REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 317/2011

In the matter between:

1.1.1.1. **THE MUNICIPAL COUNCIL OF WINDHOEK APPELLANT**

and

JOHN HEINRICH HANSEN RESPONDENT

Neutral citation: *The Municipal Council of Windhoek v Hansen (A 317/2011) [2013] NAHCMD 14 (25 January 2013)*

Coram: Schimming-Chase, AJ

Heard: 18 January 2013

Delivered: 25 January 2013

Flynote: Application for an order to remove illegal structures situated on respondent's erf – Principles relating to how a court will deal with a dispute of fact where denials are bald and unsubstantiated, alternatively not genuine or *bona fide* when onus on respondent restated.

Flynote: Waiver – Principles relating to proof of waiver and onus restated.

Flynote: Practice – annexures to affidavits, principles relating to how annexures are to be identified and referred to restated.

Summary: The applicant municipality applied for an order directing the respondent to remove, alter or pull down illegal structures on the respondent's erf, which structures were not built according to approved building plans and which also had been constructed on top of the applicant's main sewer line. The respondent denied that there were illegal structures present on his erf, and alleged that the applicant had waived its rights to apply for the aforesaid relief because the parties had agreed that instead of removing the structures the respondent would maintain the sewer line at his own costs.

Held – The respondent had not laid any basis or facts in support of its contention that the applicant had waived its rights. Respondent's bald denial that there were illegal structures in light of indications on annexures containing the building plans, which structures had not complied with the approved building plans not sufficient to raise a real and genuine dispute of fact. Application accordingly granted.

ORDER

(a) The respondent is directed to remove, pull down or alter the unlawful structures erected on Erf 1582, Tauben Street, Hochland Park, Windhoek, in particular the Garage, Swimming Pool and Lapa within 30 days of service of this order.

(b) In the event of the respondent failing to comply with the above order, the applicant is authorised to remove, pull down or alter the aforesaid structures at the respondent's costs.

(c) The respondent is ordered to pay the costs of this application, such costs

to include the costs of one instructing and one instructed legal practitioner.

JUDGMENT

SCHIMMING-CHASE, AJ

(b) This is an application launched by the Municipal Council of Windhoek ("the applicant") for an order directing the respondent to remove, pull down or alter certain unlawful structures erected on the respondent's property at Erf 1582, Tauben Street, Hochland Park, Windhoek within 30 days of service of the order and in the event of non-compliance with the order, authorising the applicant to demolish the said unlawful structures.

(c) In support of the relief sought, the applicant alleged that on 11 August 2011, it became aware through its Senior Building Inspector and the deponent to the founding affidavit, Oelof Loots that the respondent had erected structures on his erf without building plans for those structures having been approved by the applicant, in contravention of Regulation 25 of the applicant's Municipal Building Regulations promulgated by GN 57 of 1969, published in Government Gazette No 2992 of 28 April 1969. For ease of reference, I quote Regulation 25 in full:

> "BUILDING WITHOUT APPROVAL OF PLANS
>
> 25. (a) Any person who erects a building –
>
> (i) without the plans or the material of the building having been approved by the Council, in accordance with regulation 8; or
>
> (ii) in respect of which the approval of the plans by the Council has lapsed in terms of regulation 9,

shall be guilty of an offence.

(b) The Council may under any of the circumstances mentioned in subregulation (a) serve upon the owner of any building referred to in the said subregulation as the case may be, an order requiring such owner forthwith to begin to demolish such building and to complete such demolition by or on a date to be specified in such order which date may be extended by the Council.

(c) If before the date for completion of the demolishing required by such order such owner satisfies the Council that he has complied with its regulations the Council may withdraw such demolition order.

(d) If any owner fails to comply with an order referred to in subregulation (b) of this regulation, the Council shall be entitled to give effect to the terms of such order at the expense of such owner."

(d) In this regard, Mr Loots authored a statement dated 19 August 2011 where he stated the following:

> " ….. during a site inspection on erf 1582 Hochland Park, it was realised that additions were constructed without building plans been (*sic)* approved for such structures. It was also realised that on the approved plan for the garage building, a deviation happened during the construction process and therefor the building is also built without an approved plan. All of this (*sic*) additions were constructed on top of the main municipal sewer line. After the attached letter was served upon the owner, he started with correspondence with Mr C de Waal (Section Engineer: Bulk and Waste Water), who informed him, that no alternative exist (*sic*) other than to move the existing municipal sewer to the outside of his erf or to demolish the said structure. Both options will be for the account of the owner of erf 1582 Hochland Park.
>
> To date nothing was done to rectify the situation."

