IN THE HIGH COURT OF SOUTH AFRICA **REPORTABLE**

(EAST LONDON CIRCUIT LOCAL DIVISION)

CASE NO.: EL 1327/13

ECD: 2827/13

In the matter between:

BUFFALO CITY METROPOLITAN MUNICIPALITY **APPLICANT**

and

THE UNITED METHODIST CHURCH OF

SOUTHERN AFRICA (UMCOSA) **RESPONDENT**

JUDGMENT

MASETI, AJ

[1] This is an application by the Applicant against the Respondent for an order for relief in the following terms:

1.1 Declaring the respondent's activity of operating an office at the property Erf 232 44 otherwise known as 86 Tennyson Street, Quigney, East London to be unlawful for contravening the provisions of the Buffalo City Zoning Scheme Regulations;

1.2 Interdicting and restraining the Respondent and/or its assigns from conducting and/or allowing any person to conduct offices upon the said property in contravention of the said zoning regulations.

1.3 Ordering the Respondent to pay the costs of the Application.

[2] The Municipal Manager**, Andile Fani**, in his founding affidavit in support of the application stated that he was duly authorised by the applicant to depose to the founding affidavit and deposed to it as follows:

2.1 Erf 232 44 which is also known as House Number 86 Tennyson Street, Quigney, East London falls within the area of jurisdiction of the Applicant and is subject to the Buffalo City Zoning Scheme Regulations.

2.2 In terms of the Zoning Scheme Regulations the property is zoned for use exclusively for residential zone 3A purposes and a zoning certificate of the property in question was annexed to the affidavit which reads:

> "PRIMARY LAND USE: DWELLING UNIT AND 2ND DWELLING UNIT
>
> CONSENT UNIT: Day Care Centre."

As evident from the zoning certificate the property is only primarily zoned for dwelling purposes

2.3 A site inspection carried out by an official of the Applicant revealed that Erf 232 44 was being used as offices of the Respondent in contravention of its zoning certificate.

In support of that revelation a sign was affixed to the perimeter wall of the property advertising that the premises were used as connexional office of the Respondent.

2.4 The Director of the Applicant , following the inspection, wrote a letter to the Respondent to the effect that a site inspection revealed that the property was being used in contravention of the zoning regulations and the respondent was given thirty (30) days' notice within which to cease the said illegal activity ;

2.5 Seeing that the illegal activity was continuing after the expiry of 30 days' notice, the Applicant instructed her present attorney of record to interdict the Respondent from continuing with the illegal activity;

2.6 The Applicant's attorneys gave the Respondent 14 days' notice to remove the signage advertising the premises for office use.

2.7 The Applicant's attorneys received a response from the Respondent's attorneys enquiring whether many businesses freely operating in the same street as Respondent close by were under the same challenge by the Applicant as is the challenge to the conducting of a church office by the Respondent at the property. The Respondent named a few of the businesses operating in and around Tennyson Street. Until Applicant demonstrated that it was treating those businesses referred to in Respondent's letter on the same basis as Respondent, the Respondent contended that the Applicant's action and threats towards it were unlawful, unreasonable, discriminatory and unconstitutional. The Respondent denied that her activities were unlawful and would oppose any legal action against her hence the present application.

2.8 The Applicant submitted that the granting of an interdict is proper and desirable in that the Applicant has established a clear right for the relief since the Applicant is charged with ensuring and enforcing compliance with the zoning regulations

2.9 The harm is being occasioned whenever a property that is zoned for residential purposes is used for any other purpose other than the purpose for which it is zoned as happened in the present case;

2.10 The defiant tone of the Respondent suggested that it had no intention to stop the illegal activity thereby leaving the Applicant with no alternative but to approach the Court for relief.

