IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: NO
(4)

SIGNATURE **DATE 13/10/2023**

Case number: 2023/080436

In the matter between:

CHUNG-FUNG (PTY) LTD	First Applicant
ANCHOR PROJECTS (PROPRIETARY) LIMITED	Second Applicant
and	
MAYFAIR RESIDENTS ASSOCIATION	First Respondent
IMRAAN MOHAMED	Second Respondent
SALEEN EBRAHIM	Third Respondent
EBRAHIM EBRAHIM	Fourth Respondent

FEROZE SAYED BHAMJEE Fifth Respondent

NAZIRA EBRAHIM Sixth Respondent

RASHID AHMED MOHAMED VORAJEE Seventh Respondent

THE CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY Eighth Respondent

THE CITY OF JOHANNESBURG PROPERTY COMPANY SOC LIMITED Ninth Respondent

JOHANNESBURG ROAD AGENCY (PROPRIETARY) LIMITED Tenth Respondent

Summary:

Urgent Applications *- The jurisdictional fact necessary for an applicant to approach a court for relief in terms of Rule 6(12) is to establish the absence of substantive redress at a hearing in due course. In considering an applicant's ability to obtain satisfactory redress in a hearing in due course, regard must be had to the potential of harm to the applicant in the period between the hearing in the urgent court and a hearing in ordinary course. A long delay may prevent an applicant from obtaining redress in due course. The refusal of a hearing before an urgent court, in such circumstances, would defeat and applicant's rights in terms of section 34 of the Constitution. A court should be slow to refuse to hear an application brought by way of urgency where an applicant's rights in terms of section 34 would be defeated.*

An applicant seeking urgent relief set out facts that establish of absence of substantive redress at a hearing in due course. This is not the same threshold as irreparable harm for purposes of an interdict but lower. The label "inherently urgent", properly construed, does not relate to causes of action, but, to the right that is sought to be protected or the relief that is claimed. Certain rights, by their very nature, if infringed, require the attention of the urgent court provided that the threshold of absence of redress in due course has been satisfied.

Self-created Urgency *- Self-created urgency is not constituted by delay alone. Self-created urgency implies a degree of contrivance to queue jump. An applicant, that is fully appraised of its rights and any harm that it may suffer, cannot wait until the last possible moment to launch an urgent application for purposes that would constitute an abuse, in particular, purposes which would defeat or delay the lawful exercise of rights by others.*

Town Planning *- The Spatial Planning and Land Use Management Act, 2013 ("**SPLUMA**") is national legislation that empowers a local authority to promulgate a land use scheme. A land use scheme promulgated in terms of SPLUMA binds all persons and the state, including its organs. SPLUMA empowers a local authority to amend its land use scheme subject to a prescribed process which includes public participation. Once an amendment to a land use*

scheme has been approved and promulgated, it becomes part of the operative land use scheme in the area of the local authority's jurisdiction and has the force of law.

Land Use Scheme *- A land use scheme prescribes, restrictively, the uses to which land within a local authority's jurisdiction may be put, to which it may be put with a local authority's consent and in respect of which there is an absolute prohibition. Once a land use scheme is promulgated, or an amendment scheme is promulgated, it is only those rights in terms of the land use scheme that may be exercised on the property concerned.*

The local authority is obliged to ensure that all land within its area of jurisdiction is only used for the purposes permitted.

The Court's powers to suspend the operation of an amended land use scheme *- Absent a challenge to the constitutionality of the Land Use Scheme, it is doubtful that a court enjoys the power to suspend the operation of a land use scheme, given that it enjoys the force of law.*

The Court's obligation is to enforce the Rule of Law. Where the law in question is unconstitutional, in which case a declaration to that effect must be made.

JUDGMENT

PULLINGER, AJ

INTRODUCTION

[1] The controversy in this application concerns the use to which Erf 56 Crown North Township ("**Erf 56**") may lawfully be put in terms of the eighth respondent's ("**the City**") Land Use Scheme, 2018 ("**the Scheme**").

[2] The applicants seek interim relief that they "*… be authorised to use Erf 56 … for purposes of parking*" pending the relief sought in Part B of their notice of motion. Part B of the applicants' notice of motion concerns an earlier judgment in the litigation between these parties and the effect thereof in light of the rezoning of Erf 56.

