

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

Case No: HC-MD-CIV-ACT-OTH-2019/04500

In the matter between:

FINKENSTEIN HOMEOWNERS' ASSOCIATION

PLAINTIFF

and

CEDRIC NIEUWOUDT

FIRST DEFENDANT

KARIN NIEUWOUDT

SECOND DEFENDANT

Neutral citation: *Finkenstein Homeowners Association v Nieuwoudt* (HC-MD-CIV-ACT-OTH-2019/04500) [2020] NAHCMD 245 (12 June 2020)

CORAM: NDAUENDAPO J

Heard: 20 May 2020

Delivered: 12 June 2020

Flynote: Voluntary association-Homeowners association-Conduct Constitution and Rules-Binding on members-Contract established-Business activity prohibited on Estate-

Respondents conducting a B&B - Such activity in breach of Contract-Clear right established by applicant-Entitled to interim relief.

Summary: The constitution and rules of the applicant stipulate that no business activity must be conducted on the estate without consent. The constitution and the rules are binding on all the members. The respondents reside at the estate and are conducting a B&B without consent. The respondents are of the view that they don't need consent to conduct the B&B because it is a home-based business and no consent is needed. They also contend that on the proper interpretation of the rules they are allowed to rent out their property on short term without consent from the applicant.

Held, that the respondents are bound by the constitution and the rules of the applicant.

Held further that the relationship between the parties is founded on contract and therefore the applicant has a clear right to enforce the constitution and the rules.

Held further, that the applicant has established a clear right and breach of the contract constitute harm which entitles the applicant to the interim relief sought.

ORDER

- 1 Pending the determination of the main action under case number HC-MD-CIV-ACT-CON-2019/04500, the respondents are interdicted and restrained from conducting a bed and breakfast and/or Guesthouse and/or Boutique Hotel business upon the premises situated at 100 Zebra Street, Finkenstein Estate, Windhoek.
- 2 The respondents are to pay the costs of this application on a scale as between attorney and client, such costs to include the costs of one instructing and two instructed and counsel, and not capped under rule 32(11).

3 The case is postponed to 23 July 2020 at 14:15 for Case Management Conference hearing.

JUDGMENT

NDAUENDAPO, J

Introduction

[1] By notice of motion, the applicant applies for:

‘An order interdicting and restraining the Respondents from conducting a Bed and Breakfast and/or Guesthouse and/or Boutique Hotel business upon the premises situated at 100 Zebra Street, Finkenstein Estate, Windhoek.’

The parties

[2] The applicant is the Finkenstein Homeowners’ Association (FHA), a duly constituted Homeowners’ Association and legal persona with the capacity to sue and be sued and which has its principal place of administration at Portion 4 of Farm Finkenstein No. 526, Windhoek. The first respondent is Cedrick Nieuwoudt, a major male who resides at 100 Zebra Street, Finkenstein Estate, Windhoek. The second respondent is Karin Nieuwoudt, a major female who resides at 100 Zebra Street, Finkenstein Estate, Windhoek.

The Issue

[3] The issue for determination is whether the respondents are allowed or permitted to operate a Bed and Breakfast or Boutique hotel at Finkenstein Estate, a gated residential estate without consent from the applicant?

Background Facts

[4] Mr. Helmut Gottlob Von Ludwiger, the Chairman of the Board of Trustees of Finkenstein Homeowners 'Association, deposed to the founding affidavit in which he sets out the facts. The applicant is an association which was created for the benefit of the Finkenstein home owners. The Finkenstein home owners are owners of the property within the gated residential estate known as the Finkenstein Estate. It is a residential area in a nature estate.

[5] The association is a juristic person with its own constitution. The objectives include the promotion and advancement of the communal interest of members. The association has the right to make rules or bylaws. Every member is obliged to further the interests and objectives of the association and to comply with its rules and bylaws. Members are not allowed to become a nuisance or disturbance to other members or tenants.

[6] The association adopted House Rules. In terms of rule b2, the rules are binding upon all occupiers and members (including the respondents who are members). The members are obliged to further the interest and objectives of the Association. The association is responsible for enforcing the constitution and the rules.