[3] In his opposing affidavit, **BONGANI PATRICK SKIET**, the Secretary-General of the Respondent stated that he has been duly authorised to oppose the application on behalf of the respondent though a resolution of the respondent

to that effect was not annexed to the opposing affidavit. In his answering affidavit he stated the following:

3.1 That he is an ordained Minister of the Respondent and resides permanently at Erf No 23244 whose street address is 86 Tennyson Street, Quigney, East London. The said property is owned by the Respondent and that he is an office-bearer of the Respondent.

3.2 He stated that the said property is primarily used for residential purposes. It is also used as a place of prayer and worship and Christian succour and outreach as befits the residence and dwelling of the Minister of the Respondent.

3.3 According to **Mr Skiet**, the Applicant conflated the concept of connexional office with a commercial or business office in secular world which is completely in correct.

3.4 In paragraph 3.1 of his affidavit **Mr Skiet** listed duties and functions which he carries out in the said property as the Secretary-General of the Respondent. The list of duties starts from alphabet (a) to alphabet (v) which totalled up to 22. He further stated that it is the place from which his Ministry involving prayer, worship, evangelism and Christian charity is conducted and is the place at which from time to time he meets with other Ministers of the Respondent and office- bearers.

It is also a place from which his Ministry and vocation is conducted and where he carries out his duties and responsibilities as an office-bearer of the Respondent;

3.5 **Mr Skiet** contended that his use of the property in question on behalf of the respondent is lawful and the activities thereon completely legal and in accordance with the Ministry and duties of an office bearer of the Respondent.

3.6 In response to the founding affidavit deposed by the Municipal

Manger **Mr Skiet** concentrated on the character assassination of the Municipal Manager in his personal capacity which is totally an extraneous matter and therefore irrelevant in the present matter.

3.7 The Respondent further challenged that the Municipal Manager was authorised to depose to an affidavit on behalf of the Applicant since there were no proofs to that effect but at the same time disclosed some instances in other matters where the Municipal Manager according to Respondent wilfully and deliberately misled the Court and annexed to his affidavit a judgment by Smith J in the matter of Buffalo City Municipality and the **Municipal Manager vs Johan Koekemoer Case No. 493/12, ECD 193/12** where the office of the Municipal Manager was blamed. This is totally irrelevant in so far as the issues are concerned but at the same time it confirms that the Respondent is aware that the Applicant's deponent is in truth and in fact the Municipal Manager of the Applicant. The Court will address this issue at a later stage.

3.8 The Respondent further contended that prior to the Respondent purchasing the property a commercial business of a day care centre for small children was conducted upon the property and accordingly there is nothing precluding a Minister of Christian church such as the Respondent from residing upon the said property and conducting his ministry from the said property as already described above. He further stated that the zoning certificate disclosed that consent had previously been obtained to use the property as a commercial business namely a day care centre and therefore his usage of the property as disclosed above does not contravene the zoning of the property in question.

3.9 The Respondent further contended that there is no direct evidence from the person who conducted the site inspection nor from the Director of the Applicant who wrote a letter to Respondent giving Respondent 30 days' notice within which to stop the illegal activity. The respondent at the same time admit receipt of the Notice from the applicant's attorney.

3.10 The Respondent pointed out that his property is surrounded by business premises and the adjoining property to the said property is the commercial office of a lawyer. It accordingly was inexplicable to the Respondent why the Applicant was victimizing and picking upon the respondent when businesses and commercial enterprises were being conducted upon most of the properties surrounding the respondent's property. According to the respondent none of the properties surrounding the property in question have consent or permission from the Applicant to conduct businesses. It is therefore respondent's belief that the applicant is deliberately discriminating against the respondent.

3.11. The respondent further stated that he is not prepared to cease his ministry or vocation and that there is no lawful reason why he should be compelled to do so. He will be irreparably prejudiced if not allowed to conduct his ministry and vocation from the said property

[4] In her replying affidavit Applicant stated that according to Buffalo City Zoning Regulations a place of worship does not appear anywhere under primary or consent usage within all areas that are zoned residential under any of the categories listed as zone 1 to zone VI.