[3] The relief claimed by the applicants is effectively declaratory relief which may, in the discretion of the court, be granted pursuant to section 21(1)(c) of the Superior Courts Act, 2013. This is not unusual relief in the context of planning matters.[1]

[4] The application is opposed by the first to seventh respondents ("**the Residents**") who, themselves, seek relief couched in the form of a conditional counter-application that pending the finalisation of the review proceedings to which I refer below, an interim interdict be granted against the applicants and the City and ninth respondents from using Erf 56 as "*a parking lot or for any commercial purposes, including warehousing, storage of any goods, the repair of any motor vehicles, any metalwork or welding, or the letting and/or operating of shops*", "*admitting any vehicles*" onto Erf 56 "…*for parking or any other reasons connected to the wholesale malls operated by the applicants or any entity related to the applicants*", "*initiating, undertaking, or continuing with the construction of any structure, including temporary structures made of metal or any other material*…" on Erf 56, "*placing any shipping containers, metal sheds or any similar structure…*" on Erf 56, or "*allowing any person to stay overnight…either in a vehicle or in any other manner*."

[5] The Residents seek this relief if the interdict granted against the applicants, to which I refer below, is set aside.

BACKGROUND

[1] **Bitou Local Municipality v Timber Two Processors CC and Another** 2009 (5) SA 618 (C); **Vereeiging City Council v Rhema Bible Church, Walkerville and Others** 1989 (2) SA 142 (T); **Esterhuyse v Jan Jooste Family Trust and Another** 1998 (4) SA 241 (C)

[6] It is common cause that on 2 March 2021 the City's Municipal Planning Tribunal resolved to permanently close Erf 56 as a public space and to amend the City of Johannesburg Land Use Scheme, 2016 by rezoning it for the purposes of parking. The Residents appealed against the Tribunal's decision which appeal was refused on 30 August 2021.

[7] On 9 March 2022, in the Provincial Gazette Extraordinary of that date, the City promulgated Local Authority Notice 342 of 2002 in respect of Erf 56 from which date Amendment Scheme 20-01-2697 came into operation.

[8] The Residents were dissatisfied with that decision, and on 28 February 2022 instituted the aforesaid review proceedings in this court. Notwithstanding the passage of a considerable amount of time, the review proceedings remained pending. The apparent cause of the delay is the City's failure and/or refusal to provide a full record of the decision which the Residents seek to impugn.

[9] The *status quo*, currently, is that the City has now delivered a full record of the proceedings and the applicants are in the process of filing a supplementary founding affidavit as contemplated in Rule 53 of the Uniform Rules of Court. It is apparent that the hearing of any review is many months away.

[10] This application is set in the context of protracted litigation between the parties.

[11] In 2021 the Residents launched an application under case number 2148/2019 claiming an interdict against, *inter alia*, the City and the applicants. The gravamen of the relief sought was to require the City to enforce the Scheme and interdict the applicants from contravening it by, in particular, "*[a]dmitting any vehicles onto Erf 56 for parking or any other reasons connected to the Dragon City Wholesale Mall or the Dragon City Group of Companies*" and conducting any business or activity on Erf 56 that causes a nuisance and interferes with the general flow of traffic on Hannover Street and Park Drive in any manner.

[12] On 19 May 2021, Adams J handed down a judgment in favour of the Residents. The judgment and order of Adams J was upheld by the Full Court of this Division on 22 March 2023. A subsequent application for leave to appeal to the Supreme Court of Appeal and the application for reconsideration failed.

[13] The Residents make much of the fact that the applicants endeavoured, unsuccessfully, before the Full Court to introduce new evidence, that new evidence being of the rezoning of Erf 56. This was viewed by the Full Court as a "neutral fact" and did not constitute extraordinary circumstances warranting its admission.

[14] The Appeal Court did not consider the consequences of the rezoning of Erf 56 with regards to the parties' respective rights. But more on this below.

[15] As intimated above, this application was brought by way of urgency. The Residents vehemently opposed the enrolment of this application as an urgent application. It is in this context that it is necessary to say something about urgent applications before addressing the merits of the application before me.

URGENCY

[16] The Rules of Court in application proceedings prescribe time periods for the filing of affidavits. Those time periods are, *per se*, considered to be reasonable in applications where a litigant's access to Court, as contemplated in section 34 of the Constitution and its ability to obtain relief, will not be adversely affected or defeated by a hearing in the ordinary course.

[17] However, the Rules make specific provision for a litigant to approach the Court on abridged time periods for relief that cannot wait for adjudication in the ordinary course.

[18] In terms of Rule 6(12), an application is considered "urgent" where a litigant could not obtain substantive redress at a hearing in due course. If the redress would not be substantive in due course, the matter falls to be determined as a matter of urgency. As said by the Supreme Court of Appeal:[2]

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[2] **Commissioner, South African Revenue Services v Hawker Air Services (Pty) Ltd; Commissioner, South African Revenue Services v Hawker Aviation Partnership and Others** 2006 (4) SA 292 (SCA) at [9]

> "… Urgency is a reason that may justify deviation from the times and forms the Rules prescribe. It relates to form, not substance, and is not a prerequisite to a claim for substantive relief."

