THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 1315/2016

In the matter between:

ESQUIRE CONSULTING AND MARKETING CC	**FIRST APPELLANT**
CHRISTO STOCKENSTRÖM	**SECOND APPELLANT**
GERHARDUS HAGER DREYER NO	**THIRD APPELLANT**
(IN HIS CAPACITY AS TRUSTEE OF THE G H DREYER FAMILIE TRUST, IT7829/02)	
FRANCIS DELINA DREYER NO	**FOURTH APPELLANT**
(IN HER CAPACITY AS TRUSTEE OF THE G H DREYER FAMILIE TRUST, IT7829/02)	
SIX FIFTEEN INVESTMENTS (PTY) LIMITED	**FIFTH APPELLANT**
THOMAS ROBERT PEACOCK EDWARDS	**SIXTH APPELLANT**
MARTHINUS JAKOBUS RUDOLF MARX	**SEVENTH APPELLANT**
DR IVAN MARX MEDFORUM INCORPORATED	**EIGHTH APPELLANT**
BHARATKUMAR KANTILAL MEHTA	**NINTH APPELLANT**
ASHLEY HODEN PARKER NO	**TENTH APPELLANT**
(IN HIS CAPACITY AS TRUSTEE OF THE ASHLEY PARKER FAMILY TRUST TM 5789/1994)	
BEVERLEY JOAN PARKER NO	**ELEVENTH APPELLANT**
(IN HER CAPACITY AS TRUSTEE OF ASHLEY PARKER FAMILY TRUST TM 5789/1994)	
ALAN ROLAND COUSINS NO	**TWELFTH APPELLANT**
(IN HIS CAPACITY AS TRUSTEE OF THE ASHLEY PARKER TRUST TM 5789/1994)	

CORNELIS ABRAHAM TROSKIE NO (IN HIS CAPACITY AS TRUSTEE OF THE BOET TROSKIE KINDERS TRUST TMP 1447/2015) **THIRTEENTH APPELLANT**

STEPHANUS FRANCOIS NEL NO (IN HIS CAPACITY AS TRUSTEE OF THE BOET TROSKIE KINDERS TRUST TMP 1447/2015) **FOURTEENTH APPELLANT**

JACOBUS GERHARDUS TROSKIE NO (IN HIS CAPACITY AS TRUSTEE OF THE BOET TROSKIE KINDERS TRUST TMP 1447/2015) **FIFTEENTH APPELLANT**

CEDRIC JOHN PETERSON NO (IN HIS CAPACITY AS TRUSTEE OF THE BOET TROSKIE KINDERS TRUST TMP 1447/2015) **SIXTEENTH APPELLANT**

JEMMA ANN SURRIER **SEVENTEENTH APPELLANT**

and

SEA GLADES HOLDINGS (PTY) LTD **FIRST RESPONDENT**

NEVIL LEIGHTON HULETT **SECOND RESPONDENT**

KOUGA MUNICIPALITY **THIRD RESPONDENT**

EASTERN CAPE LIQUOR BOARD **FOURTH RESPONDENT**

Neutral citation: *Esquire Consulting and Marketing CC v Sea Glades Holdings (Pty) Ltd* (1315/2016) [2017] ZASCA 167 (30 November 2017)

Coram: Ponnan, Bosielo, Leach and Mathopo JJA and Ploos van Amstel AJA

Heard: 10 November 2017

Delivered: 30 November 2017

Summary: Simultaneous applications for rezoning and subdivision of land brought under the Land Use Planning Ordinance 15 of 1985, Cape (LUPO):

subdivision granted but rezoning of certain erven to business deferred for further information: later application brought for rezoning of those erven to business: this construed as part of original application that had been deferred: two year utilisation period envisaged in s 16(2)*(a)* of LUPO therefore not applicable: property in any event utilized for business purposes as envisaged by LUPO within that period: claim for an interdict based on allegation that property's use for business purposes was illegal accordingly dismissed.

ORDER

On appeal from: Eastern Cape Division of the High Court, Port Elizabeth (Goosen J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Leach JA (Ponnan, Bosielo and Mathopo JJA and Ploos van Amstel AJA concurring)

[1] The principal issue that has to be decided in this matter is whether the immovable property owned by the first respondent and more fully described as erf 3306 Sea Vista, in the Kouga Municipality (erf 3306) is zoned for business purposes under the Land Use Planning Ordinance 15 of 1985, Cape (LUPO).