(e) The applicant annexed the approved building plans of the respondent's erf 1582 to the founding papers. The annexure containing the approved building plans comprises two pages, both depicting the same building plans. The first page contains handwritten notes, depicting a portion of the garage, a swimming pool and a lapa which were not part of the approved structures on the building plans. On the second page, boxes drawn in red colour were drawn on the approved building plans indicating where the "illegal" structures were situated. Those "illegal" structures were only formally identified in the replying affidavit as a swimming pool, a lapa and a garage, i.e. no allegation is contained in the founding papers indicating what the "illegal" structures are apart from the markings on the building plans referred to.

(f) On 9 March 2011 already, the applicant, through Mr Loots, transmitted a notice under the applicant's Department of Planning, Urbanisation and Environment titled "Order Under Regulation 25(b) of the Council's Building Regulations: Demolition Order: Erf 1582 Hochland Park Illegal Structures". In this notice, the respondent (who received the notice on the same date) was informed that he had constructed additions and alterations to the existing buildings on his erf without a building plan having been approved in respect of such structures. The respondent was also informed that "It was also realised that the structures were build (sic) over the municipal main sewer line".

(g) The respondent was directed in this notice to immediately begin with demolition of the structures within 28 days, but was informed that under the provisions of Regulation 25(c) of the Building Regulations read with Article 18 of the Namibian Constitution the respondent had the opportunity to submit written reasons within 3 days why the demolition order should not be executed, or alternatively to submit within the stipulated period, building plans for approval of the illegal structure as well as an engineering certificate that the structure was constructed according to accepted building standards. Finally the respondent was warned that should he fail to act under Regulation 25(c) or fail to demolish the structure within 28 days the applicant would invoke the provisions of clause 25(d) of the Municipal Building Regulations and demolish the illegal

structures at the respondent's costs.

(h)

(i) On 19 April 2011 the applicant, through its Department of Infrastructure, Water and Waste Management delivered another letter to the respondent. This letter is titled "Relocation of sewer line in Erf 1582 Hochland Park". In this letter the respondent was informed that "permanent structures" had been erected over the municipal sewer line running within his erf along the eastern boundary without approved building plans. The letter was signed by one JJ de Waal, the Section Engineer: Engineering Services and the respondent also signed receipt for the letter.

(j) This letter also stated *inter alia* the following:

> "In an attempt to retain access to this line for maintenance purposes the City investigated numerous options and we are willing to relocate the sewer line outside your erf with a partial contribution from the owner of N$7500. We will also provide a new sewer connection point on the new line and it is the owner's responsibility to connect to this point as soon as possible.
>
> ...
>
> Should you choose not to contribute we will have to request you to remove all unapproved permanent structures on your erf to allow for maintenance of the sewer line."

(k) The respondent was advised to provide proof of payment of the N$7,500.00 by close of business on 31 May 2011.

(l) The applicant alleged that the respondent failed to act as per the letter dated 19 April 2011 and instead delivered a letter dated 31 May 2011 to the applicant, which it is alleged did not comply with the requirements of the letter dated 19 April 2011. This letter of the respondent was addressed to JJ de Waal at the Department of Infrastructure, Water and Waste Management of the applicant. It stated the following:

> "Relocation of sewer line in Erf 1582 Hochland Park

> With reference to your letter dated April 19th, 2011 herewith my response.
>
> After a lengthy discussion between my neighbours, Mr Petersen, who also received a letter from the City of Windhoek, and myself we came to the conclusion that the option of taking responsibility to keep the drain clean in case of blockage would suit us best.
>
> In an earlier letter delivered to both Mr Petersen and myself by Mr Loots of the City of Windhoek, one of our options were to clean the drain on our own cost in case of blockage, therefore, we hereby confirm that in event of that happening we will be responsible to clean the drain of blockage on our own cost."
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> (emphasis supplied)

(m) In light of the foregoing it was submitted that the respondent failed to comply with the "notice or order" and failed to submit written reasons within 3 days from the date of that letter why the order should not be executed. It is further submitted that the respondent also failed to submit within the period stipulated building plans for approval of the illegal structures as well as an engineering certificate that the structure was constructed according to accepted building standards, as a result of which the applicant was duty bound to invoke Regulation 25(d) of the Municipal Building Regulations and demolish the illegal structure at the respondent's costs.

(n) In the respondent's answering affidavit he denied that the buildings were built in contravention of the Regulations. The respondent also denied that the applicant complied with the requirements of the Municipal Building Regulations in particular with regard to the procedures and time periods provided therein. Apart from this bald denial and bare allegation of non-compliance with time periods, nothing further was alleged to substantiate this allegation and counsel appearing on behalf of the respondent did not argue this aspect any further.

