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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case number: 13661/2021

In the matter between:

ALBERT CHARL KRUGER

Applicant

and

BIRKENHEAD CONVENIENCE CENTRE (PTY) LTD

t/a SASOL MELKBOSSTRAND

First respondent

THE CITY OF CAPE TOWN

Second respondent

Coram: Van Zyl, AJ

Heard on: 13 October 2025, final submissions made on 17 October 2025

Judgment: : 3 February 2026

Summary: Interpretation - City of Cape Town Municipal Planning By-law, 2015 – Development Management Scheme - whether a service station may retail liquified petroleum gas from land not zoned for Risk Industry use – zoning of property in question General Business 1, coupled with consent use approval - such retail lawful on the facts

Costs – issue for determination squarely one of interpretation – no constitutional aspects raised – the *Biowatch* principle does not apply in favour of the applicant in relation to the second respondent's costs

ORDER

The application is dismissed, with costs, including the costs of two counsel in respect of the City. Counsel's fees are to be taxed on Scale C.

JUDGMENT

VAN ZYL, AJ:

Introduction

1. This application concerns a question of interpretation:¹ does the City of Cape Town's development management scheme (DMS), read with the relevant provisions of its Municipal Planning By-law, 2015 (the By-law),² permit liquified petroleum gas (LPG) to be retailed from a property with a business zoning that has been authorised, by way of consent use, for the operation of a service station?³
2. The applicant contends that the DMS does no such thing. He argues that the operation of an LPG facility at the property in question is unlawful because the property is not zoned for Risk Industry (RI) under the DMS.⁴ He accordingly seeks a *declarator* that the operation of infrastructure for the

¹ The papers are voluminous and traverse wide-ranging disputes, but the parties have narrowed the issue for determination by agreement.

² The DMS is promulgated as part of the By-law.

³ The development rules relating to service stations are found in Item 57 of the DMS.

⁴ The RI zoning is dealt with in items 74 to 79 of the DMS.

storage and supply of LPG in the property is contrary to section 35(2)⁵ of the By-law. He also seeks interdictory relief prohibiting the first respondent from operating an LPG facility on the property *“until such time as it has obtained the necessary land use permissions to do so under the By-law”*.

3. The respondents disagree. They make common cause in saying that on a proper interpretation of the relevant legislation an RI zoning is not necessary to store or sell LPG. A consent use approval for the property to operate a service station is a sufficient land use permission to operate an LPG facility there.
4. On 8 August 2025 (after the institution of this application) the City promulgated various amendments to the By-law.⁶ The amendments came into effect on 1 October 2025, and they were therefore operative when this matter was argued. Although the affidavits deal only with the By-law as it stood prior to the amendments, the parties were agreed that the 2025 amendments apply to this case because this court must consider the current law in deciding whether to grant an interdict. An interdict cannot remedy past illegalities; it can only be issued to address current or future infringements of the law.⁷ The matter was thus argued on the basis of the 2025 amendments.
5. On a proper interpretation of the By-law and the DMS, then, what is the position? In my view the applicant’s interpretation cannot be accepted. I am reminded of what was said in *Arprint Ltd v Gerber Goldschmidt Group South Africa (Pty) Ltd*:⁸

“Language is at best an imperfect vehicle for expressing thought and intention and resort must from time to time be had to rules of construction. But where, as in this

⁵ Section 35(2): *“No person may use or develop land unless the use or development is permitted in terms of the zoning scheme or an approval is granted or deemed to have been granted in terms of this By-law”*.

⁶ Under Proclamation 9/2025 Province of the Western Cape: *Provincial Gazette Extraordinary* 9117 dated 8 August 2025.

⁷ *National Treasury and others v Opposition to Urban Tolling Alliance and others* 2012 (6) SA 223 (CC) para 50; *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA) para 20.

⁸ 1983 (1) SA 254 (A) at 262F-H.

case, the plain and natural meaning of the word is clear there can be no call for the application of the contra proferentem and contra stipulatorem rules. The only rule of construction which might assist the plaintiff is that cited by Lord ATKIN in Liversidge v Anderson (1941) 3 All ER 338 at 361 from Lewis Carroll's masterpiece:

"When I use a word", Humpty Dumpty said in rather a scornful tone, 'it means what I choose it to mean, neither more nor less'. 'The question is', said Alice, 'whether you can make words mean different things'."

Counsel has not persuaded me that I can make the words "any legal action" mean "only a particular legal action" or "only a legal action on an existing cause of action".