The appellants contend it is not and that the respondents ought therefore to have been interdicted by the court a quo from using it for a business purpose. The respondents adopt the contrary standpoint. The outcome of this appeal turns on the resolution of this issue.

[2] The appellants are either the owners of immovable property, or the trustees of trusts which own immovable property, in what is known as Marina Village, in which erf 3306 is also situated. Marina Village, in turn, forms part of the well known St Francis Bay Marina at St Francis Bay, Eastern Cape. The development of Marina Village, which is described as being the final phase of the St Francis Bay Marina, was carried out by the first respondent which appears to be the alter ego of its managing director, the second respondent. The first respondent is also the registered owner of erf 3306.

[3] In December 2015, the appellants applied to the Eastern Cape Division of the High Court, Port Elizabeth for an order interdicting and restraining the respondents from conducting any business whatsoever on erf 3306. They alleged that the first and second respondents were in the process of establishing a restaurant business on erf 3306 which, they alleged, was contrary to the existing town planning scheme and zoning of the property. At the same time, they sought an order interdicting the fourth respondent, the Eastern Cape Liquor Board, from issuing the first and second respondents with a liquor licence for the premises. The third respondent, the Kouga Municipality, within whose municipal area the St Francis Bay Marina falls, was also joined as an interested party although no relief was sought against it. For convenience, I intend to refer to the third respondent simply as 'the municipality'. Both it and the fourth respondent played no active part either in the proceedings in the court a quo or before this Court.

[4] Although the appellants initially sought interim urgent relief, this was later abandoned and by the time the matter came before the court a quo they sought final relief. This was strenuously opposed by the first and second respondents. The court a quo ultimately concluded that the appellants had not established that it was unlawful to conduct a restaurant on the erf in question in terms of its current zoning. Accordingly, it dismissed the appellants' application with costs, although it subsequently granted leave to appeal to this Court.

[5] To resolve the current dispute regard must be had to the history of erf 3306. In many respects, this history is shrouded in mystery due to deficiencies in the papers filed in the proceedings, but what can be gleaned from what was alleged is the following. What is now known as Marina Village originally formed part of what was more fully described as 'The Remainder of Portion 32 of the Farm Goedgeloof No 745, St Francis Bay', a property zoned for agricultural use. The first respondent desired to develop a portion of this farm in order to extend the already existing St Francis Marina. Its proposal in this regard involved the excavation and construction of a canal linking into an existing canal of an earlier development of the Marina; the creation of an island surrounded by water; and the subdivision of the property into various erven, mostly residential.

[6] In order to give effect to this proposed development, the first respondent applied to the municipality under s 16 of LUPO for a rezoning of the land it wished to develop and, under s 24 of LUPO, for the subdivision of the property. I should immediately record that ss 22(1)*(a)* of LUPO provides that no application for subdivision involving a change of zoning may be considered 'unless and until the land concerned has been zoned in the manner permitting of subdivision', But s 22(1)*(b)* goes on to provide that this shall not preclude applications for rezoning and subdivision being considered simultaneously. The

first respondent therefore simultaneously applied for subdivision and rezoning. These applications appear to have been supported, inter alia, by a drawing dated September 2001 bearing the number SFM/LH/501. Unfortunately neither the applications nor this drawing were included in the papers filed in the court below, but the first respondent's allegation in a supplementary affidavit (p 266) that such plan was identical to a plan annexure NLH 12 (p 271) dated August 2003, is not disputed (all the appellants disputed was that this latter plan was not attached to the 2001 applications, which in the light of it being dated 2003 is obvious). As appears from this plan, the respondents sought the sub-division of the land it wished to develop and its rezoning to reflect 148 erven (62 canal erven and 86 non-canal erven) to be zoned as residential, one canal erf and two private space erven to be zoned as 'Open Space II', various roads to be zoned as 'Transport Zone II' and two further erven (reflected on the plan as the disputed erf 3306 as well as erf 3295) to be zoned as 'Business Zone II'. Of the 148 residential erven, it appears that the respondent applied for certain of them to be zoned as 'Residential Zone I' and others as 'Residential Zone II' but these details are unknown and are not relevant to the present dispute.

