

SOUTH AFRICA / JUDGMENT

Buffalo City Metropolitan Municipality v Jikwana (EL99/14, ECD399/14) [2014] ZAECELLC 8 (30 September 2014) [2014] ZAECELLC 8

COURT

Eastern Cape High Court, East London Local Court

BEFORE

Hartle

CASE / FILE NUMBER

EL99/14, ECD399/14

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NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE CIRCUIT LOCAL DIVISION, EAST LONDON

CASE NO: EL 99/14

ECD 399/14

In the matter between

BUFFALO CITY METROPOLITAN MUNICIPALITY

Applicant

and

TEMPLETON MNQANDELI JIKWANA Respondent

JUDGMENT

HARTLE J

1. The applicant, a local municipality, seeks an order that the respondent, an attorney, be interdicted from operating a legal law

practice without its approval at the property known as erf [.....], situate at [.....], Q [.....], East London (“the

property”), or that he be interdicted from using the property for any purpose other than that permitted in terms of the Applicant’s

Zoning Scheme.

2. The applicant requests that the orders come into effect after a period of six months.[1]
3. It is common cause that the property is zoned in terms of the Buffalo City Zoning Scheme Regulations (“the regulations”)[2] as “residential Zone IIIA”. The primary use to which the property may be put according thereto is that of a “dwelling house, second dwelling unit,”[3] and the consent use that of a “day care centre”.
4. In the schedule defining the land use restriction for this property, an “occupational practice” is listed among the additional rights pertaining to residential usage. Contrary to the zoning schemes of other municipalities, which oblige an occupier wishing to conduct an occupational practice from a residence to make application for consent use, such use is not locally prohibited provided certain conditions are met. This exception is framed in par 3.4.4.1 of the regulations in the following terms:

“Occupational Practice

Without prejudice to any powers of the Council under any law, nothing in the zoning scheme shall be construed as prohibiting or restricting the utilization of a portion of the dwelling unit for the purposes of occupational practice, provided that the requirements of the Policy for Occupational Practice in a Dwelling Unit as contained in Annexure G are complied with.”

5. It is convenient to immediately advert to the policy referred to in Annexure G (“the policy”), which provides as follows:

“ANNEXURE G

POLICY FOR PRACTICING OF AN OCCUPATION IN A RESIDENTIAL DWELLING

Where a portion of a dwelling unit is utilised for the purposes of occupational practice, the following conditions shall apply:

- (a) The person practicing the profession, occupation, enterprise or trade, (excluding employees), whether or not such person is a tenant or owner of the dwelling unit, must reside on the property.
- (b) The primary utilisation remains that of a dwelling unit.
- (c) Such portion of the dwelling unit (dwelling house, flat or residential building) may not be utilized for the purpose of a shop, business premises,[4] industry or noxious industry.
- (d) No goods sold or traded should be openly displayed and the practicing of the occupational practice should not be visible, except for the display notice in terms of item (e) below.

- (e) No advertising shall be displayed other than an unilluminated sign or notice not projecting over the road reserve boundary and not exceeding 2 000cm² in size and indicating only the name and occupation of the occupant.
 - (f) No activities shall be carried on which are, or are likely to be, a source of disturbance or nuisance to occupants of other dwelling units or portion thereof.
 - (g) In Residential Zone IV and V, prior permission is required from the Home Owner's Association and the practising occupant may not employ any person/s.
 - (h) If any person with a direct interest is of the opinion that any condition referred to in this policy or in the definition of "occupational practice" has been or is being contravened, such person may lodge a written complaint with the Council requesting action in terms of section 39(1)(b) of the Ordinance.
 - (i) The Council shall consider a complaint mentioned in (h) above, and if in the opinion of the Council a contravention of any condition referred to in this policy or in the definition of "occupational practice" has occurred, the Council shall act in terms of section 39(1)(b) of the Ordinance, or as otherwise provided for by law.
 - (j) Adequate off-street parking, as determined by Council, must be provided for staff vehicles and other vehicles associated with the occupational practice and such parking shall be provided in such a manner that it does not detract from the amenity of the area, and, where required by Council, be screened."
6. In par 1.3 of the regulations, "occupational practice" is defined to mean:
- "...the practicing of an occupation (excluding any noxious activities) from a dwelling unit by the tenant or owner of that specific dwelling unit, provided that—*
- (i) the persons so practicing including employees do not exceed 3;
 - (ii) the tenant or owner must reside and work on the property;
 - (iii) such occupational practice is not to result in disturbances such as noise, traffic congestion, air pollution, a congregation of people, excessive traffic generation or lowering of the aesthetics (e.g. visual) or adversely impact on the residential character of the area; and
 - (iv) a maximum of 40% of the total floor area of a property is used for the practice of such occupation."
7. The applicant approaches this court on the basis of its statutory obligation to enforce compliance on the part of the respondent with the zoning scheme restriction pertaining to the property. It claims that the respondent is in breach thereof by conducting a legal practice, the operation of which can only be countenanced in a residential IIIA zone if and when he successfully applies for a "Business II" re-zoning. As the premises are presently constituted, however, the applicant's believes that the respondent will not succeed in such an application since it will be necessary for him to provide at least six parking bays in

accordance with par 3.9.2 of the regulations.[5] Given the size of the property, the applicant expresses the view that this is “not possible.”

8. In pre-empting that the respondent might claim an entitlement to conduct his practice by virtue of the exception referred to in par 3.4.4.1 of the regulations, the applicant asserts in the founding affidavit that the primary use of the property is not that of a dwelling unit; that the respondent does not reside on the property; and that he further does not meet the parking requirements as outlined in the policy. It claims to have discovered these facts as a result of an inspection of the property conducted by it on 16 September 2013 when it noticed inter alia that all the habitable rooms in the structure located on the property were being utilized for the law practice and/or storage purposes. Further, the respondent has not made arrangements with the council in respect of off-street parking. Consequently in its opinion, the respondent’s purported usage of the premises as an occupational practice, to the extent that such is claimed, is neither lawful nor legitimate.
9. Evidently even before the aforementioned inspection, the applicant alleges that it “visited the property” and “witnessed” the respondent’s offence following “complaints from the public”, later disclosed in the applicant’s reply to mean a single verbal anonymous complaint. A photograph provided by it in substantiation reflects signage on the outside of the property with the respondent’s eponym “Jikwana Nginda & Associates”. [6] The inspection had been foreshadowed by a letter dated 10 April 2013 addressed to the postal address of the respondent’s

professional offices in Butterworth calling attention to the fact that his utilization of the property as a law practice was in

contravention of the current zoning thereof (and or not in compliance with the conditions stipulated in the occupational practice policy), and that his continued practice on this basis was illegal. The notice placed him on terms to cease operation of the “illegal operation” within 30 days of the notice.

