IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

Not reportable

CASE NO 2009/51286

DATE 10/08/2010

In the matter between

DAINFERN VALLEY HOME OWNERS ASSOCIATION APPLICANT

and

LINDSAY FALCONER FIRST RESPONDENT

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY SECOND RESPONDENT

THE MINISTER OF SOCIAL DEVELOPMENT OF THE REPUBLIC OF SOUTH AFRICA THIRD RESPONDENT

J U D G M E N T

VAN OOSTEN J: The applicant is a voluntary association duly constituted in respect of the townships known as Dainfern Extensions 16 (excluding certain erven) and 19 (the estate). Its aim and object in terms of its constitution is:

> *'…to promote, advance, and protect the communal interest of the owners of all erven in the township of Dainfern Valley, in particular ensuring acceptable aesthetic, architectural, environmental, security, and living standards in the said area.'*

All registered owners of properties in the estate in terms of the constitution, are automatically members of the applicant. The first respondent (Ms Falconer or the respondent) has been the registered owner of a property in the estate (the property) since 29 March 2006

and she accordingly since that date, is a member of the applicant. Ms Falconer is a qualified nursery school teacher and she has been conducting a playgroup facility known as *Valley Kids Play Group* (the playgroup) at the property since the beginning of 2006.

The first and third respondents have been joined in these proceedings as nominal interested parties only and no relief is sought against them. In argument before me it was conceded that their joinder in these proceedings was superfluous but nothing turns on this.

The applicant seeks interdictory relief against the respondent. The interdict is aimed at preventing her from operating or conducting the playgroup on the property until she has duly complied with certain statutory requirements and other formalities. Those are the following: firstly, the consent of the second respondent for the use of the property for purposes of conducting a crèche, nursery school or play group thereon, secondly, registration of the playgroup as a place of care in terms of s 30 of the Child Care Act 1983, thirdly, the granting of the necessary permit in terms of Section 100 of the Public Health By-Laws of the second respondent and fourthly, the consent of the residents of neighbouring properties to that of Ms Falconer to the use of the property for purposes of conducting a crèche, nursery school or playgroup thereon.

The respondent has raised three points *in limine.* The first is that an alternative dispute resolution is provided for in the applicant's constitution which she should have followed. The point is short-lived. Clause 22 of the constitution provides for arbitration in respect of 'any

dispute arising out or in connection with this constitution'. As it will become apparent later in the judgment the issues arising in this matter can in no way be classified as 'disputes arising or in connection with the applicant's constitution'. Secondly, a misjoinder in respect of the third respondent is alleged. It was argued that both the Minister of National Health and Welfare and the Minister of Education should have been joined in these proceedings instead of the Minister of Social Development. Counsel for the respondent readily conceded, in my view rightly so, that the joinder of any one or more of the Ministers I have referred to, was not necessary for a proper adjudication of this application. The final point *in limine* hedged on the assumption that the applicant in seeking to enforce compliance with the statutory requirements, attempts to usurp the functions of the relevant authorities. The argument is premised on a misconception of the true nature of the relief sought by the applicant: it is plainly not to enforce those requirements but rather to prevent the respondent from conducting the playgroup until she has duly complied with those requirements. There being no merit in any of the points *in limine* they were dismissed and the argument proceeded on the main relief sought.

At the outset it is necessary to state that it is common cause between the parties that the statutory requirements I have referred to firstly, are of application and must be complied with and secondly, that they have not been complied with. Ms Falconer recognises and accepts the responsibility to comply with the requirements. She states that she has already over a period of time taken certain steps in order to comply

with the requirements. She further explains that there are no reasons to believe that the necessary authorisation will not be granted and that it is merely bureaucracy and red tape preventing or delaying the final issuing of letters of compliance or consent from the relevant authorities.

I do not consider it necessary to traverse all the steps the respondent has taken thus far in order to obtain the necessary statutory sanctions. Suffice to say that there is nothing before me to show that any insurmountable obstacles exist to thwart her attempts. I will return to this aspect later in the judgment.

