



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

REPORTABLE

Case No: 24249/2015

MAKGOSI PROPERTIES (PTY) LIMITED v EDWIN HAROLD FICHARD N.O. and others

Case Summary: Township – Town planning scheme - Sandton Town Planning Scheme, 1980 – Property zoned as residential 1 being used for business purposes.

Locus standi of applicant as owner of adjacent property and requisites for grant of final interdict restraining property owner and occupier from using property as offices established - prohibition in scheme was enacted inter alia in the interests of person owning neighbouring property which would like to see certain amenities provided by the scheme maintained - it has public right to enforce compliance with the zoning provisions – its right has been invaded – only effective remedy for asserting and protecting right is an interdict, all the more so because the infringement thereof amounts to an offence.

Acquiescence – raised as defence against the grant of final interdict – not established that applicant for final interdict abandoned, renounced or surrendered the right it sought to enforce and tacitly consented to the continued infringement thereof.

General discretion of court to refuse or suspend final interdict when all the requisites for the grant of a final interdict have been met - now settled law that a court has discretionary jurisdiction, in exceptional circumstances, to suspend operation of final interdict, but not where the wrong complained of amounts to a crime, except where the maxim *de minimis non curat lex* finds application - contravention of the zoning provisions must be overlooked on the basis of *de minimis* - present use for office purposes pursuant to an approved application for rezoning which would give owner the right to use the property for office purposes - all that remains for coming into operation of the approved rezoning application is formality of publication of notice of the approval in the Provincial Gazette.

Final interdict granted, but its operation suspended.

JUDGMENT

MEYER, J

[1] This is an application in which the applicant, Makgosi Properties (Pty) Limited (Makgosi), seeks an interdict restraining the first, second and third respondents, Mr EH Fichard N.O., Ms DA Fichard N.O. and Ms N Kellet N.O. (the trustees), in their official capacities as the trustees of the Fichard Family Trust (the trust), and the fourth respondent, Efficiency Advertising and Marketing (Pty) Limited (EAM), from using or allowing the use of the trust property, being Portion 2 of Erf 819, Bryanston Township, Registration Division IR, Province of Gauteng and situated at 3 Portman Road, Bryanston, Johannesburg, for any purpose (and particularly not for business purposes) other than for dwelling houses as permitted and prescribed by its zoning as residential 1 in terms of the Sandton Town Planning Scheme 1980, for so long as the property is so zoned.

[2] EAM is in occupation of the trust property, which it uses as offices in conducting a design, advertising and marketing business, with 42 employees working there. Makgosi is the owner of an adjacent property, being Erf 820, Bryanston Township, which is being used for residential purposes. The application is opposed by the trustees and by EAM. The fifth respondent is the City of Johannesburg and the 6th – 23rd respondents are property owners in close proximity to the trust property. They are not opposing the application.

[3] The trust property is subject to the Sandton Town Planning Scheme, 1980 (the scheme). It is zoned residential 1 in terms of the zoning provisions of the scheme, and accordingly the only purpose for which it and the buildings thereon may

be used is for dwelling units, as defined in the scheme. Any other use is consequently prohibited. The use of the trust property as offices for business purposes in contravention of the scheme also constitutes an offence in terms of clause 33 of the scheme and s 58(2) of the Town Planning and Townships Ordinance 15 of 1986 (the Ordinance).

[4] On 4 June 2014, the trust gave notice in terms of s 5(5) of the Gauteng Removal of Restrictions Act 3 of 1996 (the GRR Act) in the Provincial Gazette (No. 125) of its application to the City of Johannesburg for the removal of certain conditions in the title deed in respect of the trust property and for the amendment of the scheme by the rezoning of the trust property from residential 1 to business 4, which would give the trust as owner the right to use the trust property for office purposes (the rezoning application). Should the rezoning application be successful the use by the trust and by EAM of the trust property for business purposes would be lawful. Makgosi and the 6th to 23rd respondents objected to the rezoning application.

