

Reportable

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: A 117/2010

In the matter between:

MUNICIPAL COUNCIL OF WINDHOEK

APPLICANT

And

CLAUDIA PROPERTIES CC

1ST RESPONDENT

HAW RETAILERS CC T/A ARK TRADING

2ND RESPONDENT

CORAM: NDAUENDAPO, J

Neutral citation: *Council of the Municipality of Windhoek v Claudia Properties CC*
(A117/2010) [2014] NAHCMD 344 (14 November 2014)

Heard: 31 January 2011 - 4 February 2011

Delivered: 14 November 2014

Flynote: Property Law – Application for a mandamus – Respondents applied for consolidation and rezoning of 2 erven – Application approved subject to respondents erecting a retaining wall – 54 parking bays – Respondents failed to comply with conditions – Application for a mandamus granted.

Summary: The respondents applied to the applicant for consolidation and rezoning of 2 erven. The application was approved subject to the applicant submitting an engineer's drawing for the erection of the retaining walls and to create 54 clients accessible parking bays. The respondents failed to comply with the said conditions, instead they constructed corrugated iron wall and dumped building materials and rubble on the erf. Applicant launched the application to compel the respondents to submit the engineer's drawing for the erection of the retaining walls, to remove the corrugated iron wall and to create 54 parking bays.

Held that the erection of the retaining wall was a condition of the approval of the consolidation and rezoning of the erven and must be complied with.

Held further that the temporary corrugated iron wall erected is illegal as it was not approved by applicant and must be removed.

Held further that the creation of 54 parking bays was also a condition of the approval of the consolidation and rezoning of the erven and must be complied with.

ORDER

1. Respondents are ordered to remove the illegally constructed corrugated iron wall on the river bank of the Arrebush and or next to erven 7606 and 7608.
2. Respondents are ordered to submit an engineer's drawing for the erection of the retaining walls to be constructed on erven 7606 and 7608 within three months of this order.
3. Respondents are ordered to construct the retaining wall within six months of the date of the approval by the applicant of the aforesaid engineering drawing.
4. Respondents are ordered to remove all building materials and rubble from erf 7606 and to create 54 accessible parking bays on erf 7608.
5. Respondents are ordered to pay the costs of the applicant, such costs to include the costs of one instructing and one instructed counsel.

JUDGMENT

NDAUENDAPO, J [1] Before me is an application in which the applicant seeks the following relief:

1. *Respondents are ordered to forthwith remove the illegally constructed corrugated iron wall erected on the river bank of the Arebbush River on and/or next to erven 7607 and 7608.*
2. *Respondents are ordered to submit an engineer's drawing for the erection of the retaining walls to be constructed on erven 7607 and 7608 within 3 months.*
3. *Respondents are ordered to construct the retaining wall within 6 months of the date of the approval by the applicant of the aforesaid engineering drawings.*
4. *Respondents are ordered to remove all building materials and rubble from erf 7606 and to create 54 clients accessible parking bays on erf 7608.*
5. *Costs of suit*
6. *Such further and or alternative relief as the above honourable, court deem meet, is granted.'*

[2] **The parties**

- [a] Applicant is the Council of the Municipality of Windhoek, a local authority, established in terms of the local Authorities Act, Act 23 of 1992 with its principle place of business in independence Avenue, Windhoek, Republic of Namibia.
- [b] First respondent is Claudia Properties cc, a duly incorporated close corporation with its principal place of business at 6 Ridvan Avenue, Pionerspark and registered address at 179 Diaz Street, Windhoek, Republic of Namibia. First respondent is currently the registered owner of erven 7606 and 7608, 6 Ridvan Avenue, Windhoek.

[c] Second respondent is HAW Retailers cc trading as Ark trading, a duly incorporated close corporation with its principal place of business at 6 Ridvan Avenue, Windhoek, Republic of Namibia.

THE FACTUAL BACKGROUND

[3] The first Respondent is the registered owner of erven 7606 and 7608, Ridvan Avenue, Windhoek, Republic of Namibia. Second respondent operates a business from these erven.

[4] Arebbusch River borders both erven 7606 and 7608 to the north. Erven 7606 and 7608 lie on the left bank of the Arebbusch River.

[5] Both erven 7606 and 7608 were zoned residential with the density of 1:900, that is, one dwelling for every 900 square meters.

[6] On 27 January 2005 Elmarie du Toit Town Planning Consultant, acting on behalf of the first respondent applied for consolidation and rezoning of erven 7606 and 7608 from residential to business with the bulk of 0,5.