The contentious requirement remaining concerns the consent of the residents of the neighbouring properties. This has become the subject of much debate before me. The applicant has dealt with this aspect somewhat clumsily in the papers: in the applicant's founding affidavit reference is made to a general meeting of the members of the applicant which was held on 28 August 2008. At the meeting the deponent (who is the general manager of the applicant) states it was decided by the members of the applicant in order to protect the communal interests of the owners of all erven in the estate, that all nursery schools, playgroups or crèches operating within the Dainfern Valley Estate were to comply with certain requirements, one of which is relevant for present purposes. It is the following:

> *'All the neighbours must give their approval for the operation of the nursing school;'*

The minutes of this particular meeting however, on this aspect, reflects something entirely different. There the following is recorded:

‘10. ***ADOPTION OF POLICY REGARDING BUSINESS ACTIVITIES OF JUNGLE TOTS AND DAINFERN VALLEY KIDS: NURSERY SCHOOLS OPERATING IN DFV***
This item was for a policy to be obtained for operating Nursery Schools and not tabled for approval at meeting. Mrs J Bull gave her reasons for these to be allowed to operate in the estate. She has 14 children in her playschool from 8:30-12 noon; there is no traffic problem and no noise. She has obtained a petition from all neighbours stating that excessive noise was not generated by having the playschool in their area. Consideration to be given to:
a) *Registration with Health authorities.*
b) Fully compliant with legal requirements;
c) Hours of operation: proposed 8:00am- 5.00pm weekdays only;
d) Nursery school or playschool;
e) Major number of attendees should be from the estate;
f) Discussion to take place with neighbours and get their approval;
g) Number of children; maximum30
h) HOA must be indemnified against any injuries sustained at these schools.
i) Property’s main use to be residential – as a residence.’

In her response to the inconsistency Ms Falconer concludes that the version on behalf of the applicant that a policy was adopted at the meeting in the terms I have referred to, is ‘simply false’. In the replying affidavit and with reference to the apparent inconsistency, the deponent says he was personally present at the meeting, that the policy in fact was adopted but that this aspect was incorrectly recorded in the minutes. Counsel for the respondent sought leave to respond in a further affidavit to the applicant’s version now proffered in the replying affidavit. Having given careful consideration to this aspect I have decided not to accede to the request. I prefer to adopt a more pragmatic approach which is aimed at finalising this matter in the interest of all parties. I will for present purposes, accept that the respondent is bound by the consent requirement: I have no reason to doubt the honesty of the applicant’s general manager, Mr Anderson, who is the deponent to the affidavits on behalf of the applicant. The notion of Mr Anderson

attempting to mislead this Court concerning the events at the meeting at which a large numbers of members of the applicant were present (69 in total), is too far fetched to deserve further consideration. I have not been told whether the respondent was present at the meeting. Had she not attended one would have expected her to have made enquiries as to what was discussed and decided at the meeting as this concerned the very business in respect of which she needed approval. The respondent in any event, did act in accordance with the policy: she has obtained the approval in writing of the owners of at least three neighbouring properties which are annexed to the applicant founding affidavit.

Finally, and perhaps decisively, I am of the firm view that the consent of the respondent's neighbours in any event ought to be obtained if regard is to be had to the communal rights and interests of the owners and residents in the estate. They undoubtedly have an interest in the respondent's application for approval. Their interests require recognition and protection which practically can be achieved by either having this application served upon them thereby affording them the opportunity to respond thereto, or by ordering the respondent to obtain their consent as she has already started doing in the case of three of her neighbours. Again, the practical and most cost effective way of dealing with these aspects, in my view, is simply to order compliance.

In conclusion, the respondent at this stage has still not complied with the requirements referred to in the applicant's notice of motion. Technically speaking she is conducting the business illegally. The question now arising is whether the drastic remedy of an interdict would

be appropriate in all the circumstances of this case. I do not think so. Counsel for the respondent advanced compelling considerations why the granting of an interdict at this stage would not be appropriate and submitted that the respondent should rather be afforded the opportunity to finalise matters within a stated period of time. I agree. The respondent has conducted the playgroup for a number of years. There is nothing before me to show that she is doing so against the wishes of any of the members of the applicant. On the contrary the applicant and its members in principle seem to have no objection in principle against the respondent conducting the playgroup. Their only justifiable concern is compliance with the statutory requirements. The respondent's continuation with the playgroup for a further period in order to afford her a reasonable opportunity to finalise compliance with the requirements will not cause any prejudice to either the applicant or its members.

In the result I make the following order:

1. The matter is postponed *sine die*.
2. The first respondent must comply with the requirements set out in prayers 1.1, 1.2, 1.3 and 1.4 of the notice of motion within a period of two months from the date of this order, failing which the applicant may enrol this matter again for hearing for the relief sought in the notice of motion.
3. Costs are reserved.

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Counsel for the applicant:	*Adv HF Oosthuizen*
Counsel for the first respondent:	*Adv GR Wynne*