[5] An 'authorized local authority', such as the City of Johannesburg, is enjoined to hold a hearing in respect of such application and the applicant, objectors and any person who made representations in respect thereof are heard at such hearing before the local authority considers and takes a decision to refuse or to grant the application on such conditions as it may deem fit. Notice of its decision must inter alia be given in the Provincial Gazette (s 6 of the GRR Act). An approved application comes into operation on the date stated in the notice, which date, in the case where objections were lodged or representations made or the application was approved subject to an amendment, must be not less than 28 days from the date of the publication of the notice. Otherwise it comes into operation on the date of the publication of the notice, except where an appeal is lodged (s 9).

[6] Section 7 of the GRR Act provides for an internal appeal by the applicant and any person who objected to the application and who is aggrieved by any decision of the local authority to the Townships Board, which body is to hear and consider the appeal and prepare a report for submission to the MEC (the member of the Executive Council of the Province designated by the Premier of the Gauteng Government) in which it, inter alia, recommends that the appeal be upheld or dismissed subject to any condition which it considers necessary. The MEC then considers the appeal, and dismisses or upholds it subject to any condition which he or she deems necessary. Notice of the MEC's decision is to be given without delay in inter alia the Provincial Gazette. The date of publication of this notice seems to be the date on which an approved application that unsuccessfully went on appeal comes into operation.

[7] Makgosi launched the present motion proceedings on 3 July 2015. It was heard by me on 24 February 2016 and judgment was reserved. In the interim, on 10 June 2016, the trustees and EAM filed a supplementary affidavit. Makgosi objected to the filing thereof. I accordingly heard further argument on 24 June 2016, inter alia on whether the filing of the supplementary affidavit should be permitted. I was informed by Makgosi that it did not wish to reply should the filing thereof be permitted. The supplementary affidavit deals with occurrences post the filing of the answering affidavit and the hearing of the matter on 24 February 2016. I consider the further evidence of such a degree of materiality in this case that its filing should be allowed. (See *Porterstraat 69 Eiendomme (Pty) Ltd v P A Venter Worcester (Pty) Ltd* 2000 (4) SA 598 (CPD) at 617H-I.)

[8] It is stated therein that the Municipal Planning Tribunal of the City of Johannesburg (the tribunal) notified all the parties to the rezoning application that a

hearing in respect thereof was convened for 31 May 2016, and that the hearing would be preceded by a site inspection of the trust property. The 6th to 23rd respondents withdrew their opposition to the rezoning application prior to that notification, and Makgosi remained the only objector. In opposing the rezoning application, Makgosi was represented by an attorney, Mr Roger Burman, who is a director of Makgosi's attorneys of record in these motion proceedings, Bowman Gilfillan Inc.

[9] Prior to the commencement of the site inspection, Mr Burman informed the tribunal that, although Makgosi was not prepared to formally withdraw its objection, it had no objection to the rezoning application being approved subject to the conditions proposed by the Development Planning Department of the City of Johannesburg. The need for the site inspection thus fell away and the parties were excused from attendance. The tribunal approved the rezoning application subject to the conditions proposed by the Development Planning Department of the City of Johannesburg. The approved rezoning application will accordingly, in terms of s 9 of the GRR Act, come into operation on the date stated in the notice which is to be published by the City of Johannesburg in the Provincial Gazette. The trustees say that they have no control over the date of publication of the notice.

[10] The necessary requisites for the grant of a final interdict are trite. The leading case on the subject is *Setlogelo v Setlogelo* 1914 AD 221 and the requisites therein stated have often been restated. They are (a) a clear right on the part of the applicant (b) an injury actually committed or reasonably apprehended and (c) the absence of any other satisfactory remedy available to the applicant.

[11] Makgosi's *locus standi* must be tested against the principle stated by Solomon J in *Patz v Greene* 1907 TS 427, at 433, namely:

'Everyone has the right . . . to protect himself by appeal to a Court of law against loss caused to him by the doing of an act by another, which is expressly prohibited by law. Where the act is expressly prohibited in the interests of a particular person, the Court will presume that he is damnified, but where the prohibition is in the public interest, then any member of the public who can prove that he has sustained damage is entitled to his remedy.'