A place of worship can only be lawfully conducted under primary or consent use only within areas that are zoned as Business Zoning or Institutional Zoning. Therefore where a property is zoned residentially 3A, as the one under consideration it should be used solely for the purpose of being a dwelling unit or for any other use for which consent has been granted.

Therefore the applicant as one charged with ensuring and enforcing adherence to zoning regulations has a clear right in the event of contravention of the regulations to ensure compliance.

[5] In her Heads of Argument the Applicant stated that it approached the Court on the basis of the authority it derives from its mandate to enforce Buffalo City Zoning Scheme Regulations which were promulgated in terms of Section 9 (2) the Land Use Planning Ordinance No. 15 of 1985 (Cape Ordinance) in order to achieve the co-ordinated and harmonious development of the city in such a way that it contributes to the health, safety, order, beauty and well-being of the city. The zoning scheme regulations are drawn in line with the national legislation such as the Development Facilitation Act 67 of 1995. Where a party contravenes these regulations such a contravention has the effect of defeating the above stated objectives by causing disharmony and compromising the health, safety, order, beauty and general well-being of the city.

[6] In her Heads of Argument the Respondent started with the definition of the term “office” referring to the various dictionaries which almost all described the office as a room doing business or professional activities, a place in which business, clerical or professional activities are conducted. The Respondent further referred to the requisites for a final interdict and that the applicant, in order to succeed in her application, should establish that the respondent is conducting an office in contravention of Buffalo City Zoning Scheme Regulations which according to the respondent applicant had failed to do so because of the following serious deficits:

6.1 Municipal Manager’s evidence of site inspection and a letter written by the Director of the applicant without confirmatory affidavits constituted hearsay evidence.

6.2 The applicant had failed to make out a prima facie case against the respondent to establish any factual basis that the respondent is using the premises as an office.

6.3 It is accepted law that where an applicant approached a court by means of a Notice of Motion such applicant can obtain a final order only if the facts set out in the founding papers have been admitted by the

Respondent, taken together with the averments made by the respondent, justify such an order and referred to **PLASCON EVANS PAINTS (PTY) LTD vs VAN RIEBEECK PAINTS (PTY) LTD 1984(3) SA 623(a) at 634H-635C.**

6.4 Applicant clinged to one issue namely a photograph of a board outside the premises upon which the words “Connexional office” appear.

[7] The issue before this Court is whether the property in question zoned for residential zone 3A purposes for primary use as a residential dwelling when used by the Respondent as the place involving prayer, worship, evangelism, Christian succour and outreach, as well as a place from which the Secretary-General of the respondent carries out his duties and responsibilities as an office- bearer of the respondent contravenes the applicant’s Zoning Scheme Regulations which necessitated the granting of the orders prayed for.

[8] The court will first deal with the legal issue raised by the respondent in paragraph 3.7 above namely whether the Municipal Manager was authorised to depose to an affidavit on behalf of the applicant since there was neither applicant’s resolution to that effect nor a confirmatory affidavit.

8.1 In terms of Section 4(1) (b) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 notice of intended legal proceedings contemplated in Section 3 must be served on the Municipal Manager appointed in terms of Section 82 of the Local Government Municipal Structures Act No. 117 of 1998.

8.2 Section 115(3) of the Local Government Municipal Systems Act 32 of 2000 provides;

> “Any legal process is effectively and sufficiently served on a Municipality when it is delivered to the Municipal Manager or a person in attendance at the Municipal Manager’s office.”

See also **GREAT KEI MUNICIPALITY v SANMIST PROPERTIES CC 2004 ALL SA 298 (E)** at 303.

8.3. Rule 4(1)(viii) of the Rules of this Court provides;

"Service to a local authority shall be effected by the sheriff by delivering a copy to the Town Clerk or Assistant Town Clerk or the Secretary to the Town Clerk."