[7] On or about 11 September 2012 the property (more fully described as Portion 100 – a portion of portion 4) of the Farm Finkenstein No. 526 in the Municipality of Windhoek, Registration Division K, Khomas Region, 9,976 square meters) was transferred to the respondents, as confirmed by a copy of the Deed of Transfer (Annexure "E"). The respondents reside at the property.

[8] In terms of clauses B and C of the Deed of Transfer:

'The land may not be used for business purposes except where the land also adjoins another proclaimed district/farm road and no direct access to, or exit from trunk road six section one is permitted and the layout is acceptable.'

[9] The property does not adjoin any district/farm road (as contemplated in the Deeds of Transfer) and enjoys no direct access to or exit from a trunk road. Thus, the land (referring to the property) “may not be used for business purposes.”

[10] Following registration of transfer, the respondents moved into the property, where they have been residing since. They are thus members of the Finkenstein Homeowners’ Association and subject to the constitution and Rules of the Association.

[11] The respondents have established and operate a business titled Namibia Villa Sula Bed and Breakfast upon the property (being one of the “plots” as referred to in clause D4 quoted above) since September 2018. The business is advertised on the World Wide Web, copies of which are annexed hereto (collectively marked “G”). The respondents are conducting business activities, without consent, on the property (the plot), which they may not do. He states that the respondents are obliged to comply with the Constitution and the House Rules of the applicant. They applied for consent to operate the B&B, but it was refused.

[12] In terms of the Constitution and the House Rules of the applicant the respondents are not entitled to establish and operate the B&B on the property. He states that the operation of the business, with the inclusion of the benefits advertised by the respondents, negatively impacts on the wellbeing and ethos that the Estate owners subscribe to.

[13] Mr. Niewoudt, the respondent, in his answering affidavit stated that Villa Zula Bed and Breakfast was established in full compliance with all statutory requirements from the City of Windhoek(COW) and the Namibian Tourism Board (NTB).He further states that the B&B complies with all laws, provisions and governing documents including but not limited to:(a) the Namibian Constitution; (b) the Kappsfarm Town Planning scheme (KFTPS) ; (c) the Constitution of the Finkenstein Homeowners Association; (d) the House Rules of the Finkenstein Estate;(e) All Restrictive Conditions imposed on the property by its Deed of Transfer,’ keeping in mind that when there is conflict of the scheme and township , the KFTPS provisions shall prevail over the conditions registered against the title deeds of the land registered.’

[14] Mr. Niewoudt further states that he was not given a fair hearing by the trustees when dealing with them and the issue of the B&B.

[15] He further states that the trustees of the applicant erred in concluding that the B&B is prohibited by the estate governing documents when they relied on terms and expressions that are not strictly construed and /or which did not exist in the governing documents. They specifically erred in their interpretation that "*clients of a B&B are not considered tenants*" in the house rules; erred in their interpretation of the word "residential use"; erred in their interpretation of the phrase "business activity"; erred in concluding that they need consent from FHA for establishing a B&B on their property.

[16] Mr. Niewoudt further states that property use of the Finkenstein Estate is governed under the provisions of the Kappsfarm Town Planning Scheme (KFTPS). In terms of clause 8.11.1 of the KFTPS shows that nothing in the Town Planning Scheme allow the applicant to prohibit the letting of the entire property or part thereof.

[17] He further states that the provisions of KFTPS shall prevail over conditions registered against the title deeds of land registered and therefore nullifies any attempt of the applicant to convince the court that restrictive conditions in the Deed of Transfer in conflict with the KFTPS are applicable.

[18] He further states that the property under the Kappsfarm Town Planning Scheme is zoned as Nature estate with consent use for Occupational Practices and home-based businesses such as B&B and no consent is needed to operate such a business.

[19] Mr. Niewoudt further states that Art 16(1) of the Namibian Constitution states that all persons have a right to 'acquire, own and dispose' all forms of property. The right to own relates to keeping the property for oneself, for whichever purpose, including the right to use and enjoyment of the property.

[20] Mr. Niewoudt further states that the provisions of Articles 12 and 18 of the Namibian Constitution find application in this matter.