10. Despite warning him that a further inspection would ensue, which according to the applicant in fact happened again on 16 September

2013, the respondent had ostensibly disregarded the notice and was continuing to practice unlawfully from the property.

11. The respondent raises certain objections in limine against the applicant’s claim for interdictory relief as well as a number of novel defences and or submissions in respect thereof. These can be summarized as follows:

11.1 he disputes that the deponent to the applicant’s founding affidavit has the requisite authority to make the affidavit and represent the applicant in these proceedings, more particularly since the delegated authority derived from the applicant’s council resolution did not require “immediate action” to warrant the launch of the application;

- 11.2 the applicant has raised disputes of facts (which were foreseeable at the time the application was launched), the seriousness of which render the matter incapable of being determined on the papers alone;
- 11.3 the issue of the application was premature because the respondent was not properly served with the alleged notification of contravention of the regulations;
- 11.4 the application lacks a jurisdictional basis because there was no complaint made by a person with a direct interest concerning the respondent's alleged breach of the occupational practice policy;
- 11.5 the applicant never conducted an inspection of the property as alleged;
- 11.6 the respondent's usage of the property falls within the exception provided for on the basis that it constitutes an occupational practice;
- 11.7 since there is no real distinction in the concept of running a business between a law practice and a day care centre, for which consent use is permitted in respect of the property, it is unnecessary for the respondent to apply for it to be rezoned;
- 11.8 the applicant is unequal in its treatment of the respondent, as it has failed to take action against other offenders;
- 11.9 the applicant fails to allege any prejudice it suffers as a consequence of the respondent's utilization of the property as an occupational practice;
- 11.10 the applicant has failed to satisfy all the necessary requirements for the grant of the interdict and the fact that it amended its notice of motion to delay the coming into effect of the interdict sought is tantamount to a concession that it has not exhausted all the available remedies available to it prior to the institution of these proceedings; and
- 11.11 given the applicant's concession that the property including that adjoining it at no [.....]"are straddled by a single structure," the respondent on this basis satisfies the applicant's requirements for an occupational practice.
12. Several of these issues overlap.
13. The respondent explains in an answering affidavit that he is the owner of the property, as well the adjoining property at no 90, both of which he purchased in 2011. Evidently he regards the two properties as a single unit which he characterizes as "the subject property". [7] He claims to reside in the "subject property" on a permanent basis together with his family, including his wife and children, and their helpers. According to him he uses the whole of the dwelling unit at no 90, and "a portion" of the unit at no. 88 for residential purposes. Only two bedrooms of the unit at no 88 are used as offices in respect of his "occupational

practice”,[8] which is “a mere satellite office” of his Butterworth office. He asserts that his usage of the property as an occupational practice falls within the ambit of the regulations since he practices the attorney’s profession there;[9] he resides in “the subject property” and that “the subject property” is primarily being used for dwelling

purposes. Moreover the signage (which the respondent alleges was recently changed to “Jikwana and Company”)[10] meets the requirements of the applicant and “so is the case with the requisite parking space”.

14. By reason of the several defences raised by him, the respondent submits that the application constitutes an abuse of court process

and that it should be dismissed with a punitive costs award against the applicant.

15. The applicant bears a public duty and power to vigorously enforce its regulations and oversight of land use in its area of jurisdiction.

This is evident from the provisions of sections 39(1) of the Land Use Planning Ordinance 15 of 1985 (“LUPO”) which provide as follows:

“39. Compliance with provisions of zoning scheme and of conditions of subdivision.—(1) Every local authority shall comply and enforce compliance with—

- (a) the provisions of this Ordinance or, in so far as they may apply in terms of this Ordinance, the provisions of the Townships Ordinance, 1934 (Ordinance 33 of 1934);
- (b) the provisions incorporated in a zoning scheme in terms of this Ordinance, or
- (c) conditions imposed in terms of this Ordinance or in terms of the Townships Ordinance, 1934, and shall not do anything, the effect of which is in conflict with the intention of this subsection.”

16. Section 39

(3) of the LUPO makes provision for the Administrator[11] to perform these duties and to exercise the powers of the local authority where the latter fails in its obligation, as follows:

“(3) If a local authority in the opinion of the Administrator fails to perform or to exercise satisfactorily its duties or powers in terms of subsection (1), the Administrator may, after notice to such local authority, withdraw any approval or authorisation granted by the local authority, perform the said duties, exercise the said powers and recover from such local authority any amount spent by him in this connection or instruct the local authority as to the steps to be taken by it in order to ensure compliance with subsection (1), and such instruction shall in law override any decision of the council of the said local authority.”

17. Subsection (2) spells out the obligation on the occupier of land to stringently observe the conditions of a zoning scheme in the following terms:

“(2) No person shall—

- (a) contravene or fail to comply with—
- (i) the provisions incorporated in a zoning scheme in terms of this Ordinance, or
- (ii) conditions imposed in terms of this Ordinance or in terms of the Townships Ordinance, 1934, except in accordance with the intention of a plan for a building as approved and to the extent that such plan has been implemented, or
- (b) utilise any land for a purpose or in a manner other than that intended by a plan for a building as approved and to the extent that such plan has been implemented.”
18. Section 46(1)(a) of LUPO renders a failure to comply with section 39
- (2) thereof a criminal offence, punishable with a fine not exceeding R10 000, or to imprisonment not exceeding five years, or to both such fine and imprisonment. Repeat offenders are also expected to be dealt with harshly, underscoring the high premium placed on land use control. A person convicted of an offence under LUPO who after such conviction continues with the conduct in respect of which he was so convicted, shall be guilty of a “continuing offence” and on conviction be liable to a fine not exceeding R100 in respect of each day on which he so continues or continued therewith.
19. Paragraph 2.4 of the applicant’s own regulations endorses the mandatory nature of land uses according to how property is zoned for respective purposes within its area of jurisdiction as follows:
- “The land indicated on the zoning map, as indicated in Columns 2 or 3 of Table A, is zoned for the respective purposes indicated in Column 1 of Table A (In the present instance read “Residential Zone IIIA”) and shall not be used for any other purpose whatsoever.” (Emphasis added.)*
20. Each zone in turn has its own “planning control” within the city’s zoning scheme area. According to paragraph 2.5 of the regulations the purposes, called primary uses, for which land and buildings may be used in the various specified zones are shown in column 2 of the attached table B (read “Dwelling house, second dwelling unit” applicable to the respondent’s property), and the purposes, called consent uses, for which land and buildings may be used or erected with the consent of the council in the specified zones are shown in column 3 of the table (here read “Day care centre”). Paragraph 2.5.3 reiterates again that “any use not reflected (in the applicable columns) shall not be permitted in the zone concerned.” (Emphasis added.) Where special consent has been obtained for the specified particular purpose, then and only in that case may land be used for such purpose with such special consent.[12]
21. Our courts have affirmed the role and duty of local authorities to regulate and enforce “with the requisite degree of vigour and efficiency”[13] land use in their areas of responsibility. In *Chapman Peak Hotel (Pty) Ltd and another v Jab and Annalene Restaurants CC t/a O’Hagans*[14] the court identified the nature of the clear right of affected property owners as well as the injury suffered by them in a claim for the grant of interdictory relief in a situation

where the South Peninsula Municipality had failed to take active steps to prevent the erection by the respondents of a timber deck constituting an unlawful structure and resulting in a contravention of the relevant zoning scheme rules:

“The trial judge’s assumption that the appellants had established a clear right as well as an injury, actually committed or reasonably apprehended was (correctly, in my view) not challenged before us on appeal. For purposes of considering the correctness or otherwise of the above-quoted conclusion the crux of the matter, in my view, is to be found in the nature of the “clear right” that required protection.

It was common cause on appeal before us that the nature of the clear right that was being infringed was the appellants’ public law right to enforce compliance with the relevant zoning scheme. That this must be so, is apparent when one bears in mind that the general purpose of a zoning scheme is “to determine use rights and to provide for control over use rights and over the utilisation of land in the area of jurisdiction of a local authority”. The purpose of zoning and its concomitant restriction on the use rights attaching to land is to provide for the orderly, harmonious and effective development of the affected area. It is the duty of the local authority to comply and enforce compliance with, inter alia, the provisions of the Ordinance and the zoning scheme. A zoning scheme is promulgated in the interests of the inhabitants of an area. It is legislative in character and is binding not only on owners and occupiers of land subject to the scheme, but also on the administering local authority. Failure to comply with the provisions of a zoning scheme constitutes an offence punishable by a fine not exceeding R10 000 or imprisonment for a period not exceeding five years.

There is clear authority in this Division that at least such inhabitants as are immediate neighbours to the affected property can enforce by interdict compliance with the scheme.”[15]

22. In *Megazone 145 CC v Koukamma Municipality & others*[16] the court on the basis of the very same legal duty on the municipality’s part referred to in *Chapmans Peak Hotel (Pty) Ltd and another v Jab and Annalene Restaurants CC t/a O’Hagans* granted a mandamus in favour of a landowner with a direct interest

affected by a land use contravention by the offender against the Port Elizabeth Municipality which had failed “to act decisively”[17] against an alleged contravention of its zoning scheme regulations.

23. The corollary of inhabitants’ public law right to enforce a local authority’s strict compliance with the relevant zoning scheme is the legal duty and power of the local authority to enforce its zoning scheme regulations by taking action in the face of a contravention thereof. Our case law abounds with examples where municipalities have themselves on the basis of the duty and power aforesaid sought the protection of this clear right by interdictory relief.[18]
24. Assuming it to be in evidence that the respondent is in breach of the regulations by conducting a law practice in respect of a property not zoned Business II (the fact of a legal practice is indeed conceded by the respondent), or by conducting a purported occupational practice from the property which is not strictly in compliance with the applicant’s policy

conditions, then it would appear to me that the applicant would unquestionably have a clear right to approach this court in order to prevent such conduct or, conversely, would not be required to tolerate a contravention of its zoning scheme regulations.

25. To return to the issues at hand, it is perhaps unsurprising that the respondent resorted to some point taking. It was not argued before me that the applicant's regulations or policy conditions pertaining to occupational practices are vague, but by the same token neither can they be said to be a model of clarity. The definition of occupational practice in the regulations is cast in narrower terms than is set out in the policy, and certain paragraphs of the policy create the impression of peremptory requirements or "conditions", which are out of kilter with the overall scheme of LUPO and the regulations itself.[19]
26. This I believe has given risen to the respondent's misconception that a complaint referred to in the policy from a person with a direct interest is required as a jurisdictional basis for the applicant to act against a contravention of the zoning scheme. There can be no uncertainty in my view, however, that a local authority must uphold the law against any contravention of a zoning scheme - which is the principal instrument for carrying out its function to regulate land use under LUPO, once in its opinion land use conditions are being contravened.

Paragraphs (h) and (i) of the policy - which, since they comment about the conditions of the policy referred to in paragraphs (a) to (g) thereof cannot be policy conditions themselves, merely enforce the notion that the complaints of specified members of the community regarding a land use contravention must be given the respect they deserve and be acted upon (if the applicant has not yet done so itself) so that the applicant is not seen to be condoning any contraventions of its zoning scheme. Otherwise it would be taking too narrow a view of the matter, reducing complaints to the realm of nuisance between neighbours whereas the true problem is one of the applicant effectively enforcing its statutory power and duty to maintain

control over land use in its area of jurisdiction. I am fortified in my view of this in that the provisions of paragraph (h) of the policy are not cast in peremptory terms, but the obligation of the applicant to consider such a complaint once it is made, is indeed expressed in such absolute terms.

