirely, or to postpone development until the necessary funds are available. It is not in the meantime precluded from using the land, provided it does so in accordance with any applicable town planning scheme and the title conditions.

Departure from the provisions in the zoning scheme

- It was shown that ERI failed to show proof that Ekurhuleni acted unlawfully. However, even if in implementing the proposal there had been in some respect a departure from the provisions of the zoning scheme, it would not have been unlawful. The reason is that clause 32 of the zoning scheme expressly authorises the local authority to depart from it and to use any property in any use zone for a purpose empowered by law and which it deems beneficial to the community or the surrounding area.

The appeal accordingly failed.