HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 12306/2020

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 31 MARCH 2022

SIGNATURE

In the matter between:

CITY OF TSHWANE METROPOLITAN MUNICIPALITY Applicant

and

KOOP DE VRIES STYGER Respondent

J U D G M E N T

This matter has been heard in open court and disposed of in the terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1] Introduction

The respondent is the owner of a suburban property situated in the area of jurisdiction of the applicant, being the City of Tshwane Metropolitan Municipality (the municipality). He has converted the single dwelling on the property, which was zoned for use as "Residential 1" into a multiple occupation set of four units. He did so without applying for a change in the zoning of the property and without submitting any building plans. The municipality now seeks orders declaring the building works unlawful and in contravention of the National Building Standards Act 103 of 1977 and in contravention of the regulations promulgated thereunder. The municipality also seeks the authority to demolish the offending works.

[2] The facts

Very little of the facts are in dispute. The respondent brazenly went about the conversion of the dwelling and conceded that neither rezoning applications nor building plans have been submitted. The facts are briefly the following:

2.1 The respondent became the owner of the property on 21 June 2019.

2.2 At the time that the respondent became the owner of the property, it consisted of a residential erf in a suburban area with one dwelling erected on it together with an adjacent outbuilding (motor garage).

2.3 The municipality also issued the respondent with a zoning certificate in terms of the Tshwane Town-Planning scheme, 2008 (revised in 2014). The zoning certificate was dated 25 July 2019. The property use was zoned as "Residential 1" and the property did not fall within the Schedules to the scheme whereby an additional dwelling was permitted in certain defined areas. In terms of Regulation A20 of the National Building Regulations (the Regulations) promulgated in terms of section 17(1) of the National

Building Regulations and Building Standards Act, 103 of 1977 (the Act), the classification of the property fell into class H4, being "***Dwelling house*** *Occupancy consisting of a dwelling unit on its own site, including a garage and other domestic outbuildings, if any*".

2.4 On the same day that the zoning certificate was issued, the Acting Chief Building Surveyor: Building Plans and Inspection Management of the municipality received a call from the respondent's immediate neighbour, who complained that the respondent was erecting a building against her boundary wall without her consent. The neighbour also advised that the respondent was busy altering the dwelling on the property, converting it into units.

2.5 The next day, 26 July 2019, a building surveyor in the municipality's Building Control Section, conducted an inspection of the property. Having found that the respondent was indeed in the process of converting the dwelling into units, she served a notice in terms of section 4(1) of the Act on the builders who were on site on the premises, thereby directing them to cease construction. The builders however refused to sign acknowledgment of receipt of the notice.

2.6 Three days later the Acting Chief Building Surveyor received another telephone call for the neighbour, advising him that the respondent (and his builders) have not ceased construction. Hereupon the Acting Chief Building Surveyor personally attended the premises, inspected the building works and took some photographs. His inspection and photographs revealed the following:

- There were some building works being erected against the neighbour's wall (I interpose to point out that these have since been demolished and removed and nothing more need be said about them);

- There were materials for making trusses lying in the front yard of the property;

- Mortar was being mixed for the laying of bricks;

- Works were being constructed against the neighbour's garage and inside the dwelling;

- The roof and the ceilings (including brandering and trusses) in large parts of the dwelling had been removed and walls were being raised, constructed and plastered.

2.7 Subsequent to a reporting of the above, the prosecutor of the Tshwane Municipality Court issued a summons for the respondent to appear in court on 22 August 2019. This summons was served on the building works foreman who signed acknowledgement of receipt thereof.

2.8 By 20 August 2019, following upon yet another complaint from the neighbour, a further inspection was done by the building inspector. She found (supported by photographic evidence) that trusses had been partially installed, material was on the pavement and gates to the property were locked.

2.9 On 22 August 2019 the respondent failed to appear in court but the matter was struck from the roll as the magistrate had found the service to have been inadequate for the issuing of a warrant of arrest.