27. This, to my mind, is the only sensible and reasonable construction of paragraphs
- (h) and (i) of the policy. Any interpretation which insists on a complaint from a person with a direct interest as a jurisdictional basis before the local authority is entitled to take action in terms of section 39(1)(b) of LUPO, or which entails a delay in actioning the complaint by council acting formally because it - as opposed to the municipal manager already tasked by section 55(l) and
- (p) of the Municipal Systems Act, No. 32 of 2007 as head of administration to be responsible and accountable for the administration and implementation of both its zoning scheme and LUPO, must first "consider" it, form an opinion about the alleged contravention, and then "act", [20] would, it appears to me, be absurd and indeed counter-productive to maintaining

effective land use control within the overall purpose of the scheme. In any event in the present instance the applicant says it acted on as anonymous complaint, as it must be entitled to. There is accordingly nothing vexatious about the present proceedings as the respondent seeks to suggest.

28. Neither is it apparent that any notice is required in terms of section 39(1) and
- (2) of LUPO as a precondition to enforcing compliance with the applicant's zoning scheme in the case of a land use contravention. Section 40(1)(a) of LUPO does impose a procedure which applies before the local authority can "rectify such contravention", but this only concerns the situation where a building or any part thereof was erected in contravention of section 39(2)(a). In any event it is doubtful – despite this preliminary procedure required before

the contravention may be rectified, that a local authority would be precluded in the interim from interdicting at common law the

continuation of the erections which are in contravention of section 39(2)(a) of LUPO.[21]

29. In the result, therefore, whether or not the applicant's pre litigation notice came to the attention of the respondent at his practice in Butterworth to which it was clearly dispatched rather than to the property, and whether or not the use of the Butterworth address rather than that of the property constitutes a "fatal flaw" in the notice contended for by the respondent, are non issues as far as I am concerned. However, the fact that the respondent purported "during or about July 2013," - co-incidentally shortly after the dispatch of the notice, to change his signage is a strong indicator that the applicant's notice was indeed brought to the respondent's attention.
30. Similarly there does not appear to be any peremptory requirement in respect of land use contraventions to the effect that an official inspection must be undertaken before commencing action against an offender. The respondent suggested that some formality would have accompanied the process of the alleged inspection which the applicant says it undertook because section 41 of LUPO requires

"reasonable notice" before entering upon any land in order, inter alia, to make an investigation pursuant to the provisions of the ordinance. Section 41 of LUPO provides as follows:

"41. Right of entry.—Any person authorised thereto in writing by the Administrator or director or a council may at any reasonable time, after reasonable notice and causing as little inconvenience as possible enter upon any land in order to—

- (a) do anything which the Administrator or the director or such a council, as the case may be, is permitted or required to do in terms of this Ordinance, or

(b) make an inquiry, an investigation or a survey in connection with the exercise or performance of his or its powers or duties by the Administrator or director or such a council, as the case may be, in terms of this Ordinance.”

31. I cannot agree however that because (on the respondent’s version) the applicant did not follow the letter of law in respect of a formal investigation envisaged by section 41 of LUPO, the conclusion must necessarily be drawn that it failed to investigate

the circumstances relevant to its complaint before launching the present proceedings. On the contrary the photographic evidence

in itself is objective proof of a visual inspection, leaving aside for the moment the dispute of fact raised by the respondent

concerning whether the applicant inspected his property or not as alleged by it. Whilst it must be so that an occupier’s

rights to privacy are to be respected in any enquiry, investigation or survey under LUPO impacting on them, I do not agree that this provision in itself imposes as a pre-condition on a local authority any obligation to in fact conduct a formal inspection within the knowledge of the offender before enforcing any land use contraventions. Further, the absence by the applicant in this

instance of any preceding request and or notice to enter the respondent’s property (on his version) is not necessarily corroborative of the latter’s denial that inspections of the property were indeed undertaken by it as alleged.

32. That deals with the respondent’s objections outlined in paragraphs 11.3 to 11.5 above. Regarding paragraph 11.1, it appears to have been conceded in argument that the deponent on behalf of the applicant -having annexed proof of a resolution in his favour in reply, indeed exercised the necessary authority to act in the circumstances in which he did. The deponent on behalf of the applicant clearly averred in the founding affidavit that he was making the affidavit (and by necessary implication) bringing the application “in accordance with the powers granted to (him) by the Council of the Applicant”. It was accordingly not correct to allege, as the respondent did in his answering affidavit, that the institution of the proceedings was not authorized. The respondent also complained however that no council resolution was attached. This was provided by the applicant in its reply. This court is therefore entitled in the circumstances to admit the supplementary resolution to confirm the deponent’s authority.[22] However the respondent yet persisted with the submission in argument premised on the fact that the institution of the proceedings did not require “immediate action” as envisaged by council’s resolution, the relevant extract from which reads as follows:

“Municipal Manager – powers not explicitly conferred by legislation (delegated by resolution of Council)

1. Legal matters:

1.1 Commencing with any legal process, whether civil or criminal, on behalf of the municipal (in circumstances in which his/her opinion immediate action is required, to protect the interests of the council and that such action be reported to the executive committee or the council for information.” (Emphasis added.)