[19] The threshold to establish the juristic fact of "absence of substantive redress" is lower than that of "irreparable harm" for the purposes of establishing an interim interdict.[3]

[20] Once an applicant has established that it will not obtain substantive redress at a hearing in due course, the Court concerns itself with the question of whether the abridgement of time periods from those ordinarily prescribed by the Rules is commensurate with the urgency with which the redress is required.[4] Unreasonable abridgment of time periods may have adverse cost implications for an applicant, even if it were to be successful in its urgent application.

[21] It must be apparent, therefore, that the right to approach the Court for urgent relief is inextricably tied to a litigant's rights under section 34 of the Constitution. In **Chief Lesapo**,[5] the Constitutional Court said:

> "[a]n important purpose of s 34 is to guarantee the protection of the judicial process to persons who have disputes that can be resolved by law…"[6]

and

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[3] **In re: Several matters on the urgent court roll** 2013 (1) SA 549 (GSJ)
[4] **Luna Meubel Vervaardigers (Edms) Bpk v Makin & Another (t/a Makin's Furniture Manufacturers)** 1977 (4) SA 135 (W) at 137F
[5] **Chief Lesapo v North West Agricultural Bank and another** 2000 (1) SA 409 (CC) at [13]
[6] At [13]

> "… s 34 and the access to courts it guarantees for the adjudication of disputes are a manifestation of a deeper principle; one that underlies our democratic order."[7]

[22] It said further:

> "[t]he right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self-help. **The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self-help in particular, access to court is indeed of cardinal importance.** As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable."[8] (emphasis added).

[23] It is against this fundamental consideration that the question of substantive relief in due course should always be measured.

[24] A court should be slow to refuse to hear a matter where a litigant will be deprived of substantial redress in due course. In deciding whether an applicant will be able to obtain redress at a hearing in due course, the delay between the hearing before the urgent court and a court in the ordinary course is a weighty consideration. That is not to say that a proper case need not be made out justifying the reason for approaching the urgent court and fully explaining the prejudice that a delay in a hearing will present, as well as the reasonableness of the abridgment of time periods[9] because, concomitant with a litigant's right not to be deprived of access to court, it may not exercise these rights in a manner that occasions prejudice to other parties by imposing

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7 At [16]
8 At [22]
9 **Clemson v Clemson** [2000] 1 All SA 622 (W) at 626; **Mangala v Mangala** 1967 (2) SA 415 (ECD) at 416 F

unreasonable time periods that are not commensurate with the degree of urgency asserted.

[25] In delaying an approach to court unduly (attempts to settle an impasse prior to launching an urgent application is not an undue delay[10]) thereby not affording a party's opposition sufficient time to place its case before the court, an applicant may cause prejudice to a respondent and necessarily impact upon the urgent court's ability to properly manage its roll which in turn undermines the proper administration of justice.

[26] It is in this context that it is often said that an applicant has "created" its own urgency through its delay in approaching the court. The notion of "self-created urgency" necessarily means more than mere delay. In proper cases, this is a reason for a court to refuse to enrol and hear a matter as an urgent application.

[27] In **Roets N.O**.[11] for example, this court found that the applicant had sat "*on its laurels*" and had unduly taken its time to approach the urgent court claiming irreparable harm. This led to the application being struck from the roll on account of "self-created urgency". But I think this decision properly understood, demonstrates that "self-created" urgency involves a degree of contrivance to jump the queue of hearings in the ordinary course. The contrivance in **Roets N.O**. was to wait until the eve of a sale in execution to

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[10] **Transnet Ltd v Rubenstein** 2006 (1) SA 591 (SCA) at 603 B/C; **South African Informal Traders Forum and Others v City of Johannesburg and Others** 2014 (4) SA 371 (CC) at [37] and [38]

[11] **Roets N.O and another v SB Guarantee Company (RF) (Pty) Ltd and others** [2022] JOL 55628 (GJ) at [26]

bring an urgent application seeking a stay of the sale pending, *inter alia*, a rescission application when the fact of a sale in execution had been long known to the applicant. The effect of, as the learned judge phrased it, "sitting on one's laurels" was, in that case, designed to prevent a sale in execution from being held in order to defeat the rights of the judgment creditor. Had the rescission application been brought timeously, there would have been no need to approach the urgent court at the last moment.