2.10 On 26 August 2019 a new summons was issued, this time for the respondent to appear in court on 19 September 2019. The Acting Chief Building Surveyor personally attempted to serve this summons on the respondent personally but only encountered a domestic servant at his place

of residence (which is not the property in question). She telephoned the respondent who gave her strict instructions not to accept service or sign any acknowledgement of receipt. The Acting Chief Building Surveyor then took a photograph of the domestic servant and the summons which she had placed on a window sill of the respondent's residence. The papers are silent as to what happened to the warrant for arrest which was subsequently issued on 19 September 2019 upon the respondent's failure to appear in court, particularly in view thereof that the respondent has eventually conceded having received the summons.

2.11 Four days after the service of the second summons, the Acting Chief Building Surveyor again visited the property. He found that the building works were still ongoing and he further found the following (which findings he supported with photographic evidence):

- there were still building works being erected against the neighbour's garage;

- electrical distribution boards were being installed for four different units being constructed on the property;

- handmade trusses, without bolts, were installed, which did not satisfy the specifications provided for in the Act;

- four water meters were installed, one for each of the prospective units;

- a new drain had been installed and closed up without a pressure test having done by the municipality (this was as a consequence of no plans having been submitted and, consequentially, no building inspections having taken place);

- waste pipes have been installed without gulleys or vent pipes for the new toilets;

- brickworks had been erected which pressed against the neighbour's electric fence on the boundary of her property.

- foundations had been dug for a new boundary wall;

- the single dwelling was being converted into four separate occupational units on the property.

2.12 The application for the relief referred to earlier was launched by the municipality on 19 February 2020. On 23 March 2020 the respondent indicated his opposition to the application. Upon failure to deliver an answering affidavit, the matter was set down for hearing on 7 May 2021. Covid-consequences were to blame for this delay. On 6 May 2021 only, that is more than a year after he had been called upon to do so, did the respondent deliver his answering affidavit, causing a postponement and yet another delay. In his answering affidavit, virtually none of the above facts were placed in dispute. In fact, one of the grounds of opposition was that by the time the application had been launched, all the building works complained of and which resulted in the conversion of the single dwelling house into four dwelling units, had been completed. The respondent consequently labelled the relief claimed to be moot. I shall deal with this fact and the other technical disputes raised by the respondent hereinlater.

[3] <u>The applicable statutory provisions:</u>

3.1 Section 4(1) of the Act provides that: "*No person shall without the prior approval in writing of the local authority in question, erect any building in respect of which plans and specifications are to be drawn and submitted in terms of this Act*".

3.2 Section 4(4) of the Act further then provides that "*Any person erecting any building in contravention of the provision of subsection (1) shall be guilty of an offence ...*".

3.3 In terms of section 1 of the Act a "building" has been defined widely and includes "*any other structure ... erected or used for or in connection with ... the accommodation or convenience of human beings ... [and] ... any wall ... any part of a building ... any facilities or system or part or portion thereof, within or outside but incidental to a building, for the provision of a water supply, drainage, sewerage, storm-water disposal, electricity supply or other similar service in respect of the building*".

3.4 A further section on which the municipality relied was section 21, which provides as follows:

> "*Order in respect of erection and demolition of buildings*
>
> *Notwithstanding anything to the contrary contained in any law relating to magistrates' courts, a magistrate shall have jurisdiction, on the application of any local authority or the Minister, to make an order prohibiting any person from commencing or proceeding with the erection of any building or authorizing such local authority to demolish such building if such magistrate is satisfied that such erection is contrary to or does not comply with the provisions of this Act or any approval or authorisation granted thereunder*".

3.5 It was not in dispute between the parties that this court has the necessary jurisdiction to order any relief that a Magistrates Court may have been entitled to grant.

3.6 Regulation A20 of the Regulations provides for the classification and designation of occupancies of buildings. A single dwelling house is classified as H4 as already referred to above, while classification H3 is for "*occupancy of two or more dwelling units on a single site*".

3.7 The Regulations provide an explanation for the difference between a "dwelling house" and a "dwelling unit" as follows: "*dwelling house means a single dwelling unit and any garage and other domestic outbuildings, situated on its own site*" while a "*dwelling unit means a unit containing one or more habitable rooms and provided with adequate sanitary and cooking facilities*".