33. This submission no doubt relies for its force on the misconception on the part of the respondent, which I have dealt with above, that the municipal manager cannot on the basis of the clear authority already given to him and his responsibility pursuant to the provisions of section 55(l) and (p) of the Municipal Systems Act act in the face of a contravention of the regulations, but must wait for a complaint from an interested party before he can enforce the applicant’s regulations; and or should follow a wieldy exhaustive process in council before an ultimate resort to litigation. On the contrary, given that the applicant is by law obliged to observe and enforce its regulations, it can hardly be suggested that “immediate action” is not required to protect both council’s interests as well as those of the community affected by the contravention. There is accordingly no merit in this objection either. The applicant is properly before this court vindicating its power and duty to enforce compliance with the zoning scheme regulations.
34. The applicant’s clear duty to enforce the regulated land uses in its area of jurisdiction, regardless of who complains, must also be the answer to the respondent’s complaint in paragraph 11.8 above. Despite the fact that the respondent has not pointed to any discrimination in particular in this regard, the applicant has no choice in whether it should enforce its regulations or not against any person. All who breach land use conditions fall foul of the law, which is the trigger itself for the municipal manager to be galvanized into action to protect the interests of the council. In *City of Johannesburg v Ampcor Consulting CC*[23] the court was similarly faced with a defence by land-users in contravention of the relevant zoning scheme that the municipality was “selectively targeting (the relevant respondents) in violation of their constitutional right to equality” and not treating the owners equally. Other defences of acquiescence waiver and a “change in the character of the neighbourhood” were also raised in response to the enforcement proceedings. The court in recognizing the unquestionable obligation on the part of the applicant as a statutory body to observe and enforce the provisions of the relevant zoning scheme, made short shrift of all of these arguments in the following terms:

“The applicant is a statutory body, which by law is obliged to observe and enforce the provisions of the scheme. This is specifically provided for in section 58 of the Town Planning & Townships Ordinance 15 of 1986.

The applicant cannot act beyond or in excess of the legal powers expressly or impliedly granted to it. Being enjoined to observe and enforce the scheme, the applicant cannot acquiesce in any contraventions of the scheme. To do so would be unlawful and therefore ultra vires. Put differently, the applicant cannot by virtue of acquiescence be prevented from or excused from

the performance of its statutory duty (see for example, *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Limited* 2008 (3) SA 1 (SA) [also reported at [2007] JOL 19532 (SCA) – Ed] at paragraphs [12]–[13] and cases there cited).

The fact that the applicant, according to the respondent has for many years not enforced the scheme, a fact denied by the applicant, cannot preclude it from now performing its statutory duty, to enforce the scheme. There is also no room for any waiver of rights, as contended for by the respondents. A local authority as a representative body cannot waive rights which are entrusted to it for the public benefit.

...

Similar considerations in my view apply to the defence that there has been a radical change in the character of the neighbourhood. This too cannot prevent or absolve the applicant, which is a statutory body, from the performance of its statutory duty and obligation to enforce the provisions of the scheme.

Respondents' contention that there has been selective enforcement and that their constitutional right to equality in terms of section of the 9 of the Constitution had been infringed, also cannot be sustained. At the heart of the Constitution, is the principle of legality. The rule of law which is entrenched in the Constitution requires State institutions to act in accordance with the law. The applicant is by law required to enforce the scheme. The fact that the applicant has elected to proceed against the respondent and no other contraveners of the Scheme, does not constitute a misuse of power, or amount to unfair discrimination or differentiation in violation of the equality provisions of a Constitution.”

35. I fully align myself with the court’s approach in that matter, which is that the applicant has no choice in upholding the law against any offender who uses property in contravention of the regulations.
36. Regarding the issue referred to in paragraph 11.6 above, the regulations clearly provide that special consent is required for the respondent to practice a day care centre on the property. The applicant has carefully determined in its regulations what uses apply where, and for the respondent to assert that a day care centre is on a par with a legal practice because both are businesses and that an application for rezoning is therefore entirely unnecessary is entirely devoid of any merit. However the fact that the respondent employs the sophistry which he does in this regard suggests that he is aware that consent on the part of the applicant is required to run his practice from the property to make it legitimate.
37. I turn now to deal with the respondent’s contention that a dispute of fact arises which precludes the determination of the matter on the pleadings. In his perception the main issue is whether he uses the property within the scope and definition of “occupational practice” as referred to in par 3.4.4.1 of the regulations as read with the policy. The respondent concedes unequivocally however that he is conducting a purported occupational practice from the property in service to the community,[24] so the issue is rather in my view whether he does

so strictly in compliance with the policy conditions pertaining thereto.

38. It is trite that final relief can only be granted if the facts deposed to by the respondent, read together with the undisputed facts deposed to by the applicant, justify a final order.[25] A different approach is adopted, however, if the respondent's version consists of bald or un-creditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting it on the papers.[26]
39. On the respondent's own showing, his use of the property does not fall within the exception provided for occupational practice in the regulations. This is immediately evident from the fact that he treats the two properties (no. 88 and 90) as a single structure - whereas they are semi-detached units, which defeats his submission that he and his family reside at the property and that its primary utilization remains that of a dwelling unit. The respondent uses the ploy when it suits him to vaguely refer to the "subject property" without distinguishing no. 90 from no. 88 (the property), but in the end the effect is clear. Unless he employs the stratagem of categorizing the two properties as a single property, it cannot be contended that he complies with the policy conditions in this regard.
40. In its reply the applicant attached the cadastral map of the respondent's properties. From this it is apparent that houses no. 88 and 90 are registered as erf 16734 and 71546 respectively – two subdivided or unconsolidated erven.[27] The applicant states that it bears no knowledge whether the respondent occupies no. 90, but that this fact is in any event irrelevant. Even if the two properties were a single structure, it exists for the applicant's purposes as two single and distinct properties. This approach cannot in my view be faulted and is further consistent with the definitions in the regulations of dwelling house and unit respectively.
41. Regarding the respondent's contention that his use of the property falls within the definition of occupational practice, he is deliberately coy about the number of people he employs on the property, a fact which ought to be within his knowledge. He is further generally vague about the precise information which would qualify to bring him within the purview of the definition, such as for example the size of the floor space utilized for his practice at no 88. He does not disavow that his practice causes noise or traffic congestion (or an excessive generation of traffic); or a congregation of people; or a lowering of aesthetics; or adversely impacts on the residential character of the area. Further, by his own showing the signage is still not compliant with paragraph (e) of the policy in that it does not just refer to his name and occupation. On the contrary, on its own, the signage which the respondent says is displayed outside the property, belies the fact of an occupational practice as opposed to being a branch office of a recognized legal practice.[28]
42. When it comes to the issue of his failure to have made arrangements with the applicant for adequate off-street parking - which clearly cannot happen without the co-operation of council, the substance of this damning allegation against him is not dealt with at all. He is content merely to deny it all and make the bald assertion that he complies with the requirement for an occupational practice without specifying how exactly. Lastly, his general

assertion that as far as he is concerned his “occupation of the subject property complies fully, or at the very least substantially, with the (applicant’s) requirements...” is in itself an admission that he falls short of what is required to bring himself within the parameters of the exception.