As was pointed out by Margo J in *C.D. of Birnam (Suburban) (Pty) Ltd and others v Falcon Investments Ltd* 1973 (3) SA 838 (WLD), at 844F-G, the first part of the above quoted statement of the law was amplified in *Roodepoort-Maraiburg Town Council v Eastern Properties (Pty) Ltd* 1933 AD 87, at 96, and it was held that-

'[i]t is not necessary that the act should be expressly prohibited in the interests of the particular person who claims the interdict. It is enough if the prohibition is in the interests of a class of persons of which he is a member, and if the prohibition is impliedly in the interests of such class.'

(Also see *BEF (Pty) Ltd v Cape Town Municipality and others* 1983 (2) SA 387 (CPD), at 400D-H.)

[12] It is common cause that the trust and EAM are contravening the rezoning provisions of the scheme. Makgosi, therefore, must show either that such prohibition was enacted in the interests of property owners in its position, or that it has suffered loss or damage by reason of the breach. In my view it succeeded in establishing *locus standi* on the first ground defined in *Patz v Greene*.

[13] Section 19 of the Ordinance provides that-

' . . . the general purpose of a town-planning scheme shall be the co-ordinated and harmonious development of the area to which it relates in such a way as will most effectively

tend to promote the health, safety, good order, amenity, convenience and general welfare of such area as well as efficiency and economy in the process of such development.'

[14] 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. (See *Chapmans Peak Hotel (Pty) Ltd and another v Jab and Annalene Restaurants CC t/a O'Hagans* [2001] 4 All SA 415 (C), para 12.) A town-planning scheme is conceived in the general interests of the community to which it applies. It is intended to operate, not in the general public interest, but in the interest of the inhabitants of the area covered by the scheme and who would be affected by the particular provision in the scheme. (See *The Administrator, Transvaal and Firs Investments (Pty) Ltd v Johannesburg City Council* 1971 (1) SA 56 (A), at 70D; *BEF (Pty) Ltd v Cape Town Municipality and others* 1983 (2) SA 387 (CPD), at 400H-401C; *Chapmans Peak Hotel*, para 12.)

[15] As was held by Grosskopf J in *BEF*, at 401B-C, to be 'affected' by a particular provision as an inhabitant of the area covered by the scheme, the inhabitant need not be-

' . . . damnified in a financial sense. "Health, safety, order, amenity, convenience and general welfare" are not usually measurable in financial terms. Buildings which do not comply with the scheme may have no financial effect on neighbouring properties, or may even enhance their value, but may nevertheless detract from the amenity of the neighbourhood and, if allowed to proliferate, may change the whole character of the area. This is . . . the type of value which the ordinance and schemes created thereunder, are designed to promote and protect.'

[16] Protection of those interests or values falls within the ambit of municipal function. (See *Firs Investments*, at 70D, and *Chapmans Peak Hotel*, para 12.) Also,

‘a person is entitled to take up the attitude that he lives in a particular area in which the scheme provides certain amenities which he would like to see maintained’ and ‘he may take appropriate legal steps to ensure that nobody diminishes these amenities unlawfully.’ (Per Grosskopf, J in *BEF*, at 401E. Also see: *Chapman’s Peak Hotel*, para 13, and *Pick ‘n Pay Stores Ltd and others v Teazers Comedy and Revue CC and others* 2000 (3) SA 645 (WLD), at 653H-654D.) The nature of such a person’s right that is being infringed, so it was held by Griesel J in *Chapman’s Peak Hotel*, para 12, is his ‘. . . public law right to enforce compliance with the relevant zoning scheme.’

[17] Makgosi and the trust are owners of adjoining properties in the same use zone area. Makgosi’s property is used for residential purposes. Its objection to the unlawful use of the trust property as offices is against the impact that the use of the trust property for business purposes has on the amenities of the area. In its founding affidavit it states that it ‘. . . has an interest in the amenities of the neighbourhood and a clear right to the protection thereof.’ Makgosi is an immediate neighbour to the trust property on which the non-conforming business is conducted. In setting apart areas for residential purposes under the scheme, the legislature intended to confer on the owners of land in those areas the right to enforce the scheme.

[18] The breach by the trust and EAM of the zoning provisions of the scheme also constitutes ‘injury’ for purposes of the second essential requirement for final interdict relief, which was expressed in the classic formulation as ‘injury actually committed or reasonably apprehended’. (See *Setlogelo*, at 227.) The cause of Makgosi’s complaint is that the trust and EAM are using or causing the trust property to be used in violation of the zoning provisions of the scheme. To prove the necessary injury or harm it is enough for it to show, which it succeeded in establishing, that its right has

been invaded. (See *V&A Waterfront Properties (Pty) Ltd and another v Helicopter & Marine Services (Pty) Ltd and others* 2006 (1) SA 252 (SCA), paras 20-21.)