[7] In any event, on 13 December 2001 the municipality considered these applications and resolved as follows:

'(i) That the subdivision of a Portion of the Remainder of Portion 32 of the Farm Goedgeloof No 745 be approved in terms of Section 25 of Ordinance 15 of 1985 the Land Use Planning Ordinance subject to the following conditions:

(a) The subdivision be according to drawing No SFM/LH/501 dated September 2001 subject to condition (b):

(b) That the subdivision makes provisions for the following land uses:

1. Residential Zone I
   - 62 Canal erven – average size – 117m^2
   - 86 Non-canal erven – average size – 899.3m^2
2. Open Space Zone II

- 1 Canal Erf
- 2 Private Open Space Erven

3. Transport Zone II
   - Roads

. . .

(ii) That the land use applications for Residential Zone II and Business Zone II be deferred in order to obtain more detail thereon from the applicant . . .'

[8] Quite what happened in respect of the application to rezone certain of the erven as 'residential zone two' is uncertain but, as I said, those erven are of no relevance to the present dispute. What is of importance in regard to erven 3306 and 3295, is that the decision to defer their zoning flies in the face of ss 22(1)*(a)* of LUPO which, as already mentioned, provides that no application for subdivision involving a change of zoning may be granted until the land concerned has been zoned 'in a manner permitting of subdivision'. In the case of those two erven the municipality put the cart before the horse, so to speak, by first granting the subdivision and leaving the rezoning for later decision. Be that as it may, the legality of this resolution has never been challenged and, on the strength of well-known authority, the municipality's administrative decision in this regard must stand.

[9] Armed with this resolution, the respondents proceeded to construct the necessary canals to extend the marina, subdivided the erven in terms of the approval, built roads, laid on infrastructure such as water, sewage and drainage, and generally conducted themselves as if the Marina Village development had been finally approved. But of course it had not and there was still the unresolved question of the zoning of erven 3306 and 3295.

[10] To deal with this, instead of amplifying their already existing application for rezoning, the respondents, by way of a fresh application, applied to the

municipality for those erven to be rezoned as 'Business Zone II'. This application was eventually approved by the municipality on 23 September 2004. By the time this was done, the provision of bulk services necessary for the development had already been provided, subdivision of the erven had taken place and at least certain of the residential properties had been sold to new owners. Pursuant to the rezoning in September 2004, the general plan of the subdivision of the development was finally approved on 17 October 2005.

[11] The first and second respondents submitted various site development plans for Marina Village, and in April 2006 the municipality further approved a site development plan for the property involving a mixture of land uses. In respect of erf 3306 the plan reflected mooring jetties being provided in a mooring basin created out of a large segment of the erf immediately adjacent to a canal being submerged under water. It also provided for fishermen's cottages, a slipway, shops, a restaurant, a village square, an oyster bar, a boat club house, and parking and loading facilities. Aerial photographs taken in 2007 showed that although the mooring basin had been constructed by then, no jetties had yet been installed.

[12] As often happens in developments of this nature, disputes and tensions arose between the respondents, as developers, and landowners in their development. Although the precise troubles are not necessary to detail, one dispute related to the provision of mooring facilities for landowners. Eventually a so-called 'settlement agreement' was concluded between the first respondent and an organisation known as the Marina Village Homeowners Association. The latter was represented at the time by the second appellant in these proceedings; he being an attorney and landowner in the Marina Village (he is also the appellants' attorney of record and he and his wife are the sole members of the first appellant.) That agreement, dated 9 August 2008, dealt inter alia with

matters such as moorings to be erected on erf 3306 and the right of landowners in Marina Village to use such moorings, the site development plan for erf 3306, and the right of the homeowners association to have access to the commercial, business and leisure facilities developed on erf 3306. It was pursuant to this that floating jetties came to be built in the mooring basin.