[21] Mr. Niewoudt further states that: Clause 11.2.2.4.2 of Finkenstein Homeowners association Constitution read:

'Trustees have the functions and authority to enforce the uniform interpretation of this constitution and performance of its regulations, rules and bylaws' letting of property on the estate is allowed and is common practice within the Estate, therefore the letting of one's property as a B&B is allowed as uniform interpretation of the laws is demanded by the applicant's Constitution.'

[22] He states that the House Rule (D4) Which states' No business activity may be concluded on any plot unless permitted in writing and on such conditions as the FHA may deem 'fit', is in contradiction with the KFTPS and therefore not competent as far as land use goes.

[23] The practice of operating a B&B is an accepted practice in the provisions of the KFTPS under Occupational practice. Mr. Niewoudt further states that in terms of the house rules' the business of renting to tenants are allowed in Finkenstein estate and there are no terms and conditions within the Constitution or house Rules in regard to:

'Tenants letting all or part of a member's property and members letting for long or short term periods.'

[24] In sum, he states that operating a B&B on a residential plot inside the estate is not in contravention of any governing documents of the Estate or any laws of the Kappsfarm Town Planning Scheme applicable.

Submissions by the applicant

[25] Counsel argued that, in order to succeed with the application for interim relief, the applicant must demonstrate:

(a) A *prima facie* right, although open to doubt; (b) a reasonable apprehension of harm; (c) a balance of convenience; (d) no effective alternative remedy.

Where, however, a clear right is established, it is not necessary to demonstrate a balance of convenience. Counsel argued that at the outset, already, the applicant has established a clear right.

[26] Counsel argued that in terms of the Plascon-Evans Rule, dispute of fact fall to be determined, in effect, upon the respondent's version, read with the uncontested parts of the applicant's version (where final relief is sought). Where interim relief is sought, the Webster v Mitchell principles will apply.

[27] Counsel argued that although factual disputes arise from the wide-ranging complaints raised by the defendants, these are clearly, irrelevant to determination of the real issue.

[28] In the circumstances, counsel argued, that the relief sought by the plaintiff may be granted without resolution of these (ancillary and irrelevant) factual disputes.

[29] Counsel contended that the only issue is whether the respondents' admitted conduct falls foul of Rule D4 and, if so, whether such contravention is justified by the relevant Town Planning Scheme, the Windhoek Certificate of Fitness, and the registration of the facility as a tourism facility, the provisions of the Namibian Constitution or the common law.

[30] Counsel further argued that clause 8 demonstrates that the applicant shall act in the communal interest of members; In terms of rule D2 the plot may only be used for

residential purposes; In terms of rule D4, no business activity may be conducted on any plot unless permitted in writing and on such conditions as the FHA may deem meet.

[31] In terms of the relevant Deed of Transfer, the land may not be used for business purposes except (exception irrelevant) and subject to the conditions in favor of Finkenstein Homeowners' Association.

[32] Counsel argued that In terms of the Notarial Deed of Imposition of Conditions, the respondents and all their successors in title shall by virtue of (their) ownership of the property automatically become and remain (members) of the Finkenstein Homeowners' Association and be bound by its memorandum and Articles of Association and any rules adopted by the Association until such owner ceases to be an owner.

[33] Counsel further argued that it is trite that the constitution or Rules of a Homeowners' Association binds both the Homeowners' Association and its members and that they may be enforced, by either, as contractual rights. Counsel relied on the case of *Abraham*¹ where the court held that:

'In my view the location of this case within the field of contracts is correct. By contract concluded between all the residents and the respondent, no dogs are allowed on the estate unless permission is granted by the respondent. The power of the directors to grant permission is located in the contractual Scheme; it has no other origin or foundation.'

Counsel argued that a contract has been shown and therefore clear right has been demonstrated. A breach of that contract is a direct harm against which the applicant is entitled to the relief sought.