Therefore in my view, it speaks for itself that Municipal Manager had the necessary standing (locus standi) or authority to depose to an affidavit on behalf of the applicant.

[9] I now deal with the requisites for a final order namely:

(a) A clear right on the part of the applicant;

(b) An injury actually committed or reasonably apprehended also known as an act of interference;

(c) The absence of any other satisfactory remedy available to the applicant

9.1 **A CLEAR RIGHT**

In order to establish a clear right the applicant has to prove on a balance of probability the right which she seeks to protect.

In **EDREI INVESTMENTS 9 LTD (IN LIQUIDATION) v DIS-CHEM ES (PTY) LTD 2012(2) SA 553 (ECP) at 556C-D** Eksteen J had this to say:

"The right must of course be a right capable of protection. The party seeking to establish a clear right so as to justify a final interdict is required to establish on the balance of probability, facts and evidence which prove that he has a definite right in terms of the substantive law. It seems to me therefore that

where the authorities refer to a clear right, it is reference rather to a right which is clearly established."

9.2 **AN INJURY COMMITTED OR REASONABLY APPREHENDED**

Proof of an act actually done showing interference with the applicant's rights or of a well-grounded apprehension that acts of the kind will be committed by the respondent is required.

The authorities clearly use the word as meaning an act of interference with, or an invasion of the applicant's right and resultant prejudice. The injury must be a continuing one. The court will not grant an interdict restraining an act already committed.

In **FRANCIS v ROBERTS 1973(1) SA 507 at 512G-513E RAD 513 E**, plaintiff and defendant were neighbours sharing a common boundary. There was a row over bauhinia trees growing along the boundary on the respondent's side. Shoots from those trees grew through the fence and threatened to push the fence over. Plaintiff asked the defendant to trim the trees and cut them back as they were encroaching on plaintiff's property creating a hazard.

Defendant refused to trim them stating that she was under no obligation to trim trees back and prevent them from damaging the plaintiff's fence. The magistrate granted the nominal damages of one pound and refused to grant the interdict on the grounds that Plaintiff had the remedy of going into defendant's premises himself and trim the trees. On appeal **Beadle CJ** referred to **SETLOGELO vs SETLOGELO 1914 AD 221** at p. 227, where **Innes J**, as he then was, was reported as saying:

"The requisites for the right to claim an interdict are well known; a clear right, injury actually committed or reasonably apprehended and the absence of similar protection by any other ordinary remedy."

BEADLE CJ at p. 513 C said:

"The injury with which this case is concerned is not the sort of injury which can be described as an injury which has occurred once and for all. It is the

type of injury which is capable of repeating itself time and again. The defendant has not, even today, given and unequivocal undertaking that she will refrain from allowing the infringement to occur again. Furthermore from the manner in which the defendant has defied the plaintiff's rights in the past, it cannot be said with any confidence that the plaintiff's fears that she will infringe his rights again are groundless. I do not think that this is a case where there is any obligation on the plaintiff to show, on a balance of probabilities that if he is not granted an interdict the defendant will again infringe his rights. I draw attention to the fact that proof by the plaintiff that the injury will again occur if an interdict is not granted, is not one of essential requisites for the granting of an interdict as laid down in **Setlogelo's** case, supra…… This case shows that for this type of injury an interdict is certainly, a proper remedy (513H)."

At page 514G-H **BEADLE CJ** said; "Furthermore, it must be borne in mind that this was not a case where the plaintiff rushed into litigation. Had he, without giving the defendant an adequate opportunity of remedying the nuisance, simply gone, to law, then I would have had very little sympathy for him. But I have set out the facts to show that the plaintiff exercised considerable patience before eventually resorting to legal action and right up to the very end the defendant persisted in claiming that the plaintiff had no right to demand that she trim back her trees."