43. In *Wightman t/a JW Construction v Headfour (Pty) Ltd and another*[29] the court considered the approach to be adopted in considering whether a genuine dispute of fact exists and noted that:

“A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied.”

44. The dictum is particularly apposite in the present circumstances. Here the respondent bears an evidentiary burden to make out a case that his practice is one within the purview of the exception provided for in paragraph 3.4.4.1 of the regulations, but he does so limp-wristly, ambiguously and quite unconvincingly. When he is assertive, he is opportunistically so.
45. In the result I am satisfied that the respondent’s answer cannot defeat the applicant’s right to secure relief by motion

proceedings. This is one of those instances in which the following dictum in *Soffiantini v Mould*[30] properly deserves to be of application:

“It is necessary to make a robust, common-sense approach to a dispute on motion as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. The Court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits.”

46. That leaves the issues which touch upon the requirements for the grant of an interdict. In respect of the first two requirements

the applicant has to prove on a balance of probabilities the right it seeks to protect as well as the injury that has actually been committed, or establish a well-granted apprehension that acts of that kind will be committed by the respondent. It does not appear to be in dispute at all that the applicant is statutorily obliged to enforce its zoning scheme regulations acting in the interest of the council, and by necessary implication the interests of the anonymous owner and the community at large. With regard to the second aspect, I have no hesitation in finding that the

evidence establishes a breach of these regulations by the respondent who on his own showing does not comply with the policy conditions or definitional requirements for an occupational practice. What remains then is the inexorable conclusion that he conducts his legal practice in contravention of the use rights applicable to the property.

47. The applicant has very aptly motivated in its replying affidavit why the interference of this court by the grant of an interdict is justified:

“The harm that will be suffered by the applicant is, with respect, self evident. The Applicant is responsible for municipal planning. This entails the control and regulation of the use of land by means of the provisions of its Zoning Scheme Regulations. If the property owners are permitted to contravene the provisions, then the careful and ordered planning and development of the city cannot take place.

Land use that is contrary to the Zoning Scheme Regulations undermines the sound planning principles that inform the regulations. Unlawful land use ultimately prejudices the communities that live within the Applicant’s municipal boundaries by frustrating the objectives of proper planning. This results in any number of socio-economic problems that could have been avoided where the local authority had strictly enforced compliance with its zoning scheme.”

48. The injury objectively and reasonably apprehended by the applicant is the respondent’s breach of the use rights of the property, anticipated on the basis of the respondent’s insistence - despite notice and the launch of these proceedings, that he is not contravening any of the applicant’s laws and regulations and that, since no complaint was made by anyone to the applicant, he has no reason to desist from doing anything or committing any contravention. Evidently until he applies for a rezoning of the property to Business II, his usage of the property will remain unlawful. Therein lies the prejudice to the applicant. The respondent on the other hand cannot complain of any prejudice which he suffers as a result of his unlawful conduct.
49. The third requirement for the grant of an interdict is the absence of another satisfactory remedy. The alternative remedy must be adequate in the circumstances; be ordinary and reasonable; be a legal remedy and grant similar protection. It was not submitted before me in argument that the institution of criminal proceedings against the respondent constituted that alternative. Indeed the fact that there is an another statutory penalty does not disqualify the applicant from being granted an interdict in the present circumstances.[31] Since the infringement is both ongoing and amounts to an offence in law, an interdict appears to me to be the only effective remedy.
50. The final question is whether this court should exercise its discretion in favour of the respondent by suspending the execution of the interdict. The respondent alleged generally that he would be prejudiced should the interdict be granted because he earned an income from his practice, but this was as a defence to the applicant’s claim for an interdict rather than as a plea ad misericordiam. On the contrary, he plainly snubbed the applicant’s gesture of offering a suspension of the execution of the interdict for a period of six months from date of the order to get his affairs in order.

51. In *Nelson Mandela Metropolitan Municipality & others v Greyvenouw CC & others*[32] Plasket AJ (as he then was) formed the view that the court does not have a general discretion - having found the conduct of the respondent to be unlawful and criminal, to suspend its order that would put an end to that conduct.[33] He yet went on to recognize that a “limited discretion” might exist to cater for “exceptional circumstances” but concluded that the case at hand was not one of those situations deserving of the exercise of the court’s discretion in the offender’s favour.[34]
52. A perusal of other judgments on this issue leads me to conclude however that the criminalization of the conduct does not detract from the exercise of the power which a court has to suspend the order, but is a factor which must of necessity affect its exercise of the discretion. In *Booth and others NNO v Minister of Local Government, Environmental Affairs and Development Planning* and another; *City of Cape Town v William Booth Attorneys and others*[35] the court was faced with a situation where the respondent, a law firm, conducted a legal practice in a suburb zoned “general

residential” which did not permit the use of the property for purposes of a law practice. The property owner unsuccessfully

applied for the rezoning of the property to permit the conducting of the practice therefrom. An appeal against the refusal of the application was also dismissed as was a further appeal in terms of section 44 of LUPO. The municipality applied for an interdict against the unlawful use of the property which was met with a counter application for the review of the municipality’s decision to refuse the rezoning application. The applicant in that matter had conceded that if the review failed there was no defence to the interdict application, a result which ultimately came about. The court observed that no request had been made for the order to be suspended (on the premise that the review application might fail), yet concluded that common sense dictated that some prejudice might be caused to the firm’s clients because, from the moment of its order, the property could no longer be used as a law practice except on pain of a finding of contempt of court. On this basis it was constrained to exercise its discretion in favour of the respondent, coming to its assistance in suspending the order for a period of at least one month from the date of the order in order to allow it an opportunity to relocate and sort out the needs of its clients. The court motivated the exercise of its discretion in favour of the respondent in the following terms:

“I remain of the view that there is the power to suspend an interdict, even where the conduct in question is criminalised. I do not think that the criminalisation of the conduct detracts from the jurisdiction to suspend though it may affect its exercise. Even where the unlawful conduct forming the basis of an interdict has been criminalised, the Court granting an interdict in civil proceedings is not determining that the respondent has committed a criminal offence. The Court deals with the matter in its civil aspect only. Notionally a respondent might be found to have committed a civil wrong and yet escape a criminal conviction (because of the higher burden of proof, the issue of mens rea and so forth). A court which grants a civil interdict but suspends the order no more condones the potentially criminal conduct than it does the civil wrong. The Court merely refrains from adding the immediate risk of

contempt and judicial execution in recognition of the practical difficulty the respondent may face in effecting immediate compliance or the harm which may be suffered by third parties.”[36]

53. This notwithstanding the court reasoned as follows regarding the limited extension it was prepared to allow in the circumstances:

“In the present case, and in the absence of evidence on the matter from Booth, I do not believe a suspension of more than one month is needed to prevent serious harm to WBA's clients. Booth has been practising in unlawful breach of the zoning scheme for many years. He should not have put his firm and his clients in the position they now find themselves. Having done so, he should at least have made some contingency plan in the event of the Court finding against him. He will need urgently to find other premises, at least as a temporary arrangement pending permanent relocation to another site.”[37]

54. In this instance not only is the respondent in breach of the law, but he is an officer of this court expected to uphold the law. Whilst he may have labored under the impression that there was (on his version) no complaint against him by a person with a direct interest, he could have been under no illusion, at least by the date of the issue of this application (again assuming in his favour that he did not receive the applicant's notice), that the applicant regards his use of the property as unlawful, yet he has persevered with the attitude that he will not desist from his conduct. Also some time has lapsed since the applicant amended its notice of motion to request a suspension of the order for a period of six months, giving him ample opportunity to have done what was necessary in the interim to avert any potential prejudice to him in anticipation that this court would come to the applicant's assistance on the basis sought in the notice of motion.
55. On the other hand, the situation in which the respondent will find himself by virtue of the interdict which I intend to grant, without any stay thereof, is somewhat analgalous to the position in which the law firm must have found itself in the Booth matter when the review application it had placed its hope in was dismissed.[38] If the interdict in the present instance is to be executed immediately, I expect that the respondent too will be in an invidious

position. I cannot overlook the disruption to his clients and perhaps even his employees who may be affected in the result,

notwithstanding his insistence that the East London practice was only a satellite office. I am similarly constrained to recognize the practical difficulties facing him, his staff and clients by the immediate execution of the interdict I intend to grant. The applicant itself took into account this reality by its concession that the order should be suspended[39]. However I am not inclined to grant the applicant a stay of six months which in my view is out of proportion to the perceived prejudice the practice will suffer by the immediate execution of my order, especially where the respondent himself has failed to place before me any exceptional factors in favour of such a stay.

56. In adopting the approach which I do, I fully align myself with the concern expressed by Plasket AJ in the matter of Nelson Mandela Metropolitan Municipality 7 others v Greyvenouw CC 7 others[40] referred to above regarding the impression given by the exercise of a court's discretion in favour of suspending an

interdict to put an end to unlawful land use which also amounts to a criminal offence:

“...as Harms J held in the United Technical Equipment Co (Pty) Ltd case, a lenient approach to unlawful land use may be regarded as an open invitation to members of the public to simply use their land as they want, irrespective of the zoning laws, in anticipation of their unlawful use being legalised in due course. It is obvious that this type of approach strikes at the legitimacy of the law as an instrument for the effective and fair regulation of the competing rights and interests of communities and as the means to safeguard and advance the public interest. Thirdly, and perhaps most importantly, a suspension of the order I plan to make would amount to condoning criminal behaviour in circumstances in which the respondents have acted with what may best be described as contempt for the law.”

57. In the result I issue the following order :

1. the respondent is interdicted and restrained from operating an attorneys' office at the property known as erf [.....], situate at [.....], Q [.....], East London, without the applicant's approval;
2. the respondent is interdicted and restrained from using the aforesaid property for any other purpose other than that permitted in terms of the Buffalo City Zoning Scheme Regulations;
3. prayers 1 and 2 shall come into effect after a period of one month from the date of this order; and
4. the respondent shall pay the costs of the application.

B HARTLE

JUDGE OF THE HIGH COURT

DATE OF HEARING : 7 August 2014

DATE OF JUDGMENT: 30 September 2014

Appearances:

For the applicant : Ms M L Beard instructed by Clark_Laing Inc, East London, ref. Mr J Laing.

For the respondent: Mr M H Sishuba instructed by Jikwana & Company, East London, ref. Mr Jikwana.

[1] The applicant amended its notice of motion to include this relief well after the launch of the application. The respondent

submits that it did so as a reaction to the allegation in his answering affidavit that the applicant had not exhausted available

remedies to it prior to the institution of the proceedings.

[2] These are regulations made by the Premier envisaged in terms of section 9 (2) of the Land Use Planning Ordinance 1985 (Cape Ordinance 15 of 1985), which were gazetted on 23 May 2008 in Provincial Gazette Extraordinary No. 1895. According to its Preamble they determine use rights and provide for control over use rights and control over the utilization

of land within the area of jurisdiction of the Buffalo City Municipality.

[3] “Dwelling house” (as defined in the regulations) – “means a detached building containing only one dwelling unit complying with the National Building Regulations. In the event of sectionalisation of a second dwelling unit on a Single Residential Erf (Residential Zone III), such dwelling house and second dwelling unit may be attached,” and “Dwelling unit” – “means a self-contained interleading group of rooms with not more than one kitchen, used only for the living accommodation and housing of a single family at an occupation ratio not exceeding three persons per habitable room, together with such outbuildings as are ordinarily used therewith”.

[4] According to the definition thereof in paragraph 1.3 of the regulations “business premises” include offices in a

building or structure.

[5] The planning control for parking, according to this sub-regulation, is as follows for Business II: “Parking: For the ground floor – 6 bays/100 m² G.L.A. shall be required subject to section 4.13.1 on parking alternatives and sub-section 4.13.1.3 on a reduction in parking requirements for the CBD and provided that the residential or other use of the property may not affect this parking requirement”. The alternatives involve the “consent of the council” and restrictive conditions such as, for example, the registration of a notarial deed against land housing the parking facilities elsewhere, or the payment of an assessed fee to the council to provide alternate parking off-site”. Further general parking and site access requirements are stipulated in par 4.13.1.2 of the regulations. “Parking bay” also has its own strict connotations within the meaning given to it in paragraph 1.3 (definitions) of the regulations.