[28] Tangentially, where a respondent complains of prejudice, the facts upon which it relies must be clearly stated. A bald conclusion of prejudice will not suffice where answering papers have been delivered and the issues ventilated.

[29] The proposition that any application made to an urgent court must be fully and properly motivated holds true whether or not a matter is described as "inherently urgent", such as in instances of spoliation,[12] restraints of trade,[13] business rescue applications[14] or the like.[15]

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12 **Clemson** (*supra*)

13 **Advtech resourcing (Pty) Ltd t/a Communicate Personnel Group v Khun and Another** 2008 (2) SA 375 (C) at [3]

14 **Koen v Wedgewood Village Golf and Country Estate (Pty) Ltd** 2012 (2) SA 378 (WCC) at [10]; **Matshazi and Others v Mezipoli Melrose Arch (Pty) Ltd and Another** [2020] ZAGHJHC 135 (3 June 2020) at [6] and [7]

15 For example an unlawful search and seizure (**Gigaba v Minister of Police and Others** [2021] 3 All SA 495 (GP); a commercial tenant unlawfully holding over where a new lessee requires vacant possession of the let property (**CEZ Investment (Pty) Ltd v Wynberg Autobody (Pty) Ltd** [2021] ZAGPJHC 499 (29 September 2021) at [19] to [23] and the authorities cited therein) or an unlawful arrest and detention of an unlawful immigrant (**Ashebo v Minister of Home Affairs** 2023 (5) SA 382 (CC)).

[30] Although this court has recently eschewed the use of the phrase "inherently urgent"[16] in relation to certain causes of action, it has recognised that the harm claimed by an applicant is linked to the nature of the right sought to be enforced and protected rather than any category that the "right" may fall into (i.e. the cause of action relied upon).[17] This may well, in appropriate circumstances, render the relief claimed "inherently urgent", but may have little to do with the cause of action.

[31] Thus, while it is long established that urgent relief may arise from various and divergent causes including the protection of commercial interests[18] and, I dare say, matters that require expeditious adjudication in the public interest,[19] each case must be determined on its own merits and both the requirement of absence of substantive redress in due course and the reasonableness of the abridgment of time periods must be properly traversed by an applicant approaching the court for urgent relief.

[32] The applicants' case is that since the interdict was granted against the use of Erf 56 for purposes of parking, there has been a marked decline in the number of shoppers to the shopping centres conducted on adjoining properties. This has a direct impact on the ability of tenants to meet their rental obligations to the applicants and in turn, the applicants' ability to service loan obligations. There is, so it is asserted, a knock-on effect to the tenants'

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16 **Volvo financial Services South Africa (Pty) Ltd v Adamas Tkolose Trading CC** [2023] ZAGPJHC 846 (1 August 2023) at [6]

17 At [8].

18 **Twentieth Century Fox Film Corporation and Another v. Anthony Black Films (Pty) Ltd** 1982 (3) SA 582 (W) at 586G

19 Consider the Deputy Judge President's notice dates 04 October 2021 entitled "Notice to Legal Practitioners about the Urgent Motion Court, Johannesburg" at paragraph 2.

suppliers whose businesses will also be impacted by the reduced numbers of shoppers. Ultimately however, it is contended, that there is an impact on the livelihoods of those who directly or indirectly earn a living from the shopping centres. It is therefore, in the context of the rezoning of Erf 56 (to specifically allow it to be used for the purposes of parking), that the interdict against Erf 56 from being used for purposes of parking and the number of people who have an interest in the use of Erf 56, that a hearing before the urgent court is required.

[33] The Residents deny that this matter is urgent as contemplated. Their case is that that applicants have failed to pass the threshold of absence of substantive relief. The Residents state:

> "… At best, the applicants have made the bald averment that the interdict granted to the respondents has affected the business of the applicants, and that it will not be able to meet its obligations to Bidvest Bank. The Court is remined that the applicants are the architects of their own misfortune, having unlawfully overdeveloped their retail operations resulting in an inadequacy of parking. The urgency of their application is clearly manufactured."

[34] I find this argument circular. If there is an inadequacy of parking because Erf 56 cannot be used by the applicants, it must follow logically that fewer shoppers can or would shop at the applicants' shopping centres. If the applicants have over-developed their shopping centres, that may have other consequences, but these consequences are unrelated to the question which this court is asked to determine and also unrelated to the question of whether the applicants will obtain redress at a hearing in due course.

[35] I do not understand the circumstances in which the Residents came to the conclusion that the facts asserted by the applicants are contrived or "manufactured". This suggests a degree of dishonesty on the part of the applicants in respect of which no factual foundation has been set out.