[7] Officials of the applicant initially disrecommended the proposed rezoning and indicated that the application will be reconsidered after the storm water calculations by a professional engineer on the 1,5 year flood area has been submitted for consideration by the Chief Engineer: Department of Transportation of the applicant. Applicant required the following issues to be addressed in such a report:

- 7.1 The 1:50 year flood line;
- 7.2 Flood risk assessment to confirm that the 50 year high water level will not be increased on the opposite and neighbouring properties especially erven 7478 and 7219;
- 7.3 Evacuation procedures and escape routes in the event of a flood be in place.

[8] The requisite report was submitted on or about 26 May 2005.

[9] On 28 September 2005, the applicant approved the respondent's application for the consolidation and rezoning of erven 7606 and 7608 in Ridvan Avenue from residential with the density of 1:900 to business with the bulk to 0.4 subject to the following conditions:

- 9.1 Second respondent agrees in writing to pay a betterment fee of N\$340 400 being 50% of the increase in value of the rezoned property, subject to ministerial approval, prior to the incorporation of the rezoning in an amendment scheme and submission for approval of NAMPAB;
- 9.2 A parking layout showing a minimum of one parking bay per 33.33 square metres be submitted for approval by the Strategic Executive: Transportation, prior to commencement of any building works;
- 9.3 Erven 7606 and 7608, Windhoek, be consolidated into one erf;
- 9.4 The standard conditions that the minimum building value be equal to four times the current municipal value of the land be registered against the consolidated erf;

- 9.5 Second respondent agrees in writing to comply with the recommendations of Messrs Windhoek Consulting Engineers (Pty) Ltd's report on the Arebbusch river flood lines;
- 9.6 Second respondent agrees in writing to provide a guarantee, to the satisfaction of the Strategic Executive: Transportation, to pay an amount equal to the value of the proposed fill and appropriate embankment protection as stated in paragraph 4 of Messrs Windhoek Consulting Engineers (Pty) Ltd's report, before any building plans would be approved.

[10] The respondents through their engineers settled on the mass gravity retaining wall as the appropriate structure for the river bank protection.

APPLICANT'S CASE

[11] Mr Reed, the Chief Engineer: Roads and Stormwater, deposed to the founding affidavit on behalf of the applicant. He stated that on the 19th October 2006, applicant's officials approved building plans for the erection of and additions to the existing buildings on erven 7606 and 7608. The approved building plans reflected Ark Trading as the entity which would affect these improvements.

According to the approved plans, 54 parking bays were to be created on Erf 7608. This is a statutory requirement imposed in terms of table D of the applicant's Town Planning Scheme.

[12] Second respondent failed to comply with the remainder of the conditions which were overlooked and/or not enforced by applicants' officials when the building plans were approved.

[13] Second respondent commenced with the building and completed it. Since its completion, second respondent commenced trading as Ark Trading, a business supplying building materials and household furniture goods.

[14] He further stated that Mr Preus, acting on behalf of the respondents, attended to his office with a sketch plan of what he intended to do pertaining to the retaining wall, but realized that the design, NR P5825/CW04D was not workable, as no solid formation existed upon which to construct the retaining wall as designed.

[15] The sketch plan showed concrete piles/columns going down to the deeper bedrock to enable a good founded retaining wall. He informed Mr Preus that applicant requires an engineer's structure design for the proposal. After that meeting, he noted that Mr Preus constructed a corrugated iron wall along the boundary of erven 7606 and 7608, a portion which was constructed on applicant's land. When Mr Preus was questioned about the use of the corrugated iron sheets as a retaining wall, he informed the deponent (Mr Reed) that it was only a temporary measure and that he has appointed an engineer for a new design.

[16] Mr Reed stated that on 31 October 2007 a letter was addressed to Mr Preus in which it was pointed out to him that the embankment protection that was constructed in the Arebbusch River along the western boundary of erven 7606 and 7608 was unacceptable. The respondents attempted to erect a corrugated iron wall contrary to the recommendation of its own engineers and no engineer plans were submitted as was required. The respondents were required to rectify the matter soonest by appointing an engineer to certify the following:

- a) the work done is to engineering specifications;
- b) the flow of the river has improved; and
- c) other properties along the river are not negatively affected thereby.