[34] Counsel further argued that the respondents make much of the approval to operate a business pursuant to the Certificate of Fitness issued by the Municipality of Windhoek and the authorization by the Tourism Board given to them to operate a tourist facility. These are additional requirements. Even if, therefore, such authorizations had been granted by these bodies, the authorizations are irrelevant to the operation of a business within a residential estate. (If the Defendants were correct in the approach

¹ *Abraham & Another v Mount Edgecombe Country Club Estate Management Association Two* JOL32322.

adopted by them, then they could just as well claim to be entitled to operate a liquor outlet on the basis of the Certificate of Fitness). In other words, such additional (external) authorizations relied upon by the defendants are of no consequence:

[35] Whatever other consents might have been required or obtained do not give rise to any defense to the respondents.

[36] Counsel argued that in any event, this, too, is irrelevant because, quite simply, the plaintiff's resort to this application is fully justified, even without a hearing since, simply put, the area with which we are concerned does not involve a public power: Controls imposed on it by contract.

[37] Counsel argued that it follows that, Article 18 of the Namibian Constitution does not apply to the enforcement of contractual rights of the kind relied upon by the respondents. In summary counsel submitted that the applicant has a clear right based on contract. A breach of the contract entitles the applicant to the relief. Once a clear right has been established, there is no need to show that the balance of probabilities favor the applicant.

Respondents' submissions

[38] Counsel argued that the applicant has not made out a case in its founding affidavit and attempted to correct the lack through replying affidavits, which should either be struck from the application or be ignored by the honorable court.

[39] Counsel further argued that: (a) no *prima facie* right has been established in the founding affidavit; (b) applicant failed to show any prejudice which may follow if the interim relief is not granted; (c) applicant has alternative relief, which it did exercise by issuing summons in the main matter and no ground or basis has been established by applicant to support the need for interim relief; (d) Prior to taking a decision to institute proceedings for interdicting the respondents, applicant was compelled to call a member in breach to a trustee meeting as regulated b par. 11.1.3.4 of the FHA Constitution, which was not followed by FHA; (e) a second alternative remedy was to agree to the

numerous requests by respondents for a binding alternative Dispute Resolution to resolve the differences; (f) a third alternative remedy available to applicant was to lodge objection under the Kappsfarm Town Scheme (KFTPS) in terms of par. 5.2.1, 5.2.2 and 5.2.3 against the approval of the consent-use for the Bed and Breakfast.

[40] Counsel further argued that the Plaintiff failed to address the balance of convenience or any inconvenience for any party.

[41] Counsel argued that the decision to lodge the interim application falls outside the main objectives of plaintiff, which is to act in the best communal interest of its members and to conform to all laws and regulations. No such interest was shown in the founding affidavit, and the relevant legislation was not conformed with.

[42] Counsel argued that there is no evidence of actual and factual detrimental consequence of prejudice of the Finkenstein Estate or the Homeowners Association. The reference to it is simply speculation.

[43] Counsel argued that the practice and regulations concerning the running of a Bed and Breakfast facility is not the same as a boutique or a lodge, and the respondents are allowed to do so on a residential property with the approval of the City of Windhoek and the Namibia Tourism Board. The activity is similar to letting or renting a property, which is a similar right to manage and use the property by an owner.

[44] Counsel argued that the conditions of the Deed of Transfer and the House Rules are subject to the primary right to use the property as a residential facility being a Bed and Breakfast facility. It is not similar to any form of a retail business activity or commercial activity. The authority to use the property as some form of residential property is the authority of the Town Planning Scheme and not the voluntary association. Rule D4 regarding property use, does not supersede the local and national authorities.

[45] Counsel argued that the respondents never made an admission or concession that FHA has the authority to prohibit the use of the property as residential Bed and Breakfast facility.

[46] Counsel argued that it is common cause that the property in question fall within a nature estate.

Discussion

The requisites for temporary interdicts

[47] In *Tjama Tjivikua*² the court held that:

'[24] These the applicants must show:

- a) that the right which is the subject matter of the main action and which they seek to protect by way of interim relief is clear or , if not clear, is at least prima facie established ,though open to some doubt; and
- b) that if the right is only prima facie established , there is a well-grounded apprehension of irreparable harm to the applicants, if interim relief is not granted and they ultimately succeed in establishing their right; and
- c) That the balance of convenience favors the granting of interim relief; and
- d) That the applicants have no other satisfactory remedy'.