[13] It is clear from the terms of this agreement that the second appellant regarded erf 3306 as having been zoned for business purposes. However, in October 2015, when he learned that a restaurant was being built on the property, he took offence to what he stated in the founding affidavit was 'an unlawful invasion of the appellants' privacy and right to peaceful and undisturbed possession of their properties' likely to disturb the tranquil atmosphere of the 'peaceful residential character of Marina Village and surrounding residential properties' – all of which is somewhat rich when one knows that he had known for years the property was zoned for business purposes. In any event, the second appellant immediately engaged the services of a town planner, Mr C J J Els of Pretoria, and the two of them went to St Francis Bay and trawled through the records of the municipality to see if they could find a way to attempt to stop the development on erf 3306. They thereafter consulted with senior counsel in Pretoria and prepared papers for an urgent application in which they sought to interdict the respondents from proceeding with the construction of the restaurant. At some stage the other appellants were drawn in to support the application.

[14] The argument the appellants came up with was this:

(a) The property had been subdivided by way of the municipal resolution of 21 December 2001;

(b) By 23 September 2004 when the municipality approved the rezoning of erf 3306, bulk services had been installed by the respondents and at least one

land unit had been registered as envisaged by s 27(1) of LUPO, so that the subdivision of 21 December 2001 had by then already been deemed to be confirmed under s 27(3);

(c) In these circumstances the rezoning affected by the municipality's decision of 23 September 2004 was what the parties referred to as a 'standard' rezoning in which there was no related subdivision – in contrast to a rezoning in terms of a substitution scheme in which there is always a related subdivision of the property concerned;

(d) Section 16(2)*(a)*(i) of LUPO, which deals with standard rezonings, provides that such a rezoning lapses within a period of two years in the event of the land concerned not being 'utilised as permitted in terms of the zoning granted by the said rezoning' within that period;

(e) As erf 3306 had not been utilised for business purposes within two years from the date of its rezoning for business purposes in September 2004, or so the appellants contended, such rezoning had lapsed (of which they had been unaware until the second appellant's investigations in November 2015);

(f) The construction of a restaurant was consequently illegal in that it offended the municipal zoning scheme in terms of which, so the argument went, the property was zoned as residential.

[15] On this basis the appellants contended that, as neighbouring landowners, they had a clear right not to have a restaurant built in their midst which would be infringed if an interdict was not granted preventing its construction and use on erf 3306. In a well-considered judgment the court a quo, after having subjected the facts and the various provisions of LUPO to detailed scrutiny and analysis, rejected this argument. It is not necessary for present purposes to analyse its judgment, particularly as the appellants on appeal raised two essential disputes for this court's decision – first, whether s 16(2)*(a)*(i) of LUPO was of application as the appellants alleged and, secondly, whether there had in

fact been a utilisation of erf 3306 for business purposes after it had been rezoned for such use in 2004 as the respondents contended. It was accepted that if either of these issues was decided against the appellant, the appeal must fail.

[16] The appellants' argument in regard to the first of these issues echoed that set out in para 14(a)-(c) above. I have difficulty with the argument that the entire subdivision and rezoning of erf 3306 was effected by the municipality's decision of 21 December 2001. It may well be that the municipal resolution of that date was not challenged, and the rezoning and subdivision of, say, the residential erven may well have been confirmed under s 27(3), but I cannot accept that the same can be said in respect of erf 3306. One cannot be blind to the fact that the rezoning of that erf was deferred by the municipality at that time and, as I have already pointed out, LUPO requires the rezoning of a property to be effected either before or simultaneously with its subdivision. To pretend that this had in effect been done, even though it had not, would sanction the very situation which the lawgiver had wished to prevent, and undermine the principle of legality – compare *Cool Ideas 1186 CC v Hubbard & another* 2014 (4) SA 474 (CC) paras 52-53. Even if the decision of 21 December 2001 stands, I therefore do not see how the deeming provisions of s 27(3) LUPO can be applied to a subdivision not lawfully effected under the provisions of that ordinance.