6. In the present application, too, it is not necessary to invoke rules of construction to establish the proper interpretation of the By-law. The meaning is plain, and counsel for the applicant has not persuaded me that I can make the text, with context and purpose, mean something different.

The property, and the land use authorisations attaching thereto

7. The first respondent is the registered owner of Erf 4[...] Melkbosstrand, which measures 3 272m² in extent. It is located in a typical suburban setting, surrounded by residences, businesses, and community facilities.
8. Under the DMS⁹ the property is zoned General Business Subzone 1 (GB1). The first respondent's predecessor-in-title developed a Sasol-branded service station on the property during 2004 with the City's approval, together with the necessary environmental approvals from the Western Cape Provincial Government.
9. The property enjoys, in addition, a consent use approval under the DMS that permits the operation of a service station. The first respondent is the proprietor of the service station. Its central location renders it well-suited for a service station and – the bone of contention in this application - the retail supply of LPG. This, and most of the material facts underpinning this matter,

⁹ Item 59(b).

is not disputed on the papers but in any event falls to be accepted on the principles set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*,¹⁰ as the applicant seeks final relief on motion.

10. The 2004 development consisted of a full retail forecourt with four service islands, each with two dispensers and a retail outlet. The retail of fuel included the sale and distribution of LPG, and the facility included a cylinder manifold used to fill cylinders on site. On 27 July 2011, under the National Building Regulations and Building Standards Act 103 of 1977 (NBR), the City approved the construction of a 5 000kg (5 tonnes) LPG facility on the property.
11. During 2020 the first respondent made application to the City in terms of section 42(j) of the By-law for the amendment of the existing approval granted to increase the storage and handling capacity of LPG, and to provide for an Autogas dispenser on the forecourt. The application was assessed in terms of section 97 of the By-law, and submitted to various branches within the City prior to approval.
12. Section 99 of the By-law sets out the criteria for deciding an application. An application must be refused under section 99(1) if the City is satisfied that it fails to comply with certain minimum threshold requirements. Subsection 99(2) provides that if an application is not refused under subsection (1), when deciding whether or not to approve the application, the City must consider all relevant considerations, including those listed in the subsection.
13. Subsection 99(3), which deals with the desirability of the proposed land use, imposes a duty on the City to consider the extent to which the proposed land use would be desirable in terms of, amongst other factors, the socio-economic impact, compatibility with surrounding uses, its impact on the safety, health and wellbeing of the surrounding community, traffic impacts, parking, access and other transport related considerations; and the

¹⁰ 1984 (3) SA 623 (A) at 634G-635C.

imposition of conditions that can mitigate an adverse impact of the proposed land use.

14. On 11 December 2020 the City approved the first respondent's application for the amendment of the conditions of the previous approvals on the bases that the proposal was permitted under the DMS and conformed to the built form, no additional land use rights were being applied for and the proposal was in line with the original approval granted in terms of the land uses permitted, the proposal was supported by all of the relevant internal departments to whom the application was circulated for comment; and the application was in line with the criteria set out in section 99 of the By-law.
15. Earlier that year, on 24 April 2020, the City had approved new building plans for the property to cater for an expanded facility comprising a 50 cubic metre underground LPG storage tank, auto gas filling (that is, infrastructure for the refuelling of vehicles with LPG), cylinder filling, and cylinder storage. The facility's total LPG storage capacity is 42 tonnes (42 000kg).
16. Up until 31 January 2023, the LPG outlet constituted a "major hazard installation" under the Occupational Health and Safety Act 85 of 1993 (OHSA).¹¹ It is currently recognised as a "hazard establishment" in terms of the Major Hazard Installation Regulations, 2022.
17. The applicant contends that the only zoning under the DMS upon which an LPG facility such as the first respondent's may lawfully be operated is that of Risk Industry. The bases for this contention shifted throughout the proceedings (mainly because the applicant was confronted, as the litigation progressed, with the consequences of material concessions made that fundamentally undermined his case) but they appear to culminate in the notion that a *"a more liberal regime...applies to the special category of risk activity 'service stations'"*. As will become clear, the applicant is driven to

¹¹ Section 1 of the OHSA, and see the Major Hazard Installation regulations, 2022 promulgated under the OHSA, published under GN R2989 in *Government Gazette* 47970 of 31 January 2023, read with the explanatory note published under GenN 2841 in *Government Gazette* 51628 of 20 November 2024.

make this submission because he concedes, on the papers, that the operation of a service station constitutes a risk activity that may lawfully be operated in various zones, including the GB1 zone.