I will thus deal with these requirements seriatim.

Has the applicant established a clear right?

[48] The relationship between the applicant and the respondents is regulated by contract. The contract between the parties came into existence the moment the property the respondents bought was transferred into their names. From that date, the constitution and the rules of the applicant became binding on the respondents and they are obliged to comply with the constitution and the rules.

² *Tjama Tjivikua and Others v Tommy Tjaronda* Case No:2018/00369 delivered on 15 October 2019 at para 24

[49] In *Webster v Mitchell*³ the court held that:

'The use of the phrase 'prima facie' established though open to some doubt' indicates I think that more is required than merely to look at the allegations of the applicant, but something short of a weighing up of the probabilities of conflicting versions is required. The proper manner of approach I consider is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant, could on those facts obtain final relief at a trial'

[50] The following facts are common cause:

- (a) The respondents are operating a B&B as a going concern/business
- (b) The Finkenstein estate falls within the Kappsfarm Town planning Scheme and the scheme applies
- (c) Consent was given to the respondents under the City of Windhoek Town planning scheme.
- (d) The Finkenstein Homeowners association was established on the estate to act in the interest of the residents.
- (e) The title Deed contains certain specific conditions.
- (f) The rules (Rule D.2) states that' the plot may only be used for **residential purposes**...
- (g) rule D.4 states that' **no business activity** may be conducted on any plot unless permitted in writing and on such conditions as the FHA may deem fit".

The question that arises is this:" Is it business activity that the respondents are conducting on the property? If the answer is yes, then the application must succeed, because the property must be used for residential purposes.

[51] The respondents state that they had consent from the City of Windhoek, given under the Windhoek Town Council scheme, but not under the Kappsfarm Town Town

³ 1948(1) SA 1186 (W) at 1189.

Planning Scheme. Finkenstein Estate falls under the Kappsfarm Town planning scheme and the consent should have been given under that scheme.

[52] The respondents further state that the Kappsfarm Town Planning scheme prevails/overrides everything. They argue that the authority to use the property as some form of residential property is the authority of the Town Planning Scheme and not the voluntary association. Rule D4 regarding property use, does not supersede the local authority. That may be so, but even the Kappsfarm town planning scheme prohibits business activity, unless home based business activity and what the respondents are doing does not fall within that definition.

[53] The respondents further state that they did not get a fair hearing. But they applied to the association for consent, but that was refused because of the nature of the business they want to do. The parties tried to resolve the matter amicably, but to no avail. The constitution and the rules do not compel the parties to refer the matter to ADR. It was within the power of the applicant to approach the court for interim relief.

[54] The respondents further state that the applicant erred in the interpretation of the rules. In terms thereof one of the KFTPS consent uses include a home based business. The B&B is a home based business and therefore is allowed, according to the respondents.

[55] Counsel for the applicant argued that a home based business means the onsite sale and serving of goods and/or consumables from a dwelling unit. It is not an accommodation establishment or hotel and consent use does not include a B&B. The consent was not given in terms of the Kappsfarm Town planning scheme, but in terms of the City of Windhoek Town planning scheme.

[56] Counsel for the applicant, correctly, argued that the running of a Bed and Breakfast facility cannot, possibly, be forced into the definition of a home based business. This is made even clearer by the additional use definitions more applicable to the use sought by the respondents, such as accommodation establishment and tourist establishment as defined in the Town Planning Scheme.

[57] The respondents further rely on articles 12, 16 and 18 of the Namibian Constitution. Those provisions do not apply. It is contractual relationship. For instance art 16 –the right to own property and dispose of it does not give the respondents the right to do anything illegal on their property.

[58] The respondents further state that the Rules allow them to rent out their property. That is correct, but it must be for residential purposes. In terms of the title deed the property must be used for residential purposes only. In this case it is a business, a B&B with a restaurant and a bar.