3.8 Regulation A22(3) provides that "*no owner shall ... backfill or enclose a drainage installation until such installation has been inspected, tested and approved by the local authority ...*".

3.9 Section 13 of the Act exempts "*minor building work*" from its application, but these have limitations as prescribed in Regulation AZ2, being, inter alia "*the replacement of a roof or part thereof with the same or similar material*"; "*the partitioning or enlarging of any room by the erection or demolition of an internal wall if such erection if such erection or demonstration does not affect the structural safety of the building concerned*" and "*the erection of any other building where the nature of the erection is such in the opinion of the building control officer it is not necessary for the applicant to submit, with his application, plans prepared in full conformation of these regulations*".

3.10 Plans and the approval thereof are also not necessary where maintenance is undertaken but, in terms of Regulation A1(4), this is limited to "*repair which has become necessary as a result of ordinary wear and tear or which*

is undertaken in the normal course of maintenance or upkeep of any building".

3.11 The Regulations also provide for "*General Enforcement*" in Regulation A25, the relevant portions of which read as follows:

> "*(1) No person shall use any building or cause or permit any building to be used for a purpose other than the purpose shown on the approved plans of such building, or for a purpose which causes a change in the class of occupancy as contemplated in these regulations, whether such plans were approved in terms of the Act or in terms of any law in force at any time before the date of commencement of the act, unless such building is suitable, having regard to the requirements of these regulations, for such first-mentioned purpose or for such changed of occupancy.*
>
> *(6) The local authority may serve a notice on any person contemplated in section 4(4) of the Act or sub-regulation (4) or (5), ordering such person forthwith to stop the erection of the building concerned or to comply with such approval, as the case may be...*
>
> *(7) Whether or not a notice contemplated in sub-regulation (6) has been served, the local authority may serve a notice on the owner of any building contemplated in sub-regulation (4) or (5), ordering such owner to rectify or demolish the building in question by a date specified in such a notice*".

[4] The respondent's case and the evaluation thereof:

4.1 As already stated, the facts summarised in paragraph 2 were not materially in dispute. This includes the fact that no building plans have been submitted and neither has any application for the change of the zoning of the property or its classification been submitted.

4.2 In respect of the zoning issue the respondent, through his counsel, had to concede that the respondent was not before court with clean hands. The respondent had clearly acted in breach of the Tshwane Town-planning Scheme. He proffered no explanation for his conduct.

4.3 In respect of the remainder of the issues and, in particular, the applicability of the Act and the Regulations, the respondent's attitude, as displayed in his belated answering affidavit, was technical to the point of being as obstructive as he had been in respect of the service of the summonses on him. I shall deal with those defences which may be material to the disputes between the parties, hereunder.

4.4 Firstly, the respondent contended that the Acting Chief Building Surveyor had no authority to depose to an affidavit on behalf of the municipality. Various statutory provisions and extracts therefrom were cited in the answering affidavit. It is not necessary to repeat the law as to whether a witness needs to be "authorized" at all, as the respondent had, by the time of hearing of oral argument, abandoned this point, in my view, correctly so. In any event, the deponent had produced the necessary delegations to act on the municipality's behalf in reply to the respondent's raising of this point.

4.5 Another point was that the municipality should be non-suited due to the failure of the joinder of the current occupiers of the four units. The steps preceding this application was launched long before any occupation of the units and in fact long before the completion of construction. Even if it might be that the units were occupied by the time of the belated answering affidavit, no particulars were furnished as to when these occupiers commenced their occupation. They clearly commenced their occupancy when the respondent had been (repeatedly) informed of the municipality's contentions regarding the unlawfulness of the construction. The respondent clearly permitted occupancy of the units either in contravention of the Act and the Regulations, or at risk of such contravention, but definitely in contravention of the zoning certificate. In my view, these occupiers should look to the respondent for the relief of any prejudice they might suffer but the respondent cannot claim a procedural benefit as a result of his own unlawful actions. This point is therefore rejected.