[36] The Residents state further,

> "I respectfully submit that there no basis for urgency. The applicants could simply scale back their retail operations and free-up more space for parking. This would bring their conduct in accordance with the law, and would also alleviate the challenges that they allege they face as a result of the interdict."

[37] Whether or not the applicants have over-developed the shopping centres is not an issue that falls to be determined. It is the lawful use of Erf 56 that falls to be determined. This is wholly distinct from whether or not the shopping centres are lawfully operated.

[38] The City does not engage in the urgency debate.

[39] Given the principles I have set out above and the general importance of this matter to the community surrounding Erf 56, I find that the applicants have passed the requisite threshold to found the jurisdictional fact of absence of redress in due course. The Residents have presented no meaningful answer, outside of speculative arguments,[20] that the applicants have experienced a

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[20] In relation to the probative value of speculative averments, see **Knoop N.O and Another v Gupta and Another** 2021 (3) SA 88 (SCA) at [19]

decline in shoppers or that their tenants have experienced a decline in their businesses.

[40] Given that in the Johannesburg court system a hearing in the ordinary course can take some six to nine months, I cannot find that the losses that both the applicants and their tenants are experiencing can be put right after a lengthy passage of time. The applicants' tenants face a decline in shoppers on a daily basis. This is not a case, such as **Salt**,[21] where the applicants and their tenants can readily make alternative arrangements in the interim.

[41] The Residents and the City have filed answering affidavits (albeit outside of the time period stipulated in the notice of motion). The Residents and the City may amplify their affidavits to address part B of the application should it be necessary, as the applicants have disavowed reliance on their experts' evidence for the purposes of the relief claimed in Part A of their notice of motion.

[42] There is no apparent prejudice to the Residents by the abridgement of the time periods and none is asserted.

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[21] **Salt and Another v Smith** 1991 (2) SA 186 (NM) at 187 D/E

PRINCIPLES APPLICABLE TO PLANNING LAW

[43] At the heart of this application is a proper understanding of the nature of planning law and, more particularly, the nature and effect of town planning schemes.

[44] Town planning is an exclusive area of local government executive competence.[22] The exercise of this power is regulated by the Spatial Planning and Land Use Management Act, 2013 ("**SPLUMA**"). Prior to SPLUMA, town planning in the former Transvaal was regulated by the Townships and Town Planning Ordinance, 1984 ("**the Ordinance**").[23] [24] SPLUMA is national legislation that came into effect on 1 July 2015. In terms of section 24(1) of SPLUMA every municipality in the Republic was afforded five years to adopt and approve a single land use scheme for its entire area of jurisdiction.

[45] The Scheme is an adopted and approved Land Use Scheme as contemplated in section 24 of SPLUMA. It was published by the City on 2 January 2019 and came into operation on 1 February 2019. Upon coming into operation, it repealed and replaced the sixteen different Town Planning Schemes that had previously been in operation across the greater City of Johannesburg.[25]

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[22] Section 156 of the constitution read with Part B of Schedule 4 and Part B of Schedule 5. The ambit and extent of these powers was considered in town planning matters was considered in **Govan Mbeki Local Municipality and Another v Glencore Operations South Africa (Pty) Ltd and Others** 2022 (6) SA 106 (SCA) at [14] to [19]

[23] SPLUMA does not expressly repeal the Ordinance

[24] An exposition of the various Ordinances that were applicable throughout the Republic can be found in **Johannesburg Metropolitan Municipality v Gauteng development Tribunal and Others** 2010 (6) SA 182 (CC) at [30] to [32]

[25] Clause 2 of the Scheme. One of the schemes repealed by the Scheme is the Johannesburg Town Planning Scheme, 1979

[46] In **Mungisa, Ntangu-Rare v City of Johannesburg Metropolitan Municipality**[26] this Court explained the nature of a town planning scheme with reference to the Ordinance. It said

> "… A town planning scheme is a unique piece of legislative arrangement in terms whereof each erf within the geographical area covered by a scheme has a specific zoning attached to it, **which zoning permits only certain uses specified in the scheme itself**.
>
> **No provision is made in a scheme for "grey areas". An occupier of an owner of an erf either uses the property for the purposes permitted by the scheme or he does not** …
>
> The City's obligation to enforce the Scheme is an integral part of the operation of the Scheme." (emphasis added)

[47] This principle applies with equal measure with regard to SPLUMA and the Scheme. The Scheme provides a zoning for every such piece of land and prescribes restrictively, the uses to which any land may be put. It prescribes restrictively, the uses to which any land may be put to use with the consent of the City and the uses to which land may not be put[27] (at least not without a successful rezoning application).