[19] I am, therefore, satisfied that Makgosi has established its *locus standi* and the first two requisites for the grant of the final interdict it seeks. Coming to the third and final requirement, the trust and EAM argued that an interdict was not the only appropriate remedy. They found authority for their contention - that in order to establish the final requirement Makgosi was required, but failed to show that a criminal prosecution would not be an adequate remedy - in the judgment of the Supreme Court of Appeal in *Food and Allied Workers' Union and others v Scandia Delicatessen CC and another* 2001 (3) SA 613 (SCA), paras 35-36 and 39, wherein it was held that 'in certain cases a criminal prosecution may well be an adequate remedy such as to disentitle a person to whom such remedy is available from obtaining an interdict' and that where a criminal prosecution would constitute an adequate alternative remedy, a final interdict should not be granted in circumstances where the applicant failed to place any evidence before the court as to why the institution of a prosecution would be an inadequate remedy.

[20] The *Scandia Delicatessen* appeal is distinguishable from the present application. That appeal arose from an application that was dismissed by Page J in the Durban and Coast Local Division of the High Court (reported as *Food and Allied Workers' Union and others v Scandia Delicatessen CC and another* 1999 (3) SA 731 (D)) in which he held that the high court does not have the power to make a committal order for contempt based upon non-compliance with a judgment of the industrial court ordering the reinstatement of the applicants in that case and that it is impermissible to attempt, indirectly, to confer that power on the high court by seeking to convert the industrial court's order into an order of the high court. In the

alternative it was held that, despite the fact that no power to commit for contempt based on non-compliance with an order *ad factum praestandum* was given to the industrial court, the legislature had made adequate provision for the execution of industrial court judgments by that court by virtue of the provisions of subsections 53(1) and 82(1) of the previous Labour Relations Act 28 of 1956 that were applicable to the dispute between the parties. Such provisions made non-compliance with any order made by the industrial court a criminal offence punishable with a fine not exceeding R2 000 or imprisonment for a period not exceeding two years or such imprisonment without the option of a fine or both such fine and such imprisonment. (See the SCA judgment, paras 2-12.)

[21] The Supreme Court of Appeal (per Farlam JA) held that, in essence, what was being sought was a final mandatory interdict and that the question required to be considered was whether the appellants had established the requisite that there was no other satisfactory remedy available, and particularly whether a criminal prosecution under s 53(1) was competent in the circumstances, and, if so, whether it was shown that such a prosecution would not be an adequate remedy (paras 22-27). Farlam JA concluded that a criminal prosecution under s 53(1) was competent (para 33) and that it had not been shown that such a prosecution would be an inadequate remedy for the appellants in that case (paras 34-40). Those findings were clearly fact specific and based on the circumstances of the appeal before the Supreme Court of Appeal. Farlam JA concluded the judgment in saying:

'It follows from what I have said that the unmotivated statement in *Minister of Health v Drums and Pails Reconditioning CC t/a Village Drums & Pails* 1997 (3) SA 867 (N) at 877E-G, that the fact that an Act provides by way of criminal sanction for an alleged contravention of its provisions is no bar to the granting of an interdict, is not correct for all cases.'

(Emphasis added.)

[22] The *Scandia Delicatessen* case and the present case are not comparable at all. There is a glut of authority (I have referred to some of them (*Firs Investments*, *BEF*, *Pick n Pay* and *Chapmans Peak Hotel*)) that inhabitants, particularly immediate neighbours to the affected property, can enforce, by interdict, compliance with a zoning scheme. These cases require a swift remedy to be applied against a party contravening a zoning scheme. As was stated by Griesel J in *Chapmans Peak Hotel*, para 18:

‘Once it is accepted that the nature of the right in question is a public right, then it must follow, in my view, that for continuing infringements of that right the only effective remedy is an interdict [See eg *Johannesburg City Council v Knoetze & Sons* 1969 (2) SA 148 (W) at 154A-155B and authorities referred to therein.], all the more so where such infringements amount to an offence [*Patz v Greene & Co* 1907 TS 427.].’