[17] On 14 October 2008, Windhoek Consulting Engineers submitted a report to applicant styled: **Flood Risk Assessment: Flood line investigation for Erf 7608**. In the report it was proposed that a reinforced concrete wall be built along the boundary of the new improvements to erf 7608. The purpose of the reinforced concrete wall would be to protect the river bank against the scouring effect of the Arebbusch River, which is severe along that stretch of the river. It was proposed that the structural design of the reinforced concrete wall will follow in a separate report. They proposed that the wall should be constructed of reinforced concrete, founded on hard bedrock and that the top of the wall should be constructed of reinforced concrete, founded on hard bedrock and that the top of the wall should have a free bound of at least 400mm above the water surface or a height equal to the energy level above the water surface and that the first 50 metres of the wall should be at the bottom and of the cul-de-sac with a pulled surface behind the wall.

[18] By 6 November 2008 no engineering plans reflecting the structural design of the proposed concrete wall had been submitted. On 6 November 2008 a letter was addressed to Mr Preus and in this letter he was informed that the engineering design received from Windhoek Consulting Engineers for flood protection can only be scrutinized once the design of the retaining wall is received. He was also informed that the temporary protection measures along the boundary of the Arebbusch river that is being constructed at that stage, are illegal as it is on municipality land and no drawings were approved for the construction. The utilization of the parking area, as reflected in the approved building plans, then used for stock piling of fill material/building rubble is illegal and that according to the approved building plans, respondents had to provide 54 client parking bays on erf 7608. Respondents were instructed to:

- (i) Supply the city with engineering drawings for the retaining walls to be constructed;
- (ii) Immediately stop the construction of the illegal temporary protection measures on the bank of the Arebbusch River;
- (iii) Remove the already constructed illegal temporary protection measures (the corrugated iron sheets) on the bank of the Arebbusch River;
- (iv) Remove the materials/building rubble in the Ridvan Avenue parking area.
- (v) Provide 54 client accessible parking bays on erf 7608; and
- (vi) Remove the illegal building structure (a wall) that encroaches onto municipal land in the Arebbusch River.

[19] The respondents failed to comply with the requirements as stated in the letter. By the time the application was launched, the respondents simply refused to comply with legitimate demands to comply with applicant's requirements.

RESPONDENTS' CASE

[20] Mr Preus, the manager of the second respondent, deposed to the answering affidavits on behalf of the respondents. He argued *in limine* that the application (on notice of motion) by the applicant was filed prematurely. He stated that he instructed Windhoek Consulting Engineers to look into the matter and they compiled a report styled: **Flood Risk Assessment: Flood line Investigation for Erf 7608**, which was submitted to the applicant. In this report it was stated that owners of Erf 7478 and 7219 opposite Erf 7608 obtained permission from the applicant to construct reinforced concrete walls along the boundary of their property for protection against scouring and erosion of their riverbank. He further stated that if a similar concrete wall is built to protect Erf 7608 against scouring and erosion on the present boundary of Erf 7608 a bottleneck will be formed between the boundary wall of Erf 7608 and boundary wall of Erf 7478 and 7219. To avoid that bottleneck, the engineers made the following recommendation:

'The proposed flood protection wall does not coincide with the present Erf boundary. Along section AC and Ef (shown on attached drawing 588-19/CWO 1) it has been necessary to reduce the Erf boundary in order to create sufficient flow area in the river channel. Section F1 is slightly outside the present Erf boundary, but does not negatively affect the flow in the river. Our client therefore requests that the City of Windhoek considers redefining the Erf boundary along the line of the flood protection wall. The total area of the Erf will reduce by approximately 38m. If this request is approved, our client will take the necessary legal steps to have the re-defined Erf registered.' (my underlining)

[21] The plan and the drawing for the redefined boundaries were annexed to the report as annexure "AP1". He further stated that the retaining wall for Erf 7606 and 7608 cannot be designed and built, before it is known where it has to be built, whether on the present boundary or on the re-designed boundary. According to the deponent a complete investigation must be made as to the nature of the ground for the full length of the route decided for the retaining wall. The respondents also needed to investigate whether to erect the concrete wall on existing bedrock or whether concrete pylons would be needed for certain portions of the route.