C. B. PREST in his book **THE LAW AND PRACTICE OF INTERDICTS (1993) pages 42-46 at p.44** writes:

"The applicant for an interdict is not required to establish that on a balance of probabilities flowing from the undisputed facts, injury will follow. He is only to show that it is reasonable to apprehend that injury will result."

At page 45 further writes:

"The apprehension must be induced by some action performed by the respondent or authorised to be performed by his agent."

In **Setlogelo's** case cited supra at page 227 the words injury committed or reasonably apprehended were used and the authorities clearly used the word

as meaning an act of interference with or an invasion of the applicant's right, and resultant prejudice.

9.3 **THE ABSENCE OF ANY OTHER SATISFACTORY REMEDY**

A final interdict is a drastic remedy and is in the court's discretion. The Court will not; in general grant an interdict when the applicant can obtain adequate redress in some other form of ordinary relief. An applicant for a permanent interdict must allege and establish on a balance of probabilities that he has no alternative legal remedy. See **PREST** supra at pages 45-46.

In **KEMP, SACS & NELL, REAL ESTATE (EDMS) BPK V SOLL en 'n ANDER 1986(1) SA 673(O) at 689F-H** the question raised was whether the court had a discretion to refuse a final interdict where an applicant had succeeded in establishing the legal requirements for the granting of the final interdict. It was held that the discretion of the court where consideration of prejudice and convenience are of importance was bound up with the question whether the rights of the party complaining could be protected by any other ordinary remedy. It would therefore seem that the discretion of the court to refuse a final interdict is indeed limited to the availability of an adequate alternative remedy.

[10] In applying the law into the facts the court will first address the argument advanced by the respondent's counsel in paragraph 6.1 and 6.3 supra as follows:

10.1 In paragraph 3.4 of her answering affidavit the respondent made a lot of concessions admitting evidence adduced by the applicant including the alleged hearsay evidence.

This approach has been addressed **in NAMPESCA SCA (SA) PRODUCTS (PTY) LTD v ZADERER AND OTHERS 1999(1) SA 886 at 892 H** where; **VAN REENEN J** stated:

> "As the applicants are seeking relief which is final in nature and the parties have not requested that any factual issues be referred for trial or evidence in terms of Rule 6(5)(g), such disputes must be resolved by applying the test enunciated in **PLASCON EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD 1984 (3) SA623(A) at 634E-G,** namely that the interdict sought can be granted only if the facts stated by the respondents, together with the admitted facts in the applicant's affidavits, justify the granting thereof. Where there are disputes of facts, a court can decide the issues only if it is satisfied that there are no real and genuine disputes of facts, that the respondent's allegations are so farfetched or untenable that their rejection merely on the papers is warranted or that viva voice evidence will not disturb the probabilities appearing on the affidavit."

[11] It is not in dispute that Erf No. 23244 falls within the area of jurisdiction of the applicant and that it is subject to Applicant's zoning Scheme Regulations which were promulgated in terms of Section 9(2) of the Land Use Planning Ordinance No, 15 of 1985.

[12] It is further not disputed that Erf No. 232 44 with a street address of No. 86 Tennyson Street, Quigney, East London is zoned for use exclusively for residential dwelling falling under Residential Zone 3A as evidenced by a Zoning Certificate.

[13] The Respondent admitted that a sign was affixed to the perimeter wall of the property with a board advertising that the premises were used as a connexional office of the respondent but the respondent denies that the activities conducted therein were that of an office.

[14] Paragraph 3.1 of Respondent's opposing affidavit listed the duties that were performed there which in their nature are duties and functions that are performed in an office. In her Heads of Argument the respondent further

defined an office as a place in which business, clerical or professional activities are conducted. The Secretary-General of the respondent admitted carrying on or conducting activities in the said premises.

[15] The respondent admits receiving Notice from the applicant to remove the signage advertising the premises for office use but flatly refused to cease the illegal activity and regarded applicant's action as unlawful, unreasonable, discriminatory and unconstitutional.