[23] I am, therefore, also satisfied that Makgosi established the third and final requisite for the grant of the final interdictory relief it seeks. It has a clear right to approach this court in order to prevent the continuous contravention of the zoning provisions of the scheme by the trustees and EAM. Its only effective remedy for asserting and protecting its right is an interdict, all the more so because the infringement thereof amounts to an offence. (See *Chapmans Peak Hotel* (supra), para 18.)

[24] The trust and EAM raised acquiescence as a further defence in argument before me on 24 June 2016. The final interdict should not be granted, they argued, because on 31 May 2016 Makgosi acquiesced in the rezoning of the trust property from residential 1 to business 4, which rezoning permits an office development on the trust property. They argued that in these circumstances, Makgosi is now

precluded by its acquiescence in their conduct from obtaining the interdictory relief it seeks. They relied on the decision in *Botha v White* 2004 (3) SA 184 (T), for their contention that an applicant, such as Makgosi, may be estopped by acquiescence from seeking an interdict to stop a continuous contravention of the zoning provisions of a scheme. The applicant in that case sought to interdict the respondent from continuing to conduct businesses from her property on the basis that the property was zoned agricultural and not business. The respondent took over existing businesses that were conducted on the property when she bought the property. She subsequently applied for, and was granted, without objection from the applicant, the necessary licences authorising her to conduct the businesses and she applied for a rezoning of the property, which application was pending. Patel J found that the applicant was estopped by acquiescence from seeking an interdict as he had for a period of over three years not complained about her conducting the businesses from the property and he had, in fact, been one of her customers (paras 24-34).

[25] In *Policansky Bros v Hermann & Canard* 1910 TPD 1265, at 1278-9, Wessels J said the following:

'It is a principle of our law that if a person has once acquired a right he is entitled at any time to vindicate that right when infringed, provided the period of prescription has not elapsed. This is the general rule, but in course of time exceptions have been grafted on to this rule. The equitable principle that if a person lies by with full knowledge of his rights and of the infringement of those rights, he is precluded from afterwards asserting them, has been adopted by our courts. It forms a branch of the law of *dolus malus*. The principle of lying by is not unknown to the civil law, though its application is not so often met with in our system of law as it is in English law. Sometimes the rights are lost through mere acquiescence, at other times by estoppel, as where the element of prejudice exists in addition to acquiescence. Thus acquiescence can be proved by definite acts or by conduct.'

[26] In *Burnkloof Caterers (Pty) Ltd v Horseshoe Caterers (Green Point) (Pty) Ltd* 1974 (2) SA 125 (C), at 137D-F, Friedman AJ said the following:

‘Acquiescence is, in my view, a form of tacit consent, and in this regard it must, however, be borne in mind that, as Watermeyer CJ said in *Collen v Rietfontein Engineering Works* 1984 (1) SA 413 (A) at 422:

“Quiescence is not necessarily acquiescence,” and that “conduct to constitute an acceptance must be an unequivocal indication to the other party of such acceptance”.’

(Also see: *Safari Surf Shop v CC v Heavywater and others* [1996] 4 All SA 316 (D) at 323i-j; *New Media Publishing (Pty) Ltd v Eating Out Web Services CC* 2005 (5) SA 388 (C), at 407E-I; *Harvey v Umhlathuze Municipality and others* 2011 (1) SA 601 (KZP), paras 180-182.)

[27] Whether a party can be said to have acquiesced in the conduct complained of is a question of fact. (*Burnkloof*, at 137B.) The acts or conduct relied upon to prove acquiescence must be unequivocal and inconsistent with any intention to enforce a party’s infringed right. As was said by Innes CJ in *Dabner v South African Railways and Harbours* 1920 AD 583, at 594, ‘[i]n doubtful cases acquiescence, like waiver, must be held to be non-proven.’ (See *Qoboshiyane NO and others v Avusa Publishing Eastern Cape (Pty) Ltd and others* 2013 (3) SA 315 (SCA), para 3.)