4.6 A further basis for opposition was the respondent's contention that the municipality's case was "exclusively" based on sections 4(1) and 4(4) of the Act and that was the full extent of the case that the respondent had to meet. This is an oversimplification of the case. Although the applicant's deponent referred to sections 4 and 21 of the Act as the basis of the application, he also, in paragraphs 12 and 13 of the founding affidavit, referred to the zoning of the property. In paragraph 15 of the founding affidavit, he expressly stated the following: "*... the conversion of the premises into units is contrary to the Zoning Certificate issued to the respondent, which authorised the premises to one residential dwelling*". The respondent's terse answer instructive. It was simply this: "*The contents hereof are denied. It is repeated that no case was made out based on land use. The applicant exclusively relied on the Building Standards Acts for the relief it seeks in the Notice of Motion*". As already pointed out

above, the denial is without foundation. The contravention of the zoning certificate has rightly been conceded at the time of hearing. In an attempt at avoiding the consequence of this concession, the respondent seeks to limit the declaration of unlawfulness referred to in the Notice of Motion to the linking thereof exclusively to the other contraventions, being those of the Act and to the provisions of the Regulations. I find this facetious and self-serving. Clearly the conduct of the respondent in converting one dwelling house into four units without prior approval or re-zoning is unlawful and I find no reason why, on the admitted facts, the municipality should not be entitled to such a declaration.

4.7 It is in the same fashion that the respondent, without putting forward any contrary evidence, claims that "no cause of action" has been made out by the municipality. This bald allegation has as little foundation as the respondent's equally bald allegation that the Act is either not applicable or that the works are excluded from the Act. No case had been made out by the respondent that the works are "minor works" as contemplated in section 13 of the Act. The only attempt at justifying such an exclusion, is the respondent's own say so and his erroneous view that he is entitled to do anything as long as the outside walls of the dwelling are not extended. He furnishes no other motivation for any exclusion, save insofar as he claims that the dwelling was in a dilapidated state when he purchased it and that he was merely busy with maintenance. Clearly this contention is so uncontrovertibly refuted by the photographic evidence referred to above, that it must be rejected. The claim clearly falla outside Regulation A1(4) referred to in paragraph 3.9 above.

4.8 The respondent's "bull point" was that section 4(1) of the Act can only be relied on by the municipality while the construction was actively being carried out and that the municipality can no longer rely on it once the

building works have been completed. The absurd construction that the respondent seeks to place on the combination of sections 4(1) and 21 (read with Regulation A25) is that, as long as the respondent can delay matters until completion of the activities he had been called upon to cease, he is safe from any subsequent order once he had completed the offending works. This proposition need merely to be stated to demonstrate its absurdity and it is trite that no interpretation of a statute which would lead to an absurdity will be followed.

4.9 In support of the respondent's contention further, much reliance was placed on *Wierda Properties v Sizwe Ntsaluba Gobodo* 2018 (3) SA 95 (SCA). In fact, the respondent's counsel, relying on this judgment, proclaimed in heads of argument: *"... Section 4 (1) of the Act only deals with the process of erecting any building ... it does not deal with a building that has already been erected .... There is, however, no need for the Court to venture upon the aforesaid interpretive exercise as same has already been considered by the Supreme Court of Appeal ...".*

4.10 Firstly, the judgment in *Wierda Properties* is to be distinguished from the present case, both on the facts and on the law.

4.11 In *Wierda Properties*, the determination that the court had been required to make, was in respect of the validity and enforceability of lease agreements which had been entered into after the fact, in respect of buildings which had been erected without plans and for which no occupation certificates had been issued. The lessor in *Wierda Properties* was not the person who had constructed the offending works. The previous owner did that. In *Wierda Properties* the party seeking relief were the lessor and the tenant (in respect of the initial counter-applicant) and not the municipality. It was not a case of a local authority seeking to exercise its oversight over building

works erected within its area of jurisdiction. The facts are therefore completely different from the current application. In the current application, the respondent is the person who had committed the contraventions.