[22] The deponent further stated that by the time the letter from applicant marked "M/S" was received, they (respondents) have still not received a reply to the proposed re-defining for the boundaries of Erf 7606 and 7608. In that letter the issue of redefining of boundaries of Erf 7606 and 7608 was not addressed and Mr Preus went to see Mr Reed regarding that. According to the deponent, Mr Reed undertook to take the necessary steps to obtain approval for the said proposals. By the time the notice of motion was filed the redefining of the boundary proposal was not approved. After receiving the notice of motion the respondents appointed SEELNBINDER CONSULTING ENGINEERS for designing and constructing the retaining wall. The engineers informed the respondents that the time it will take to plan and construct the retaining wall will be at least 14 months. Given that, the respondents stated that it is impossible to comply with the requirements of the applicant within the proposed time frames.

The respondents further stated that applicant should have known that there will be a dispute of facts that cannot be decided on notice of motion and that an action should have been instituted.

[23] Based on the above, the respondents contended that the application was launched prematurely. Mr Preus further stated that the prayer to remove the so-called illegally constructed corrugated iron wall erected on the riverbank of the Arrebbush River was ill-conceived and cannot be complied with.

[24] He further stated that the proposed parking lot is situated next to the present boundary of Erf 7608 and will have to be re-designed if the proposed new boundary of Erf 7608 has been approved and it is therefore impossible to comply with prayer four of the notice of motion before the plaintiff approve or refuse the proposed re-defining of the boundary of Erf 7606 and 7608. He further stated that the building rubble is intended to be used when the retaining wall is built and when it is removed there will even be more parking space.

[25] The applicant, in reply, stated that the so-called 'bottleneck' was created by the original design as depicted in the drawing annexured "M6" and has nothing whatsoever to do with the construction of the boundary wall on erven 7478 and 7219.

[26] The applicant, in reply, stated that the boundary of Erf 8068 is far outside the intended construction of the retaining wall (except for the portion which possess applicant's property at F1) and does not have the effect of 'redefining' the Erf. The boundaries of Erf 8068 at the AC and EF are not affected and do not require the reconstruction or 'redefined Erf" (the Erf boundary). The actual Erf size is not affected.

[27] The applicant, in reply, stated that the wall can be built anywhere inside respondents' erven boundaries without applicant's permission, once structural design of the wall has been submitted to and approved by applicant. Mr Reed, on behalf of applicant, stated that Mr Preus came to see him some time after he addressed this letter to him. He informed him that the tyres used were temporary measure only pending the submission of the required engineering drawings and that respondents will instruct engineers to prepare a structural drawing for applicant's approval.

[28] No design was received and in the letter dated 6 November 2008 the respondents were specifically informed that the engineering design received from Windhoek Consulting Engineers for the flood protection could only be scrutinized once the design of the retaining wall was received. At the time applicant noticed that the respondents were in the process of erecting the corrugated iron wall, partially also on applicant's property and they were told to stop until the construction of the wall.

[29] According to the applicant, the respondents have failed to submit the designed structure for the retaining wall, failed to remove the corrugated iron sheets already constructed and in fact carried on with the construction of this wall, failed to remove the fill material and building rubble in Ridvan Street and failed to provide the 54 client accessible parking bays on Erf 7608.

APPLICANT'S SUBMISSIONS

[30] The applicant *in limine* submitted that the deponent, Mr Preus, was only authorised to depose to the answering affidavit and was not authorised to oppose to the application on behalf of the respondents which are both close corporations. Mr Maleka submitted that it is now trite that a deponent does not need to be authorized to depose to an affidavit.

It is however required that a deponent be only authorized to seek the relief sought from court and similarly a deponent should be duly authorized to oppose the relief sought by the applicant.¹

[31] At the beginning of the hearing, counsel for the respondents sought to introduce a special power of attorney signed by Mrs Erika Preus in her capacity as the only member of the second respondent in which she appointed Mr Preus to be her lawful agent and to oppose the application instituted by the applicant. There is also resolution by Mrs Preus authorizing Mr Preus to oppose the application by the applicant. The court admitted the special power of attorneys and resolution as there was no prejudice to the applicant. From the special power of attorney and the resolution it is clear that Mr Preus was authorised to oppose the application. In this regard Muller J in *Otjozondjupa Regional Council v Dr Ndahafa Aino-Cecilia Nghifindaka and two others* case No LC 1/2009 unreported judgment delivered on 22 July 2009 at P14, said the following:

'It is clear from the authorities that there must be at least something to show that the litigation on behalf of an artificial person has been authorised. In several matters courts have regarded a statement under oath by a deponent that he or she had been duly authorised to bring the application as sufficient.'

The submission by Mr Maleka is without substance and the court was satisfied that Mr Preus was duly authorised to oppose the application.