[28] I am unable to find, on the evidence presented in the supplementary affidavit, that Mr Burman’s statement to the tribunal - that although Makgosi was not prepared to formally withdraw its objection, it had no objection if the rezoning application is approved subject to the conditions as proposed by the Development Planning Department of the City of Johannesburg - amounted to a tacit consent on the part of Makgosi to allow the trust and EAM to indefinitely continue with their unlawful use of the trust property until such time as the rezoning is approved and comes into effect.

In other words, I am unable to find that Makgosi's conduct was unequivocal and inconsistent with an intention to enforce its public law right to compliance with the zoning provisions of the scheme. It does not necessarily follow from the fact that Makgosi did not have an objection to the rezoning application being approved subject to the conditions proposed that it has abandoned, renounced or surrendered the right that it sought to enforce in these proceedings or that it henceforth consented to the continued infringement of that right. Makgosi has brought the present application for interdictory relief despite the application for rezoning being pending. The enforcement proceedings in this court were for all practical purposes finalised and all that remained was for judgment to be delivered at the time when Makgosi elected not to oppose the rezoning application on the conditions proposed. This is, at best for the trust and EAM, a doubtful case of acquiescence and it, therefore, must be held to be non-proven. The facts in *Botha v White* and those in this case are clearly distinguishable. The defence of acquiescence must fail.

[29] Being satisfied that all the requisites for the grant of a final interdict have been met, it remains to be considered whether the interdict should nevertheless be refused or suspended. In *Lester v Ndlambe Municipality and another* [2014] 1 All SA 402 (SCA), para 23, the Supreme Court of Appeal endorsed the decision of the full court in *United Technical Equipment Co (Pty) Ltd v Johannesburg City Council* 1987 (4) SA 343 (T) on the question whether a court has a general discretion to refuse or suspend an interdict when all the requisites for the grant of a final interdict have been met. Majiedt JA, writing the unanimous judgment, said the following:

‘ . . . In *United Technical Equipment Co (Pty) Ltd v Johannesburg City Council* the Full Court was seized with an appeal against the granting of an interdict in the Local Division in terms whereof the appellant company (*qua* respondent *a quo*) was restrained from using property

which was zoned residential in terms of the Town Planning Scheme, for business purposes (offices). It was common cause that by using the property as offices, the appellant was committing an offence. The appellant's case was that the court should have suspended the interdict pending the final dismissal of his application to the Administrator for rezoning of the property. Harms J, writing for the Full Court, considered whether a court has a general discretion to grant or refuse an interdict. The learned Judge pointed out that in the leading case on interdicts, *Setlogelo v Setlogela*, this Court granted a final interdict, having been satisfied that all the requisites for the granting of a final interdict have been met, without considering at all whether it should, in the exercise of a discretion, refuse the interdict. Harms J also referred to *Peri-Urban Areas health Board v Sandhurst Gardens (Pty) Ltd* 1965 (1) SA 683 (T) [also reported at [1965] 2 All SA 211 (T) – Ed], where the court refused to suspend an interdict under similar circumstances because, as Clayden J put it: “where the breach of law interdicted is a breach of a statute a stricter approach is adopted.” As Harms J correctly explains what Clayden J meant to convey was not that there is a rule that a statutory right is stronger than a common law right, but simply that the statutory breach referred to is a breach which is visited by criminal sanctions (as is the case here). The following *dictum* of Harms J is apposite:

“It follows from an analysis of these cases that discretion can, if at all, only arise in exceptional circumstances. Furthermore, I am not aware of any authority which would entitle the court to suspend the operation of an interdict where the wrong complained of amounts to crime.”

Harms J added that ‘[t]he Court would thereby be abrogating its duty as an enforcer of the law.’

[30] The maxim *stare decisis* or the doctrine of precedent (see *Firstrand Bank v Kona & another* 2015 (5) SA 237 (SCA), paras 21-22) dictates that it must now be accepted as settled law that a court has the discretionary jurisdiction, in exceptional circumstances, to suspend or defer the operation of a final interdict. However, no

such discretion exists where the wrong complained of amounts to a crime, except where the maxim *de minimis non curat lex* (the law is not concerned with trivia) applies. (See *Bitou Local Municipality v Timber Two Processors CC and another* 2009 (5) SA 618 (CPD), paras 26-32.) Absent such discretion, a court has to ‘. . . uphold the rule of law, refuse to countenance an ongoing statutory contravention and enforce the provisions of the Act.’ (Lester, para 28.)

