FORM A

FILING SHEET FOR EASTERN CAPE JUDGMENT

Civil Judgment

JENNIFER JOY TUCKER
and

ROBERT H SCHEMMER
NDLAMBE MUNICIPALITY

CASE NUMBER: **1460/2008**

DATE ARGUED: 30 October 2008

DATE DELIVERED: 6 November 2008

JUDGE(S): Pickering J,

LEGAL REPRESENTATIVES:
Appearances*:*
for the State/Applicant(s)/Appellant(s): Adv. Paterson
for the Accused/Respondent(s): Adv. F. Louw

Instructing attorneys*:*
Applicant(s)/Appellant(s): Borman & Botha (Mrs. Carinus)
Respondent(s): Netteltons, (Mr. Nettelton)

CASE INFORMATION:

- *Nature of proceedings* :
- *Topic*:
- Keywords:

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION)

CASE NO: 1460/2008

In the matter between

JENNIFER JOY TUCKER	**Applicant**
and	
ROBERT H SCHEMMER	**1st Respondent**
NDLAMBE MUNICIPALITY	**2nd Respondent**

JUDGMENT

PICKERING J:

This application concerns an unfortunate dispute between neighbours at Boesmansriviermond. Applicant seeks an order in the following terms:

"*(a) That first respondent comply with the restrictive condition B(g) of the title deed T57203/84 of Erf 597, Boesmansriviermond, and in particular with the provision that no building or structure or any portion thereof shall be erected nearer than 5 metres to the street line which forms the boundary of the erf;*

(b) That second respondent enforce the zoning scheme provision applicable to Erf 597, Boesmansriviermond, and in particular the provision of Residential Zone 1 sub-regulation 3.3.2, alternatively sub-regulation 3.3.3, that the street building line be at least 3 metres;

(c) That second respondent require first respondent to comply with section 4(1) of the National Building Regulations and Building Standards Act 103 of 1977 in respect of the garage erected on Erf 597, Boesmansriviermond, and in particular the requirement that the garage be erected only in terms of plans and specifications drawn and submitted in terms of the Act and approved by the second respondent; and failing that compliance

that second respondent enforce the provisions of the Act and its Regulations in respect of Erf 597, Boesmansriviermond;

(d) For alternative relief;

(e) For costs."

Second respondent, Ndlambe Municipality, has indicated its intention to abide the decision of the Court.

Applicant is the registered owner of erven 598 and 609 and first respondent the registered owner of erf 597. Applicant's two erven immediately adjoin erf 597. The three erven were originally created at the establishment of Boesmansriviermond Township Extension No 1.

It is common cause that the title deed of erf 597 is endorsed with certain restrictive conditions which were imposed by the Administrator of the Cape of Good Hope when approving the establishment of the township.

Restrictive condition B(g) is relevant to these proceedings. It reads as follows;

> "*No building or structure or any portion thereof except boundary walls and fences, shall except with the consent of the Administrator, be erected nearer than 5 metres to the street line which forms a boundary of this erf, nor within 3 metres of the rear or 1,5 metres of the lateral boundary common to any adjoining erf…*"

Applicant contends that such condition, including condition B(g) were intended to be and are in favour of all the other erven in the said Township and that as such they are in favour of the erven owned by her and are enforceable by her.

Although first respondent in his affidavit takes issue herewith, and accordingly with applicant's *locus standi*, this contention could not seriously be pursued during argument by Mr. Louw who appeared for first respondent. This is understandable in the light of the decision in Malan and Another v Ardconnell

Investments (Pty) Ltd 1988) (2) SA 12 (A) particularly at 37 H – 38 A, relied upon by Mr. Paterson who appeared for applicant.

It is common cause that the said erven fall within the zoning of Residential Zone 1 as set out in zoning provisions in force at Boesmansriviermond. Regulation 3.3 thereof is applicable. In terms of regulation 3.3.2 there shall be a street building line of at least 4 metres subject to regulation 3.3.3 which provides that the street building line shall be at least 3 metres "*where the average depth of a land unit (measured at right angles to any street boundary of such land unit) does not exceed 20 metres.*"

Section 4(1) of the National Building Regulations and Building Standards Act 103 of 1977 provides:

> "*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.*"

It is common cause further that first respondent has erected a garage on Erf 597 and that the garage is built within the street line of 5 metres provided for in the restrictive condition and within the street line of either 4 metres or 3 metres provided for in the zoning scheme regulations. Before building the garage first respondent successfully applied during 2001 to the Member of the Executive Council, Eastern Cape, Department of Housing, Local Government and Traditional Affairs for the removal of the restrictive conditions. He was also granted permission by second respondent to depart from the zoning provisions relating to the street building line. His building plans for the erection of the garage were approved by second respondent on 25 May 2006. He accordingly proceeded to build the garage.