[33] Mr Maleka further submitted that the respondents failed to implement the recommendations of their own engineers by, failing to obtaining an engineer's structure designs and submitting and obtaining approval for plans for the reinforced concrete retaining wall and erecting the said wall.

¹*Ganes & Another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) [2004] 2 ALL SA 609.

Instead, the respondents have unlawfully erected corrugated iron wall along the boundary of erven 7606 and 7608, a portion of which was constructed on applicant's land.

[34] He further contended that the corrugated iron wall was not approved by the applicant, nor was any plan in respect of it submitted to the applicant for approval. The respondents admitted that such corrugated iron wall was erected but said it was of a temporary nature that is clearly in violation of the applicant's Town Planning Scheme.

RESPONDENTS' SUBMISSIONS

[35] In the heads of argument, Mr Corbett, argued that the applicant has failed to prove, on admissible evidence, that the applicant duly authorised the institution of the present proceedings and/or that Mr Taapopi was duly authorised, not only to institute the present proceedings on applicant's behalf, but also to identify another person to depose to affidavits on applicant's behalf. That argument was not raised in the answering affidavit and as Mr Maleka, rightly submitted, the court should not entertain that argument at all. The respondents should have raised that argument in the answering affidavit to enable the applicant to deal with that in the replying affidavit. In the result the court will not entertain that argument.

[36] Counsel further submitted that the applicant did not make out a *prima facie* case in its founding papers. Counsel argued that: '*the applicant, in attempt to bolster its case, now suddenly in its heads of argument refer to, not only the Town Planning ordinance, ordinance No. 18 of 1954 (as amended), and the applicant's Town Planning Scheme promulgated in terms thereof, but also invokes various sections of the ordinance and the Town Planning Scheme.*'

'It is however, abundantly clear on perusal of the applicant's founding affidavit that applicant nowhere, even remotely refer to the Town Planning Scheme of applicant allegedly promulgated thereunder, as well as the relevant sections relied upon.'

[37] Mr Corbett further argued that *'the lack of the necessary factual averments to sustain a cause of action for the relief sought against applicant is furthermore compounded by the fact that applicant failed to refer to the relevant legislation and sections relied upon in its founding affidavit and that applicant, on its own admission, acknowledges that it will be impossible for the respondents to comply, within the time period applied for in the notice of motion with the relief sought in paragraphs 2 and 3 of the notice of motion. The relief sought on applicant's own version is also premature.'* He therefore submitted that applicant *has demonstrably failed to make out a prima facie case for the relief sought and that this Honourable Court therefore, on this basis alone, should dismiss applicant's application with costs.*

THE LEGAL FRAMEWORK

[37] The Town Planning Ordinance, Ordinance No 18 of 1954, (the Ordinance) as amended provides for the promulgation of town planning schemes in respect of the local authorities mentioned in schedule three thereof. Section 1 of that Ordinance provides as follows:

'1 The intent or purpose of this Ordinance shall be:-

(1) Every town planning scheme shall have for its general purpose a co-ordinated and harmonious development of the local authority area, or the area or areas situate therein, to which it relates (including, where necessary, the re-construction and re-development of any part which has already been sub-divided, whether there are or no buildings thereon) in such a way as will most effectively tend to promote health, safety, order, amenity, convenience and general welfare, as well as efficiency and economy in the process of development and the improvement of communications.

(2) A scheme shall contain such provisions as may be deemed necessary or expedient for regulating, restricting or prohibiting the development of the area to which the scheme applies and generally for carrying out any of the objects for which the scheme is made, and in particular, for dealing with any of the matters mentioned in the Second Schedule to this Ordinance.

In terms of section 48 (1) (a) of the Ordinance.

'Any person who-

(a) after a scheme has come into operation-

(i) executes any work or does any other matter or thing contrary to any provision of the scheme without such approval as it may be competent for the responsible authority to grant, or contrary to any condition subject to which such approval was given; or

(ii) fails to comply with any provision of the scheme with which it is his duty to comply; or

(iii) fails to comply with the requirements of any notice lawfully issued under the scheme and duly served upon him; or

(iv) uses any land or building in a manner contrary to any provision of the scheme or;

(b) executes any work or uses any land or building contrary to any prohibition imposed by a local authority or joint committee under sub-section (1), (2) or (3) of section thirty-nine, or contrary to any condition subject to which authority to execute such work was granted; or;

(c) Shall be guilty of an offence and liable on conviction to a fine not exceeding R2000 or to imprisonment for a period not exceeding six months: Provided that in the case of a continuing offence an additional fine exceeding R50 for every day upon which the contravention continued may be imposed.'