[6] The respondent’s signage is clearly not in conformity with par

(e) of the policy in that it indicates more than the name and occupation of the respondent. It also suggests that someone other than just the resident in fact carries on business at the premises and for this reason is also not in conformity with the definition in the regulations of what constitutes an occupational

practice.

[7] This conclusion is supported by the argument advanced in the respondent's heads of argument at paragraph 22 and 23 thereof

and also by the respondent's own description of the subject property in paragraph 5.3 of his answering affidavit.

[8] The respondent omits to disclose the total floor area percentage which the practice occupies, especially in relation to no. 88

Tennyson Road.

[9] He does not qualify that he is the only person practicing the attorney's profession at the property.

[10] It is not clear on what basis the respondent can suggest that the signage, even with the changes, conforms to the policy requirement

in this regard. The fact that other practitioners are ostensibly involved also leaves wide open the conclusion on this

basis alone that the respondent falls short of the definitional requirements for an occupational practice.

[11] In terms of section 2 of LUPO "Administrator" means the competent authority to which the administration of the Ordinance has been assigned by the Premier.

[12] Paragraph 2.5.4 of the regulations.

[13] Paragraph [38] of the judgment referred to in footnote 14 below.

[14]

[2001] 4 All SA 415 (C).

[15] At paragraphs [11] – [13].

[16]

[2006] JOL 16645 (SE).

[17] At par [33] read with [27] of the judgment.

[18] Huisamen & others v Municipality of the City of Port Elizabeth

- [1997] 2 All SA 458 (E); United Technical Equipment Co (Pty) Ltd v Johannesburg City Council [1987] 4 All SA 409 (T); Nelson Mandela Metropolitan Municipality & others v Greyvenouw CC & others
- [2003] JOL 10796 (SE); Ethekewini Municipality v Vukukhanye Personnel Services CC [2011] JOL 27376 (KZD); City of Cape Town v Maccsand (Pty) Ltd & others [2010] JOL 25970 (WCC); Municipality of Port Elizabeth v De Jonge NO [1998] JOL 2904 (E); City of Johannesburg v Cantina Tequila & another [2013] JOL 30387 (SCA); Falconer NO & another v Nelson Mandela Metropolitan Municipality
- [2005] JOL 14755 (E); City of Johannesburg v Ampcor Consulting CC
- [2011] JOL 27026 (GSJ), Booth and others NNO v Minister of Local Government, Environmental Affairs and Development Planning and another; City of Cape Town v William Booth Attorneys and others [2013] JOL 30152 (WCC); Bitou Local Municipality v Timber Two Processors CC & others [2008] JOL 22630 (C).
- [19] The city's interests would have been better served by a model in terms of which a professional practice can only be commenced once council has given approval, subject to whatever conditions it may then wish to impose.
- [20] Counsel for the applicant suggested that the formal processes of council might take anything up to six months causing a substantial delay before a complaint of a land use contravention can be acted upon.
- [21] See Tzaneen Local Transitional Council v Louw Et Uxor and Another 1996 (2) SA 860 (T) at 863H – 864C.
- [22] Msunduzi Municipality v Natal Joint Municipality Pension/Provident Fund and Others [2006] JOL 17793 (N) at page 6 at par [4].
- [23] Supra.
- [24] See paragraphs 5.4, 5.5, 5.6.1, 12.4, 13.2 and 14 of the respondent's answering affidavit.
- [25] Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984 (3) SA 623(a) at 634H-635C. Ngqumba-Damons N.O. / Jooste v STMTS President 1988 (4) SA 224 (A) at 259 D – H.
- [26] National Director of Public Prosecutions v Zuma (Mbeki and another intervening) 2009 (2) SA 279 (SCA) at par 26.
- [27] The applicant is assisted in this regard by the provisions of paragraph 1.2(3) of the zoning scheme regulations which provide that the erf register kept by it of all erven in the area of its responsibility is deemed to be correct.

[28] Significantly the advert in respect of the respondent's practice published in the "Yellow Pages" – which

was provided by the applicant in reply, lists the name of the contact person for the respondent's practice as a "Ms

Sobekwa", who evidently is not the practitioner purportedly (on the respondent's version) living at the property and conducting the occupational practice contended for.

[29]

[2008] ZASCA 6; 2008 (3) SA 371 (SCA) at 375 G – 376 B. See also *Randfontein Municipality v Grobler & Others* [2010] 2 All SA 40 SCA.

[30] 1956 (4) SA 150 (E) at 154G–H.

[31] *Huisamen & Others* supra at 483I – 484 F.

[32] *Supra*.

[33] At par [94].

[34] Par [94] of the judgment. See also *United Technical Equipment Co (Pty) Ltd* supra at 347G.

[35] *Supra*. See too the approach adopted by the courts in the matters of *The Municipality of Port Elizabeth v De Jonge* NO (*Supra*); *Huishamen and others v Municipality of the City of Port Elizabeth* (*Supra*); and *Municipality of Port Elizabeth v Rudman* 1998 (4) BCLR 451 (SE) in granting extensions. Contrariwise the discretion was exercised against the respondents in the matters of *United Technical Equipment Co (Pty) Ltd v Johannesburg City Council* (*Supra*); *Nelson Mandela Metropolitan Municipality & others v Greyvenouw CC & others* [(*Supra*); *Falconer NO & another v Nelson Mandela Metropolitan Municipality* (*Supra*); *City of Johannesburg v Ampcor Consulting CC* (*Supra*); and *Bitou Local Municipality v Timber Two Processors CC & others* (*Supra*).

[36] Par [65].

[37] Par [66].

[38] The respondent no doubt placed his hope in a finding by this court that his use of the property indeed fell within the purview of the exception referred to in paragraph 3.4.4.1 of the regulations.

[39] The court is not bound by this concession.

[40] *Supra* at par[95].

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