Unbeknown to first respondent the applicant had objected to the MEC for Housing, Local Government and Traditional Affairs concerning the removal of the restrictive conditions. Second respondent, however, had failed to forward the objection to the MEC. Applicant accordingly applied for and was granted,

on 18 October 2007, an order reviewing and setting aside the MEC's approval of the removal of the restrictive condition; the decision of second respondent granting to first respondent a departure from the zoning provisions; and the decision of second respondent to approve first respondent's building plans for the erection of the garage on erf 597.

It followed accordingly that the garage, as presently built, was in violation of the restrictive condition, the zoning scheme regulations and the requirement as to approved plans.

On 31 October 2007 applicant's attorney addressed a letter to second respondent requiring it to take "*appropriate steps*" in the light of the Court order. No reply was received hereto and on 3 January 2008 a similar letter was addressed to second respondent. Again there was no response thereto and on 26 May 2008 applicant's attorney advised second respondent that an application was being prepared with the view to compelling second respondent to comply with its obligations in terms of the relevant legislation. To this letter there appears also to have been no response and first respondent's garage remained obdurately in place. Accordingly on 27 June 2008 the present application was launched, service being effected on first respondent on 3 July 2008. This appears to have galvanised first respondent into action and he renewed his application to the MEC for removal of the restrictive conditions, such application being submitted on 1 August 2008. On 4 August 2008 a meeting took place with second respondent's representative at second respondent's offices at which applicant's husband and applicant's attorney as well as first respondent and his attorney were present. The details of this meeting are not relevant save to say that attempts to broker a settlement came to naught.

On 7 August 2008 first respondent's attorney wrote to applicant's attorney, referring to the fresh application for removal of restrictions and requesting that the present application be postponed sine die pending the outcome of that application.

Applicant refused to accede thereto. Applicant's attorney then approached the relevant MEC in order to establish what the status of first respondent's application was. On 17 September 2008 the office of the MEC responded enclosing a letter dated 3 September 2008 addressed to first respondent in which first respondent was advised that there were certain outstanding documents, namely:

> "*(i) Bondholder's consent (bank must indicate removal of restrictions applications);*
> *(ii) 12 copies of locality plan;*
> *(iii) Zoning certificate.*"

Applicant's attorney was advised that these documents were still being awaited.

At the hearing of the application before me Mr. Paterson submitted that on the papers as they stand the first respondent had failed to establish that an application in proper form and order was before the MEC and that in the circumstances applicant was entitled at least to an order in terms of prayer (a) of the Notice of Motion. Mr. Louw for his part referred to a letter apparently addressed to applicant's attorney by first respondent's attorney on 15 October 2008 in which it was stated that first respondent had now complied with the requirements of the MEC. He accordingly applied that the matter be postponed pending the MEC's decision. Mr. Paterson, as indeed he was entitled to do, refused to admit that the application was now in proper form absent any affidavit to this effect. Mr. Louw then sought an adjournment of the matter in order for such an affidavit to be obtained. I refused this application because in my view such affidavit would not in the circumstances have taken the matter any further and would have run up more unnecessary costs.

For present purposes I am prepared to accept in favour of first respondent, on the assurances of Mr. Louw, that the application before the MEC is now in proper order. That being so, it seems to me that a postponement should be

granted. It would, in my view, be a futile exercise to order first respondent to comply with a restrictive condition which he has already applied to have removed. On the papers before me, however, which constitute the case applicant had to meet, that application was defective. I would have expected first respondent immediately the defects had been rectified, to have filed an affidavit to that effect. Had he done so a refusal by applicant to consent to a postponement might well have been held to be unreasonable. In the circumstances, however, applicant was, in my view, entitled to came to court to oppose the application for a postponement especially in circumstances where first respondent's efforts to regulate the position had not been characterised by any degree of urgency, his fresh application to the MEC only being filed some 10 months after the order of 18 October 2007 and only after the launch of these proceedings. There is no reason therefore why applicant should not be entitled to the wasted costs occasioned by the postponement.

There is no indication on the papers as to when the decision of the MEC may be expected. It is to be hoped that the matter is given urgent attention in view of the delays which have already occurred. The following order will issue:

1. The application is postponed sine die pending the outcome of the first respondent's application to the Member of the Executive Council, Eastern Cape, Department of Housing, Local Government and Traditional Affairs for the removal of the restrictive condition against the title deed of Erf 597, Boesmansriviermond.

2. First respondent is ordered to pay the wasted costs occasioned by the postponement.

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J.D. PICKERING
JUDGE OF THE HIGH COURT

Date argued: 30 October 2008
Date delivered: 6 November 2008

Appearing for applicant: Mr. Paterson
Instructing attorney: Borman & Botha (Mrs. Carinus)

Appearing for Respondent: Mr. Louw
Instructing attorney: 1st Respondent: Netteltons, Mr. Nettelton
2nd Respondent: Wheeldon Rushmere, Cole, Mr. Huxtable