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[26] An unreported decision of the South Gauteng High Court per Masipa J, under case number 25745/12 dated 15 November 2012

[27] Clause 10 read with Table B

[48] Section 26(1) of SPLUMA which provides that

> "An adopted and approved land use scheme-
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> *(a)* has the force of law, and all land owners and users of land, including a municipality, a state-owned enterprise and organs of state within the municipal area are bound by the provisions of such a land use scheme"

and means, necessarily, that it has the same status as any other statute promulgated within the Republic and, an offence is created, for non-compliance therewith.[28]

[49] Land Use Schemes are not static. They may be amended from time to time. The local authorities power to do so arises from Section 28 of SPLUMA. In the instant case, the process is set out in the City's Town Planning By-Law, 2016 ("**the By-Law**").

[50] Section 21 of the By-Law prescribes processes in the re-zoning application. Succinctly stated, the process:

[50.1] begins with the notice being published in the provincial gazette, in newspapers[29] and at the subject property[30] as well as written notice to the owners and occupiers of every contiguous erf, including those on the opposite side of the street;[31]

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28 Section 58
29 Section 21(2)(a)
30 Section 21(2)(f)
31 Section 21(2)(k)

[50.2] includes a public participation process in terms of which provision is made for objections, comments and representations[32] and the consideration thereof by a municipal planning tribunal;[33] and

[50.3] if a re-zoning application is granted, an Amendment Scheme is promulgated,[34] giving a date on which it will come into effect whereafter:

> "[t]he City shall observe and enforce the provisions of the scheme from the date of it coming into operation and any person who contravenes a provision of an approved scheme shall be guilty of an offence."[35]

[51] Thus an Amendment Scheme has the effect of law from the date stipulated in the promulgation notice.

THE ISSUES

[52] I return now to address the issues.

[53] The applicants seek declaratory relief that they may use Erf 56 for purposes of parking. They do so, so it is stated, to obtain the *imprimatur* of the Court given the interdict granted against the applicants at the behest of the Residents against such use.

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[32] Section 21(5)
[33] Section 21(6)
[34] Section 22(7)
[35] Section 22(8)

[54] At the time Adams J granted the interdict, the use of Erf 56 for purposes of parking was unlawful. The learned Judge enjoyed no discretion in the matter, and was obliged to grant such an interdict against the use of Erf 56 for purposes of parking.[36]

[55] The Supreme Court of Appeal in **Lester**,[37] put the proposition thus:

> "[28] As stated, Lester has erected an unlawful structure on his property — this fact is unchallenged and common cause. The jurisdictional basis for a demolition order in terms of s 21 has therefore been established. All administrative actions, such as the unanimous resolution of Ndlambe's full council on 5 December 2010 not to approve the final revised plans, remain valid and legally binding until set aside on review or appeal. Absent any challenge on appeal — internally in terms of s 9 of the Act to a review board, or on review in terms of PAJA to a competent court — that resolution had legal consequences. In *Camps Bay Ratepayers' Association and Another v Harrison and the Municipality of Cape Town* the Constitutional Court, in referring with approval to *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*, said that:
>
> > '(A)dministrative decisions are often built on the supposition that previous decisions were validly taken and unless that previous decision is challenged and set aside by a competent court, its substantive validity is accepted as a fact. Whether or not it was indeed valid is of no consequence. Applied to the present facts it meant that the approval of the February 2005 plans must be accepted as a fact. If the footprint issue was part of that approval, that decision must likewise be accepted as a fact unless and until it is validly challenged and set aside.'
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> See also *Member of the Executive Council for Health, Eastern Cape v Kirland Investments.* I have already found that the court below erred in finding that it had a discretion whether or not to issue a demolition order. **Absent such discretion,**

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[36] **Chapmans Peak Hotel (Pty) Ltd and another v Jab and Annelene Resturtants CC t/a O'Hagans [2001] 4 All SA 415 (C)** at [18] and the authorities therein cited; **Bitou Local Municipality** *(supra)* at [22] to [31] and the authorities therein cited; **Makgosi Properties (Pty) Ltd v Edwin Harold Fichard N.O. and Others**, an unreported judgment of Meyer J dated 12 July 2026 under case number 24249/2015 at [30]

[37] **Lester v Ndlambane Municipality** 2015 (6) SA 283 (SCA)

> **the court below simply had to uphold the rule of law, refuse to countenance an ongoing statutory contravention and enforce the provisions of the Act.**" (emphasis added; footnotes omitted)

[56] But, the promulgation of the Amendment Scheme materially changes the context in which that interdict was granted. It must be axiomtic that where an interdict is granted against the unlawful use of land, and that unlawful use is regularised by a rezoning, the interdict against the unlawful use is no longer operative.