(o) The respondent further alleged that in respect of the building plans the applicant itself had approved the applicant's plan in respect of constructing "the structure" on top of the sewer line and that the applicant could not use its own

negligence to the respondent's prejudice. The respondent further alleged that the applicant had waived any rights it may have had because of "... the agreement reached between the parties in relation to the options that were given to me and my neighbour". Accordingly, the respondent submitted that the applicant was therefore in any event not entitled to the relief sought given the agreement reached between the parties. He stated further that there was no credible evidence except the "mere say so that there is any consideration of the regulations".

(p) The respondent also stated the following in amplification in his answering affidavit:

> "From the correspondences attached by the applicant it is clear that the parties reached an agreement that I and my neighbour had to chose the third option which was for my building to remain intact and that my neighbour and I at our costs would maintain the sewer line over which our buildings were constructed with the approval of the applicant. That being the case the applicant is not entitled to now renege from the agreement reached. The fact that we took that option has been agreed upon between myself, Mr Loots as well as Mr De Waal. It was orally agreed without prejudice to my rights and without admitting to non-compliance that, in that case, I do not need to remove part of my building being complained of."

(q) The respondent specifically alleged that although the letter dated 19 April 2011 authored by Mr de Waal appeared to be at odds with the allegations quoted above, he stated emphatically that it was agreed that he and his neighbour would maintain the sewer lines at their own cost. There is no confirmatory affidavit from the respondent's neighbour.

(r) The affidavits delivered on behalf of both parties leave a lot to be desired. The facts set out in the papers on both sides are sparse. No attempt was made to either properly amplify the facts in support of the relief sought by the applicant or to direct the court's attention to the specific passages of correspondence annexed to the founding affidavits it wished the court to consider. The respondent also did not annex any documentation in amplification of its

opposition which I deal with below. I therefore reiterate the principle set out in Port Nolloth Municipality v Xhalisa; Luwalala v Port Nolloth Municipality [1] that the annexures to an affidavit are not an integral part of it, and an applicant cannot justify its case by relying on facts which emerge from annexures to the founding affidavit but which have not been alleged in the affidavit and to which the attention of the respondent has not been specifically directed. I also quote with approval the principles relating to the contents of affidavits generally set out in Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa [2] as follows:

> "It is trite law that in motion proceedings the affidavits serve not only to place evidence before the Court but also to define the issues between the parties. In so doing the issues between the parties are identified. This is not only for the benefit of the Court but also, and primarily, for the parties. The parties must know the case that must be met and in respect of which they must adduce evidence in the affidavits."

(s) It was also held in the above matter [3] that it is not open to an applicant or a respondent to merely annex to its affidavit documentation and to request the court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof.

(t) I now turn to deal with the various factual allegations which I am to consider.

(u) As stated above, the respondent denied that any illegal structures were present on erf 1582 Hochland Park. No further allegations in respect of this denial were advanced. Furthermore, as regards the structures built on the sewer line, the respondent stated that the applicant had approved the respondent's plans to construct on the sewer line. No response was provided to

[1] 1991 (3) SA 98 (C) at 111 B-I

[2] 1999 (2) SA 279 (T) at 323 F

[3] At 324 F-G

the statement of Mr Loots annexed to the founding affidavit to the effect that it was also realised that on the approved plan for the garage, a deviation happened during the construction process and the respondent moved the construction of the garage and constructed it an alternative place which was not approved by the applicant and further that all the additions were constructed on top of the sewer line. The respondent did not state for example that the structures depicted on the building plans as illegal had not been built on his erf, which would have raised a genuine dispute of fact. He also did not deny the allegation that there was a deviation during the construction process resulting in the garage being constructed at a different place not approved by the applicant. All the respondent stated was that there were no illegal structures on his erf.

(v) In the absence of a response to this statement, coupled with a bare denial that there were illegal structures on the respondent's erf, the statement of Mr Loots thus stands unchallenged. It is also borne in mind that Regulation 6 of the Municipal Building Regulations provide *inter alia* that every person intending to erect a building must apply to the applicant for approval of the building plans. The building plans annexed to the founding papers were approved by the applicant, and the illegal structures were drawn on those approved building plans. It is clear in my view that the respondent should have provided a proper response to those allegations.

(w) The respondent also raised the issue that the applicant had waived its rights to act in terms of the notice due to an oral agreement reached between the respondent and his neighbour, one Mr Petersen, and Messrs Loots and De Waal on behalf of the applicant to the effect that instead of the respondent covering part of the cost of removing the sewer line, the respondent could choose a third option for his buildings to remain intact and that he would at his costs maintain the sewer line. Mr loots denied this allegation in his replying affidavit. No such option is provided in the correspondence referred to, yet the respondent stated that even if the earlier correspondence appeared to be at odds with his version, he persisted with his stance that the agreement referred to above was indeed concluded between the parties.