18. The applicant places much emphasis on what he regards as public safety concerns as underpinning his application. The first respondent, on the other hand, argues that the applicant is not socially-minded, but that his interest in the matter is purely commercial, and that the application was brought for an improper purpose because the first respondent is a competitor of the business in which the applicant has an interest. This aspect becomes relevant in relation to the question of costs, and I shall revert to it at that juncture.

The proper interpretation of the DMS in the context of the City's constitutional competence and the relevant principles of statutory interpretation

19. It is necessary, at the outset, to consider the City's legislative powers in regulating the operation of LPG facilities such as the one in the present matter. The principles underlying the interpretation of the City's legislation are touched upon thereafter.
20. Under the Constitution of the Republic of South Africa, 1996, the City is exclusively responsible for administering municipal planning matters in Cape Town. It has original legislative powers regarding such matters which entail *"a regulatory and policy-making role more than a mere authority to administer and implement prescripts"*.¹²
21. The City adopted the By-law, including the DMS, pursuant to these powers. The DMS thus has legislative force under the Constitution.¹³ Section 26(3) of

¹² *Cape Town City v Independent Outdoor Media (Pty) Ltd and others* 2024 (1) SA 309 (CC) paras 45; and 47-48. See section 156(1)(a) and (2) of the Constitution, read with Schedule 4B; *Fedsure Life Assurance Ltd and others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) paras 26 and 38; *City of Cape Town and another v Robertson and another* 2005 (2) SA 323 (CC) paras 53-60.

¹³ Section 43(c) read with 156(2) of the Constitution.

the By-law itself provides that “[t]he development management scheme is an integral part of [the] By-law and it has the force of law”.¹⁴ The DMS regulates a complex, policy-laden intersection of rights, obligations, and interests, including use rights, spatial policies and social inclusion, economic and sustainable development, environmental protection, and public health.¹⁵ It is by now trite that the policy choices it reflects are, as a requirement of the doctrine of separation of powers, owed due deference in recognition of the City's constitutional legislative competence, its findings of fact and policy, and its expertise and experience.¹⁶ Insofar as policy (amongst other factors) informs interpretation, I cannot agree with the applicant's submission that the evidence on record in these proceedings are to be considered without deference to the City in relation to policy, simply because the dispute entails a discrete question of statutory interpretation which is the sole province of this Court.

22. The applicant suggested in argument that the retailing of LPG could have been addressed *“through smaller supply operations, which are commonplace and routinely authorised by the City”*. The City's explanation of the DMS's legislative purpose regarding the regulation of the retail of LPG and other fuels, as well as its justifications therefor, are however uncontradicted on the papers. It is thus not open to the applicant to call those purposes and justifications into question in his legal submissions. The DMS itself stands unchallenged, and the parties and this court are bound to accept and apply its provisions as adopted by the legislature.¹⁷ Put differently, the applicant may not question the lawfulness of the LPG facility based on his disagreement with the DMS's provisions or his view that the DMS could have achieved its objectives in a different manner.¹⁸

¹⁴ See *Walker v City of Cape Town and others* [2024] 2 All SA 612 (WCC) para 14.

¹⁵ See section 26 of the By-law.

¹⁶ See *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* 2004 (4) SA 490 (CC) paras 46-49 in relation to administrative action, but also applicable to legislation.

¹⁷ *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and others* 2014 (1) SA 521 (CC) paras 40-47.

¹⁸ *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) paras 77-78.

23. As a basic premise, the interpretation of legal documents requires the consideration of the triad of text, context and purpose. The applicable principles of interpretation (including statutory interpretation) are, in brief, that words must be given their ordinary meaning, unless doing so would result in an absurdity. Provisions must be interpreted contextually, purposively and as far as reasonably possible in conformity with the Constitution,¹⁹ and a sensible interpretation should be preferred to an insensible one. Courts must guard against inserting what they think a reasonable, sensible or businesslike outcome would be, because that trespasses from interpretation into legislation.²⁰

Text

24. In terms of section 35(2) of the By-law, no-one may use or develop land unless permitted by the zoning scheme or through a municipal-planning approval. Section 1 of the By-law defines “approval” to mean a *“permission including any conditions, granted or deemed to have been granted in terms of this By-law; and when a permission is granted on appeal in terms of this By-law, ‘approval’ means only that decision including any conditions”*.
25. Section 25(1) of the By-law provides that the zoning scheme comprises the DMS, zoning, map and zoning register. Under section 26(1)(a) of the By-law the DMS regulates, *inter alia*, use rights and how land use is controlled. Section 1 of the By-law defines a “use right”, in relation to land, *“the right to use that land in accordance with its zoning, a departure, consent use, condition of approval or any other approval granted in respect of the rights to use the land.”*²¹
26. It is common cause that the consent use approval granted in respect of the

¹⁹ *Minister of Water and Sanitation and others v Lotter NO and Two Similar Cases* 2023 (4) SA 434 (CC) para 19.