[57] The use of Erf 56 for purposes of parking is no longer an unlawful. It may now lawfully be used for that purpose and that purpose alone.

[58] But as correctly pointed out by the Residents, this is not where the interdict granted by Adams J ended. The learned Judge also granted wide-ranging relief to protect the Residents from various instances of nuisance.

[59] The Residents rely on various authorities for the proposition that a court order is binding and must be obeyed until set aside. As a general proposition, this is a correct exposition of the law, but the position is more nuanced than that stated by the Residents. Any judgment or order is granted in the context of the facts proven at that time viewed through the prism of the law as it stands at that time.

[60] In **Zondi**,[38] the Constitutional Court held, in relation to its power to extend a period of invalidity of a statute, that:

> "[n]ew facts may emerge or circumstances may change and render the period of suspension unjust or inequitable. In these circumstances, this Court not only has the power but also has the obligation under its just and equitable jurisdiction to vary that period of suspension and the conditions attached to the suspension, if necessary, to reflect the justice and equity required by the facts of the case".[39]

[61] This principle was applied by the Constitutional Court in **Residents of Joe Slovo**.[40] It said:

> "… the case of *Zondi* is strong support for the proposition that where an order is made on an assessment of the circumstances that existed at a particular time, a court retains the power to vary that order if these circumstances change."[41]

[62] The Constitutional Court went on to discharge part of the order it had made[42] based on a material change in circumstances.[43]

[63] The purpose for which I cite these decisions is not to pre-empt the relief sought by the applicants under Part B of their notice of motion, but to demonstrate judicial cognisance of changed facts and circumstances and illustrate that a judgment and order reflects the facts and law as they stood when the decision was taken.

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38 **Zondi v MEC, Traditional and Local Government Affairs and Others** 2001 (3) SA 1 (CC)
39 At [39]
40 **Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing Rights and Evictions and Another as *Amici Curiae*)** 2011 (7) BCLR 723 (CC)
41 At [23]
42 **Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others** 2009 (9) BCLR 847 (CC)
43 At [37]

[64] The argument advanced by the Residents, taken to its logical conclusion, necessarily means that the City's hands were tied by the order of Adams J and that by virtue of the nuisance that the learned Judge found, that the City would be precluded from entertaining any application for rezoning, whether of its own volition or upon application by the applicants. That contention cannot be correct, as it would trammel upon the separation of powers doctrine.

[65] The intersection between the nuisance complained of by the Residents and the effect of the rezoning of Erf 56 is for another court to determine under Part B of the applicants' notice of motion.

[66] The question that will confront another court, in due course, is whether the materially changed circumstances renders the remainder of order granted by Adams J otiose.

[67] Accordingly, if Erf 56 is used for any other purpose, the City would be obliged to take the steps necessary to bring such unlawful use to an end.

[68] The City, which played a minor role in these proceedings, took the stance that Erf 56 may only be used for parking and that any other use would be unlawful and addressed by them in accordance with SPLUMA, the Scheme and the By-Law.

[69] Accordingly, and for present purposes, the only portion of the order granted by Adams J that is affected by the change in circumstances is the interdict against the use of Erf 56 for the purposes of parking.

[70] In the counter-application, the Residents seek an interim interdict against the use of Erf 56 for a wide range of uses, including parking, pending the outcome of the review proceedings that they have instituted against the City.

[71] I have already found that the promulgation of the Amendment Scheme in relation to Erf 56 has the effect of law, and is to be enforced like any other statute. This, then, begs the question of the Court's power to suspend the operation of a statute pending a review.

[72] Mr Ben-Zeev, for the Residents, suggested that the answer is to be found in the Supreme Court of Appeal's judgment in **Govan Mbeki**.[44]

[73] **Govan Mbeki** concerned certain Land Use Management By-Laws promulgated by three local municipalities. The effect of these By-Laws was identical. The By-Laws concerned restraints placed on the transfer of erven and land units within their respective areas of jurisdiction without the transferor of such erf or land unit producing a certificate issued by the relevant municipality, certifying that all spatial planning, land use management and building regulation conditions or approvals in connection with those erven or land units had been obtained and complied with.

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[44] *supra*

[74] In that matter it was contended that the effect of the By-Laws was to impose an embargo on the restriction of the transfer of ownership, which restriction was unconstitutional.