[31] I am of the view that, as from 31 May 2016, the contravention of the zoning provisions of the scheme by the trust and EAM must be overlooked on the basis of *de minimis*. The trust is presently using the trust property for office purposes pursuant to an approved application for the rezoning of the trust property from residential 1 to business 4. It can safely be accepted that any appeal against the decision of the City of Johannesburg approving the rezoning application subject to certain conditions is unlikely. Makgosi and the 6th to 23rd respondents were the only objectors. The 6th to 23rd respondents withdrew their objections and Makgosi did not object to the rezoning application being approved subject to the conditions proposed by the Development Planning Department of the City of Johannesburg. No hearing was accordingly held and the rezoning application was approved subject to those conditions that were acceptable to Makgosi and the other objectors. It seems that all that remains for the coming into operation of the approved rezoning application is the formality of publication of the notice in the Provincial Gazette. These circumstances are exceptional and this court, therefore, has the discretionary jurisdiction to suspend the operation of the final interdict, which should be granted.

[32] Finally, the matter of costs. Makgosi remains substantially successful and no cause exists for departing from the normal rule that costs follow the result. But Makgosi seeks a punitive costs order against the trustees and EAM on the grounds

that they resorted to procedural stratagems and dilatory tactics to delay the finalisation of this matter until such time as the trust's pending rezoning application was considered by the City of Johannesburg.

[33] On the eve of the expiry of the *dies* to file their answering affidavits the trustees and EAM delivered a notice in terms of rule 35(12) of the Uniform Rules of Court wherein they requested the production of some 52 documents. The documents sought were in their own possession as they formed part of the objections to the proposed rezoning of the trust property. Subsection 5(8) of the GRR Act enjoins a local authority to send to an applicant by registered post a copy of every objection received within a period of 14 days after the closure of the period of objection. Not a single document sought in the notice in terms of rule 35(12) was referred to in the answering affidavit that was eventually filed. The procedural stratagem employed by the trustees and EAM, according to Makgosi, delayed the filing of the answering affidavit and resulted in the matter not coming before this court before the end of 2015.

[34] It seems to me that Makgosi is correct in its contention that the trustees and EAM resorted to procedural stratagems and dilatory tactics that were primarily designed to buy them time and keep Makgosi out of its legitimate remedy. A punitive costs award on the scale as between attorney and client, therefore, seems justified and appropriate in all the circumstances. (See *Delfante and another v Delta Electrical Industries Ltd and another* 1992 (2) SA 221 (C) at 233.)

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

- (a) Subject to the provisions of paragraph (b) hereof, the first to fourth respondents are interdicted and restrained from using or causing or permitting

the use of the immovable property known as Portion 2 of Erf 819 Bryanston Township, Registration Division IR, province of Gauteng, and situated at 3 Portman Road, Bryanston, Johannesburg (the property) for any purpose (and particularly not for business purposes) other than for dwelling houses as permitted and prescribed by its zoning residential 1 in terms of the Sandton Town Planning Scheme, 1980 (the scheme) for so long as the property is so zoned.

- (b) The operation of the interdict referred to in paragraph (a) hereof is suspended until the date on which the 1st to 3rd respondents' approved application for the removal of certain conditions in the title deed relating to the property and for the amendment of the scheme by rezoning the property from residential 1 to business 4 (the application), comes into operation as contemplated in section 9 of the Gauteng Removal of Restrictions Act 3 of 1996 (the Act), or until the setting aside of the approval and refusal of the application on appeal in terms of section 7 of the Act, whichever is the earlier.
- (c) The first to fourth respondents are to pay the applicant's costs of suit on the scale as between attorney and client.

P.A. MEYER
JUDGE OF THE HIGH COURT

Dates of hearing:	24 February and 24 June 2016
Date of judgment:	13 July 2016
Counsel for applicant:	AW Pullinger
Instructed by:	Bowman Gilfillan Inc., Sandton
Counsel for 1 st – 4 th respondents:	HF Oosthuizen
Instructed by:	Richard Meaden Inc., Bedfordview