[17] No final decision on this need be taken, however, as on the facts it seems to me that what in fact occurred, as the municipality indeed intended, was that although the subdivision and rezoning was approved in respect of certain of the erven, the simultaneous applications for subdivision and rezoning relating to erven 3306 and 3295 were effectively postponed for a final decision thereon to be taken later. It is significant that the municipality, in considering the subsequent rezoning application, considered it to be part of the initial

application for rezoning that had been determined together with the subdivision application in December 2001. At a meeting of its Standing Committee for Works, Planning and Development held on 24 August 2004, (p 77 and following) a recommendation to approve the rezoning of erf 3306 was passed. The minutes of the meeting record that reference was made to the decision of December 2001, that 'the Council had referred the proposed Business Zone . . . back subject to formal application and Site Development Plans indicating proposed uses being submitted' and that the subsequent application for rezoning had therefore been submitted for that purpose. In these circumstances it would be splitting technical hairs, in my view, to hold that the subsequent application was a wholly fresh proceeding and did not form part of the initial application.

[18] Accordingly, the decision on 23 September 2004 to approve the rezoning of erf 3306 brought finality in respect of the earlier application for subdivision that, for all practical purposes, had been approved in principle in December 2001 and then put on hold by reason of there being no finality in respect of the rezoning of erven 3306 and 3295. In these circumstances, the argument that subdivision of erf 3306 had been effected before 2004, so that the subsequent application for rezoning was a standard rezoning application attracting the provisions of s 16(2) of LUPO, must fail.

[19] On this basis alone, as the two year period in s 16(2) upon which the appellants have hung their hat, does not apply, the appeal must fail. But for the sake of completeness, and even if that was not the case, there seems to me to have been a clear utilisation of erf 3306 as permitted in terms of the business zoning before a period of two years from the rezoning for business had elapsed.

[20] In this regard the appellants alleged in their founding affidavit deposed to in 2015 that the erf 'has not been used as a shop or as a restaurant until date

hereof' and that the construction work that had begun that year constituted 'the first concrete indications of an intention by the first and second respondents to utilise erf 3306 for any of the purposes authorised by "business zone II"'. Bearing in mind that s 2(xxx) of LUPO contains the definition that '"utilisation", in relation to land, means the use of land for purposes of the improvement of land, and "utilise" has a corresponding meaning', this is a somewhat simplistic view of what was in issue. In the light of this definition, even if s 16(2) was of application, it was not necessary for the erf to have been used as a shop or as a restaurant during the two year period as alleged by the appellants – it was sufficient if the land was used for purposes of improvement for use in terms of its permitted zoning.

[21] And that is precisely what the respondents did. By 2004 it had excavated a substantial portion of the property to create the mooring basin which effectively forms part of a canal that was created; by 2006 the canal walls, required to accommodate the area of the restaurant, had been constructed as had the foundations for the deck of the restaurant which is now been built; and by that time a wooden walk way had been built to join the restaurant deck.

[22] The appellants argued that this evidence was unsatisfactory as it had been forthcoming in supplementary affidavits filed at the eleventh hour. While that is so, the appellants never sought an opportunity to respond which they could easily have done had they disputed the allegations. But more importantly, as already mentioned it is common cause that by 2004 the respondents had provided the basic amenities and infrastructure for the development, including erf 3306. They had therefore effected improvements upon that erf with the intention for it to be used for business purposes, as had been envisaged in the initial simultaneous applications for rezoning and subdivision.

[23] It was argued on behalf of the appellants that the fact that this basic infrastructure had been provided should be ignored as it had been put in place before the application for rezoning was approved in September 2004, whereas the only period of relevance was the two year period immediately after that event. This argument cannot be accepted. The bulk services were provided to erf 3306 in the clear anticipation that its ultimate rezoning would be approved, which it was. It seems to me to matter not that the infrastructure had been installed prior to approval of the rezoning, which resulted in the respondents not having to provide it thereafter. The fact remains that by the end of the two year period relied upon by the appellants, the improvements had been effected as part of the development of the erf for the business purposes for which it had been rezoned.

[24] In these circumstances the second issue relied upon by the appellants must be determined against them as well. They therefore failed to prove their case that the building of a restaurant was unlawful, and their application was correctly dismissed by the court a quo.

[25] The appeal is dismissed with costs.

L E Leach

Judge of Appeal

Appearances:

For the Appellant:	J P Vorster SC
Instructed by:	Stockenström Fouché Inc Attorneys, Pretoria McIntyre Van Der Post Attorneys, Bloemfontein

For the 1st and 2nd Respondent:	G J Friedman
Instructed by:	Friedman Scheckter Attorneys, Port Elizabeth Matsepes Attorneys, Bloemfontein