[75] Immediately, it is apparent that the Supreme Court of Appeal was concerned with two very different considerations to that before me. First, in the instant case, there is no challenge to the constitutionality of SPLUMA or the By-Law pursuant to which the Amendment Scheme was promulgated. Second, it was the finding of unconstitutionality made by the Mpumalanga High Court that gave rise to the suspension of the impugned provision of the relevant By-Law.

[76] It was in relation to the suspension of the impugned provisions of the By-Law, that the Supreme Court of Appeal said:

> "[42] The High Court suspended the declaration of invalidity for six months '*to allow the competent authority to correct the defect*'. No reasons were given in the judgment for this order. In the absence of any such reasons for this deviation from the default position of setting aside unconstitutional exercises of public power, this order was not competent. **I can see no reason to keep the invalid by-laws in operation, especially because of the usurpation by the two municipalities of legislative functions of other spheres of government. It follows that the suspension of the declaration of invalidity of the by-laws must be set aside**…" (emphasis added)

[77] The decision is **Govan Mbeki** is not authority for the proposition that the Court may suspend a statute. It is authority for a very different proposition, being

that there is no basis for an invalid and unconstitutional exercise of public power to remain in operation.

[78] I have doubts that a court has the power to suspend the operation of a promulgated Amendment Scheme. In **Morar**[45], the Supreme Court of Appeal considered an application in which the Court's power to appoint a liquidator to a partnership and the extent of such of the powers that a court may vest in a liquidator. It said:

> "[18] When the court appoints a liquidator for a partnership it is remedying the failure of the partners to attend to the liquidation of the partnership by agreement. Such failure may arise from disagreement over the need to appoint a liquidator, or over the identity of the liquidator or over the powers that the liquidator should enjoy. That being so it is logical to take as one's starting point the powers that the partners could themselves confer by agreement, if they were not in a state of hostilities. The court is then asked to do no more than resolve a dispute between the partners over the appointment of the liquidator or over the liquidator's powers. It does so in a way that the parties themselves could have done. The disagreement arises in consequence of the one partner refusing to agree to the liquidator being appointed or the liquidator having a particular power and that can be characterised as a breach of the obligations of co-operation and good faith that are central to all partnerships. The court is then merely enforcing the contractual obligations of the partners themselves.
>
> [19] **Once the court is asked to go beyond this it is necessary to identify a source of its power to do so**. That is central to the rule of law that underpins our constitutional order. Courts are not free to do whatever they wish to resolve the cases that come before them. **The boundary between judicial exposition and interpretation of legal sources, which is the judicial function, and legislation, which is not, must be observed and respected. In this case no such source was identified**." (emphasis added)

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[45] **Morar N.O v Akoo and Another** 2011 (6) SA 311 (SCA)

[79] I do not need to resolve this conundrum however. As matters stand, the use of Erf 56 for parking is lawful. The lawful exercise of a right is not capable of being interdicted.[46] For present purposes, the balance of the order granted by Adam's J concerning issues of nuisance remains unaffected.

[80] Moreover, it is the Residents' case that the interdict granted by Adams J against the use of Erf 56 for purposes which would constitute a nuisance may give rise to contempt. Should the Residents seek a declaration of contempt coupled with an appropriate coercive order,[47] this, in and of itself, is a suitable alternative remedy that may be employed to give effect to Adams J's order.

[81] This leads, ineluctably, to the conclusion that the conditional counter-application must fail.

CONCLUSION

[82] It must be plain, in the circumstances, that the applicants are entitled to a declarator that Erf 56 may be used for the purposes of parking.

[83] As I am only dealing with interim relief and more litigation of a substantial nature is envisaged which will ultimately determine the parties' rights, it is inappropriate that any costs order is made at this time.

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[46] **Tiger Trading Co v Garment Workers Union & Others** 1932 WLD 131 at 133; **A K Entertainment CC v Minister of Safety and Security & Others** 1995 (1) SA 783 (E) at 797 I - J

[47] As to the distinction between coercive orders and punitive orders in contempt proceedings see **Secretary, Judicial Services Commission into allegations of State Capture v Zuma and Others** 2021 (5) SA 327 (CC) at [47]

[84] In the result, the following order is made:

1. It is declared that Erf 56 may be used for parking in terms of Amendment Scheme 20-01-2697 promulgated in Local Authority Notice 342 of 2002 on 9 March 2022.

2. The 1st to 7th respondents' conditional counter-application is dismissed.

3. The costs of this application are reserved for determination in Part B of this application.

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A W PULLINGER

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 12h00 on 13 September 2023.

DATE OF HEARING: **6 September 2023**

DATE OF JUDGMENT: **13 September 2023**

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