[16] The issue for this court to decide is whether the applicant has established all the requisites of a final interdict on a balance of probability for this court to decide whether to grant the relief or not.

[17] Paragraph 9 supra with its sub-paragraphs deals with the requisites for a final interdict.

[18] It is my view that the applicant has established a clear right as conferred upon her by the Zoning Scheme Regulations promulgated in terms of Section 9(2) of the Land Use Planning Ordinance No. 15 of 1985. The test applicable has been summed up in **EDREI INVESTMENT'S** Case referred to in paragraph 9.1 supra.

[19] The object of the zoning scheme is to achieve the co-ordinated and harmonious development of the city in such a way that it will contribute to the health, safety, order, beauty and general well-being of the city. A contravention of the zoning scheme has the effect of defeating the above stated objectives by possibly causing harm and compromising the health, safety, order, beauty and general well-being of the city.

[20] The injury which the applicant is concerned with is not an injury which has occurred once and for all but a continuing one. An interdict, in its nature, is not a remedy for past invasion of rights but is concerned with the present or future infringements. The respondent has not even today, given an unequivocal undertaking that she will refrain from allowing the infringement to occur. Instead she does not see anything unlawful with her activities.

[21] The applicant did not rush into litigation but gave the respondent adequate notice to remedy the situation before eventually resorting to legal action.

[22] It is therefore this court's view that the applicant has established an act of interference on a balance of probability. The approach adopted in **FRANCIS v ROBERTS** cited in paragraph 9.2 above is hereby followed.

[23] The question is whether in the present case the Court can exercise any discretion other than granting the relief applied for. Can applicant obtain adequate redress in some other form of ordinary relief? Seeing that the respondent is adamant to continue with the illegal activity despite being advised that a place of worship can only be lawfully conducted under primary or consent use only within the areas that are zoned as Business Zoning or Institutional Zoning, it would seem that the discretion of the court to refuse a final interdict is indeed limited to the availability of an alternative remedy. In the present case there is no alternative remedy at all but to grant the relief sought.

[24] In the premises the application for declaring the respondent's activities of operating an office at the property Erf 23244 otherwise known as 86 Tennyson Street, Quigney, East London to be unlawful for contravening the provisions of the Buffalo City Zoning Scheme Regulations succeeds.

[25] The application to interdict and restrain the Respondent from conducting and or allowing any person to conduct offices upon the property described in paragraph 24 above succeeds.

[26] I now make the following order:

(a) The respondent ‘s activity of operating a connexional office with its related activities at Erf 232 44 otherwise known as 86 Tennyson Street, Quigney, East London which is zoned as Residential Zone 3A is declared unlawful for contravening the provisions of the Buffalo City Zoning Scheme Regulations;

(b) The Respondent and/ or its assigns are interdicted and restrained from conducting and/or allowing any person upon the premises mentioned in paragraph (a) above to conduct any activity that is declared unlawful in terms of this order;

(c) The Respondent is ordered to remove any and all signage on the perimeter wall which advertised the premises as a place wherein the activity described in paragraph (a) above has been declared unlawful;

(d) The said signage should be removed within (7) seven days from date of this order;

(e) The Respondent should pay costs of this application.

_____

P L C MASETI

ACTING JUDGE OF THE EASTERN CAPE DIVISION

DATE OF HEARING: 12 JUNE 2014

DATE OF JUDGMENT: 26 JUNE 2014

FOR THE APPLCIANT : ADV L KUBUKELI

INSTRUCTED BY : MAGQABI SETH ZITA ATTORNEYS

9 ST GEORGES ROAD

SOUTHERN WOOD

EAST LONDON

FOR THE RESPODNENT: ADV WYLDE

INSTRUCTED BY : BRIAN CUTLER ATTORNEYS

C/O BATCHELOR & ASSOCIATES

45 PEARCE STREET

BEREA

EAST LONDON