²⁰ See *Close-Up Mining and others v Boruchowitz NO and another* 2023 (4) SA 38 (SCA) para 23; *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18; *Chisuse and others v Director-General, Department of Home Affairs and another* 2020 (6) SA 14 (CC) para 48.

²¹ My emphasis.

property in this matter constitutes a municipal planning approval for purposes of the By-law. The consent use allows the property to be used for the purposes of a “service station”. “Service station” was, prior to the By-law’s amendment, defined in item 1 of the DMS as *“property for the retail supply of fuel, and includes trading in motor vehicles, oil, tyres or motor spares, general repairs to motor vehicles, exhaust fitment, shock absorber fitment, washing of vehicles, and an ancillary shop; but does not include spray-painting, panel beating or body work”*.²²

27. It is also common cause on the papers that what constitutes “fuel” is not defined in the DMS or the By-law, and that the concept must therefore be given its ordinary meaning,²³ which includes gas that is burned to produce heat or power, that is LPG.²⁴ It is also not disputed that the retailing of fuel necessarily entails storing it on site. Clearly, therefore, under the pre-amendment text of the DMS the concept of “service station” included the retail sale of LPG. The DMS did not (and still does not) place a limit on the quantity of LPG that a service station could sell or store.

28. As indicated, after the institution of this application – challenging whether a service station may sell LPG - the City amended the definition of “service station” to read as follows (the relevant addition is underlined):

“[S]ervice station’ means property for the retail supply of fuel, and includes trading in motor vehicles, oil, tyres or motor spares, general repairs to and servicing of motor vehicles, exhaust fitment, shock absorber fitment, washing of vehicles, the sale of LP gas or similar fuel and an ancillary shop; but excludes spray-painting, panel beating or body work”.

29. The applicant says that the issues in this application are “*complicated somewhat*” by the fact that material provisions of the DMS have been

²² My emphasis.

²³ *National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others* 2000 (2) SA (CC) para 25.

²⁴ See section 1 of the Petroleum Products Act 120 of 1977, which defines LPG as “a petroleum product which consists mainly of propane or butane or both and which can be stored as a liquid under relatively low pressure for use as a fuel”.

amended in the period between the delivery of the affidavits and the hearing of the application. I fail to see the complication. The amendment places beyond dispute that a service station may sell and store LPG. This is because, as the text indicates, the definition consists of an operative phrase (“the retail supply of fuel”), various examples of what may be included in the business of retailing fuel, and various exclusions. The “sale of LP gas or similar fuel” is introduced as an express example of “the retail of fuel”. It is not a separate concept or a different kind of activity separate from the retail supply of fuel. Had the City intended to restrict the sale of LPG as suggested by the applicant, the LPG-specific amendments to the definition of “service station” would have said so. Thus, regardless of the pre-amendment position, from 1 October 2025 onwards LPG may, on the plain text of the By-law, be sold and stored at a property whose zoning permits “service station” as a land use.

30. The applicant nevertheless persists in the contention that service stations may not sell LPG or that LPG may be sold only from RI zonings. He argues that the amendment of the definition of “service station” shows that “the retail supply of fuel” is distinct from “the sale of LP gas or similar fuel”. In other words, the amended definition includes a list of activities ancillary to the principal activity entailed in the use rather than specific examples.
31. I agree with the City’s submission, however, that that is a distinction without a difference. Everything between the words “fuel” and “shop” in the definition consists of an iteration of the types of activity that may be conducted at a service station. A service station, by definition, is engaged in “the retail supply of fuel” as defined in the DMS. The words following “and includes” logically and necessarily set out different examples of what constitutes ‘the retail supply of fuel’ under the DMS. It is untenable to contend that “the sale of LP gas” is a new concept, unrelated to the overarching concept of “the retail supply of fuel”. In fact, the applicant himself contradicts that contention by admitting that LPG can be used as a fuel in internal combustion engines in vehicles, and that the supply of fuel to vehicles falls within “the retail supply of fuel”. Nowhere on the papers has it been suggested that “retail supply” does

not include “sale” or that “fuel” excludes all forms of LPG.