(x) It is well established that the onus rests on the party relying on a waiver throughout to allege and prove the waiver on a balance of probabilities and that in assessing the probabilities, the factual presumption that a party is not lightly deemed to have waived his or her rights should be borne in mind. Clear evidence of a waiver is required. [4]

(y) The respondent has clearly not set out the requisites to prove a waiver. The respondent can also not be assisted by the Plascon-Evans Rule because the respondent drew the onus in this regard and did not put up sufficient facts to discharge the onus or to raise a real, genuine or *bona fide* dispute of fact either.[5]

(z) What remains to be determined is whether there are illegal structures at the respondent's erf. Apart from the bare denial that there were illegal structures, the respondent only stated that the applicant had approved the applicant's plan in respect of constructing the "structure" on top of the sewer line. As previously stated the respondent did not deal with the allegation, in particular the statement of Loots dated 19 August 2011 to the effect that there were deviations in the construction process on the approval plan of the garage and that all the additions were constructed on top of the main municipal sewer line. I point out that the respondent's attention was not specifically drawn to that portion of Mr Loots' statement in the founding affidavit, however it cannot be ignored that the statement was an annexure. That statement was made in about 10 lines. The respondent further had an opportunity to respond to those allegations and simply did not.

(aa) The applicant only formally identified the "illegal" structures as a swimming pool, lapa and garage in the replying affidavit. Counsel for the

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[4]Hepner v Roodepoort v Maraisburg Town Council 1962 (4) SA 772 (A); Feinstein v Niggli 1981 (2) SA 684 (A); Grobbelaar and Another v Council of the Municipality of Walvis Bay 1997 NR 259 (HC)

[5]Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1163-5; Wightman t/a JW Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA) at 375 par [13]

respondent submitted that the structures should have been identified in the founding papers and not in reply. He did not apply to strike these averments but submitted that on the principle that the applicant must make out its case in the founding papers, the court should ignore the reference to the structures in reply. In this regard, counsel for the respondent raised for the first time in his heads of argument the issue that because the illegal structures were not identifiable, the court could not make an order as it would lead to ambiguity. In support of his argument, counsel for the respondent relied on the unreported judgment of this court in Rally for Democratic Progress v The Electoral Commission of Namibia [6] as well as the case of Gates v Gates 1939 AD at 150 which was approved in the Rally for Democratic Progress case. The only reference I find to the Gates case in that case is at paragraph 200 where the court stated that it is trite that the more serious the allegations, the stronger the evidence must be before a court will find the allegation established. This is what was held in Gates and approved in the Rally for Democratic Progress case in support of the principle that an allegation of an irregularity or corrupt practice affecting the outcome of an election is not one to be taken lightly. The facts of that case are not applicable to this matter and the principle is thus submitted out of context.

(bb) In any event, though the structures were mentioned in the replying affidavit for the first time, the two copies of the building plans annexed to the founding papers indicated via markings and handwriting that the issue the applicant had was with the new garage as well as the pool and a lapa. They were also outlined in red boxes in the second copy of the building plans annexed to the founding papers. In this regard I hold the view that the markings and drawings could have been identified with more clarity in the founding affidavit with regards to the particular annexures. However the formal mention of the structures in the replying affidavit in my view fortified the allegations in the founding papers and was not strictly new matter. Coupled with the bare denial of the presence of illegal structures I hold the view that the alleged structures and their situation on a public sewer line were identified on a balance of probabilities by the applicant.

[6] Delivered on 14 February 2011 in case number A01/2010 No 2

(cc) It is clear that the applicant has the power in terms of regulation 25 of the Municipal Building Regulations to serve on the owner of a building who has erected a structure without approval of the building plans an order requiring the owner to demolish the buildings, failing which it may do so itself. The respondent failed to comply with the notice, in particular to provide the applicant with written reasons why the order should not be executed, or to submit building plans for the approval of the illegal structures as well as an engineering certificate that the structure was constructed according to accepted building standards.

(dd) I accordingly find that the applicant has made out a case for the relief sought on a balance of probabilities, and that the application should be granted with costs, as costs follow the event.

(ee) In the result the following order is made:

(d) The respondent is directed to remove, pull down or alter the unlawful structures erected on Erf 1582, Tauben Street, Hochland Park, Windhoek, in particular the Garage, Swimming Pool and Lapa within 30 days of service of this order.

(e) In the event of the respondent failing to comply with the above order, the applicant is authorised to remove, pull down or alter the aforesaid structures at the respondent's costs.

(f) The respondent is ordered to pay the costs of this application, such costs to include the costs of one instructing and one instructed legal practitioner.

EM SCHIMMING-CHASE

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Acting Judge

APPEARANCES

APPELLANT:	Adv TC Phatela (with him (Mr C Kavendjii)) Instructed by Hengari, Kangueehi & Kavendjii Inc
RESPONDENT:	Mr S Namandje Instructed by Sisa Namandje & Co