4.12 The law considered in *Wierda Properties* was also completely different from the present application. Apart from the issue of the validity of a lease agreement, the consequences of occupation of building works erected without plans was considered, particularly with reference to section 14 of the Act, dealing with occupancy certificates. None of these questions feature in the present application.

4.13 Furthermore, the judgment in *Wierda Properties*, apart from the aforementioned differences, is no authority for the proposition advanced by the respondent. The Supreme Court of Appeal did not find that section 4(1) finds no application once a building has already been constructed or when the building works have already been completed. Apart from the absence of such a finding, in various parts of the judgment, the learned judges of appeal made reference to remedies available to municipalities, distinguishing those from the rights of lessor and tenants. See for example paragraphs [20] and [27] of the judgment. Accordingly, this "defence" must also fail.

[5] Conclusions

5.1 I find that, on the facts, the respondent has contravened the terms of the zoning certificate issued in respect of the property and thereby has contravened the provisions of the Tshwane Town-Planning Scheme, 2008. The building works whereby the dwelling house had been converted into four dwelling units are unlawful and the municipality is entitled to a declaration in this regard.

5.2 Even if I may be wrong in the above conclusion, not on the facts, but on the basis that the respondent may be correct in his assertion that the application was not clearly enough a "land-use application" as he calls it, I find that the municipality is still entitled to a declaration of unlawfulness due to the respondent's non-compliance with the Act.

5.3 The Act is clearly applicable: the respondent was not merely conducting "maintenance", the works were not "minor works", the conversion altered the classification and occupation of the previously approved dwelling house, the works involved alternations to roof structures, electrical and water and sewage reticulation and involved drainage works, all which needed plans for approval and inspection.

[6] Relief sought

6.1 Apart from the declaratory relief, the municipality is entitled to the "demolition" relief. This would include the works erected against the neighbour's garage.

6.2 One must take into account, however, that there may be tenants still in the units and they might need time to adjust their circumstances. It might also be that, as had happened in *Wierda Properties*, approval for the offending works may be sought from the municipality and that the works may comply or be capable of rectification so as to comply with the specifications prescribed by the Act. Similarly, an application for re-zoning might conceivably be successful (depending also on the neighbour's attitude) if belatedly made. This court has a discretion to suspended the execution of its orders if the circumstances warrant it.

6.3 On the issue of costs, not only should the customary rule that costs should follow the event apply, but, having regard to the brazen unlawful conduct

of the respondent and his tardiness in prosecuting his opposition to the application, coupled with the nature of the "defences" raised, I am of the view that a punitive costs order is warranted.

[7] Order

1. The erection of building works at the property situated at 215 Ockert Street, Wiedapark, Centurion, Pretoria (the property), whereby the dwelling house has been converted to four dwelling units contrary to the zoning certificate issued in respect of the property and which works have been done without building plans approved by the City of Tshwane Metropolitan Municipality (the offending Works), are declared unlawful and declared to be in contravention of section 4(1) of the National Building Regulations and Standards Act 103 of 1977 and the Regulations promulgated thereunder.

2. The City of Tshwane Metropolitan Municipality is authorised to enter the property and to demolish the offending works, which shall include all the works whereby the dwelling house was converted into four dwelling units and which shall include the electricity-, water drainage- and sewerage installations installed in connection therewith and all works erected against the neighbour's garage or the electrical fencing of her property.

3. The execution of the order in paragraph 2 above is suspended until the finalization of applications for approval of the necessary plans and specifications and the finalization of applications for re-zoning of the property, both sets of applications which must be delivered to the City of Tshwane Metropolitan Municipality within 30 days from date of this order.

4. The suspension shall lapse in the event of said applications not being timeously lodged or, having been lodged, not being successful or, being only partially successful, to the extent of such failure to succeed.

5. The respondent shall pay the costs of this application on the scale as between attorney and client.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of hearing: 8 March 2022

Judgment delivered: 31 March 2022

APPEARANCES:

For Applicant:	Adv G Mashigo
Attorney for Applicant:	Rambevha Morobane Attorneys, Pretoria
For Respondent:	Adv J A Venter
Attorneys for Respondent:	Phillip Venter Attorneys, Pretoria