Section 44 (2) of the applicant's Town Planning Scheme provides that:

'A person, in this clause referred to as the "building owner", intending to erect a building in any use zone shall furnish the Council with drawings or other sufficient indication of the external appearance of the proposed building, including such description of the materials to be used in its construction as may be necessary for that purpose (all of which are hereafter in this clause referred to as "the particulars").'

Section 44 (5) of the applicant's Town Planning Scheme provides that:

'No person shall commence the erection of any building until such time as the particulars hereinbefore referred to have been approved by the Council or by the Competent Authority on appeal.'

Section 2 of the Ordinance defines "building" as follows:

'building', without any way limiting the ordinary meaning of the word, includes-

"(a) any structure, whether it be of a permanent or temporary nature, erected or used for the housing or accommodation of human beings or for the storage, manufacture or sale of goods or materials or for the destruction or treatment of refuse or other waste materials;

(b) a wall, swimming pool, swimming bath, reservoir, tower, bridge, chimney, mast, summer-house and hot-house and any structure appertaining thereto to erected or used in connection therewith;

(c) any boundary fence or boundary wall;

(d) any projection from a building.'

(Underlining is for emphasis only)

[38] The application for the consolidation and rezoning of erven 7607 and 7608 by the respondents to the applicant was done in terms of the Town Planning Scheme. In *Hecknoolt No v Gamiel 1959* (4) SA 244 (1) at 246A-C and *Van Resburg v Van Resburg en Andere 1963* (1) SA 505 (A) at 509 E-510B, The court held that a party in motion proceedings may advance legal argument in support of the relief or defence claimed by it even where such arguments were not specifically mentioned in the papers, provided they are from the facts alleged.

[39] Although the Town Planning Scheme and the Town Planning ordinance were not mentioned in the founding affidavit, the consolidation and rezoning of erven 7607 and 7608 were done in terms of the applicant's Town Planning Scheme and therefore applicant's counsel was entitled to refer to the Town Planning Scheme and ordinance in his heads of argument as per the case law mentioned above. In terms of section 28(1) of the ordinance the applicant is enjoined to observe and enforce the observance of all the provisions of the scheme.

[40] The respondents admitted that a temporary corrugated iron wall was erected on the river bank of the Arrebusch river on and or next to erven 7607 and 7608. That was done without drawing plans being submitted to the applicant for approval. The erection of the corrugated iron wall was therefore in contravention of section 44 (5) of the applicant's town planning scheme which provides:

'No person shall commence the erection of any building until such time as the particulars hereinbefore referred to have been approved by the Council or by the competent authority on appeal.'

Section 2 of the scheme defines building as '(a) any structure, whether it be of a permanent or temporary nature...' Consequently prayer 1 of the notice of motion must be granted.

[41] When the application for consolidation and rezoning of erven 7606 and 7608 Ridvan avenue was approved on 28 September 2005, it was subject to, inter alia, the following conditions: to construct a retaining wall and that an engineer's drawing for the retaining wall be done and submitted to the applicant. The respondent admitted that they gave instruction to Seelenbinder Consulting Engineers CC to design the drawing for the retaining wall, but that the engineers needed more time to design that. The consolidation and rezoning of erven 7606 and 7608 in Ridvan Avenue was also subject to the respondent creating 54 accessible parking bays. On their own admission, the respondents did not do that.

For all those reasons, the application should succeed.

[42] In the result the following order is made:

1. Respondents are ordered to remove the illegally constructed corrugated iron wall on the river bank of the Arrebusch and or next to erven 7606 and 7608.
2. Respondents are ordered to submit an engineer's drawing for the erection of the retaining walls to be constructed on erven 7606 and 7608 within three months of this order.
3. Respondents are ordered to construct the retaining wall within six months of the date of the approval by the applicant of the aforesaid engineering drawing.
4. Respondents are ordered to remove all building materials and rubble from erf 7606 and to create 54 accessible parking bays on erf 7608.

5. Respondents are ordered to pay the costs of the applicant, such costs to include the costs of one instructing and one instructed counsel.

GN Ndauendapo
Judge

APPEARANCES

APPLICANT:

Mr P Kauta

Of Dr Weder, Kauta & Hoveka Inc.

RESPONDENTS:

Mr Grobler

Of Grobler & Co.