[59] As stated above, the relationship between the parties is governed by contract. In *Abraham*⁴ the court held that:

‘In my view the location of this case within the field of contract is correct. By contract concluded between all the residents and the respondents, no dogs are allowed on the estate unless permission is granted by the respondent. The power of the directors to grant permission is located in the contractual scheme; it has no other origin or foundation. Whilst rule 5.1.9 reiterates that the local authority laws relating to the keeping of dogs must be obeyed, the special rules(for example with regard to the breeds municipal law, have no public law content and do not involve the exercise of public power or the performance of a public function. The restrictions imposed by the rules are private ones, entered into voluntarily when electing to buy in the estate administered by the respondent, rather than elsewhere; presumably motivated inter alia by the particular attractions which the estate offers by reason of the controls imposed on it by contract. In my view PAJA finds no application in this case and sizes of dogs), which the parties to the contract have agreed to superimpose on.’

In my respectful view and based on the facts, the applicant has established a clear right.

Reasonable apprehension of harm

⁴ *Abraham & Another v Mount Edgecombe Country Estate Management Association Two* JOL 32322 (KZD).

[60] Where you breach the contract, like in this case, the innocent party has a clear right. In *Bushwillow Park Homeowners*⁵ the court held that:

‘Accordingly, I find that a rule existed that required prior approval of a paint color that could be applied to the exterior of the buildings in the estate. Such a rule evidences a clear right by the applicant, as guardian of the rules, and of the estate to enforce the rules. Defiance of the applicant’s authority is a direct harm against which the applicant is entitled to procure relief to prevent or remedy.’

The respondents are operating a business in defiance of the authority of the applicant, and that is a direct harm against which the applicant is entitled to the interim relief.

Balance of convenience?

[61] Where there is a clear right arising from a contractual relationship, it was held that it is not necessary to demonstrate that the balance of convenience favors the applicant. In *Erf 179 Bedfordview*⁶ the court held that:

‘The applicants have established a clear right to the relief sought. Where an applicant establishes a clear right it is a fortiori entitled to the relief sought and this requirement (balance of convenience) falls away.’

No other satisfactory remedy?

[62] The applicant have issued summons against the respondents. The respondents are defending the matter. The matter is in this court and it must still go on trial. That will take time before the matter is finalized in this court. Once that is done, the unsuccessful party may take the matter on appeal to the Supreme Court. The matter may take up to a year before it is finalized. Accordingly, although the action instituted by the applicant against the respondents is an alternative remedy, it is not a satisfactory one. The respondents are continuing with the business activity and the interim interdict is needed to stop the harm caused by the business activity.

⁵ *Bushwillow Park Homeowners v Paulode Oliviera Fernandes & Another* [2015] ZAGPJHC 250, 2015 JDR 2427 (GJ) at 11.

⁶ *Erf 197 Bedfordview (pty) Ltd v Bedford Square Properties(Pty)Ltd* 2011 JDR 0409(GSJ) at 24

[63] In any event, in *Fourie v Uys Herbstien*⁷ pointed out that, even on English authority, it would be wrong, in such a case, to expect proof of an alternative remedy , bearing in mind that it will in fact(mean that the innocent party) be compelled to part with its rights.

[64] For all those reasons, I am satisfied that the applicant are entitled to the relief sought.

Order:

1. Pending the determination of the main action under case number HC-MD-CIV-ACT-CON-2019/04500, the respondents are interdicted and restrained from conducting a bed and breakfast and/or Guesthouse and/or Boutique Hotel business upon the premises situated at 100 Zebra Street, Finkenstein Estate, Windhoek.
2. The respondents are to pay the costs of this application on a scale as between attorney and client, such costs to include the costs of one instructing and two instructed and counsel, and not capped under rule 32(11).
3. The case is postponed to 23 July 2020 at 14:15 for Case Management Conference hearing.

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JUDGE

⁷ 1957 (2) SA 125C.

APPEARANCE:

FOR THE PLAINTIFF:

Adv. J Marais SC (assisted by Mr. Dobbles)

Instructed by Engling, Stritter & Partners

Windhoek

FOR THE 1ST AND 2ND DEFENDANTS:

P de Beer

Of De Beer Law

Chambers

Windhoek