32. A further argument raised by the applicant is that service stations are only permitted to retail “cylinder LPG” for “non-vehicle purposes”, and only pursuant to the authority to operate an ancillary shop.²⁵ There is, however, no such restriction in the DMS, and no basis upon which it can sensibly be inferred from the text. As the applicant himself observes, it is well-established that the definitions in the DMS should not be interpreted in a way that defeats the purpose of the substantive provisions of the DMS.²⁶
33. The DMS does not create a special dispensation for LPG sold in cylinders at service stations. It does regulate how LPG is stored and sold in certain instances. A house shop, for example, is prohibited from storing gas for sale and from engaging in the “sale of gas containers”.²⁷ Had the DMS intended to regulate how service stations may store or sell LPG for non-vehicle purposes, its provisions regarding service stations would have done so expressly. It does not do so, because the sale and storing of LPG at service stations are regulated in the same manner, whether intended for vehicular or non-vehicular use. The ancillary shop must be located on the same property as the service station, as an ancillary shop is within the service station. There is no safety, structural or other reason why only the shop should sell non-vehicular LPG.
34. The applicant extracts more marrow from the “shop” bone: he argues that a service station selling LPG is a shop, which may not undertake a “risk activity”.²⁸ He contends that the definition of “shop” in the By-law means that any enterprise at a service station involving the sale of LPG or similar fuel is to be regarded as a shop as defined. A place where a risk activity is

²⁵ The shop must be “ancillary” and therefore “*directly related to, and subservient to, the lawful, dominant use of the property*”: see the definition of “ancillary” in item 1 of the DMS.

²⁶ *Fundtrust (Pty) Ltd (in liquidation) v Van Deventer* 1997 (1) SA 710 (A) at 726H-J.

²⁷ Item 28(f) of the DMS.

²⁸ Defined in Item 1 of the DMS as as “*an undertaking where the material handled or the process carried out is liable to cause combustion with extreme rapidity, give rise to poisonous fumes, or cause explosion, and includes major hazardous installations and activities involving dangerous and hazardous substances that are controlled in terms of national legislation*”.

conducted, so the argument goes, cannot be a business premises or a shop, and thus, to avoid “*irreconcilable inconsistency*” with the definitions of “business premises” and a “shop”, a service station may not sell LPG in quantities that render it a risk activity.

35. One returns to the text of the By-law: the amended definition of shop²⁹ reads as follows:

“[S]hop' means property used for the retail sale of goods and services to the public, and includes a retail concern where goods which are sold in such a concern are manufactured or repaired; provided that the floor space relating to such manufacture or repair shall not comprise more than 40% of the floor space of the shop; but excludes an industry, supermarket, service trade, motor repair garage, service station (except the sale of LP gas or similar fuel), restaurant, adult entertainment business, adult services, adult shop or sale of alcoholic beverages.”

36. This means that a “shop” is “*property used for the retail sale of goods and services to the public*”. It does not include a “service station”,³⁰ but it may sell LPG or similar fuel to the public. The definition does not mean that any enterprise at a service station which sells LPG is a shop. It only provides that a shop may sell LPG. That, in turn, does not mean that a service station may not sell LPG: it would be irrational and inconsistent with the purpose of the DMS (about which more below) to hold that a service station without a shop could not sell LPG to vehicles.

37. In any event, a shop as defined in the By-law does not exclude the undertaking of a “risk activity” as defined. Only “business premises” (and “industry”) are limited by the express exclusion of risk activity, which means that business premises does not permit the sale of LPG if it would be constitute a risk activity (unless another land use permits such an endeavour). No such limit applies to a service station, which may sell and store LPG or similar fuel even where it constitutes a risk activity. The fact

²⁹ In Item 1 of the DMS. My emphasis.

³⁰ Without the express exclusion it would, because both constitute the retail sale of goods to the public.

that a service station is not subject to the same limits as business premises does not create an inconsistency. It simply reflects that they are different land uses with different objectives and requirements. This aspect is dealt with in more detail later in this judgment.

38. Having referred to the text, it is necessary to look closer at the relevant context, and the purpose of the DMS.

Context

39. The DMS regulates the use of land, but also (in terms of section 26(1) thereof) facilitates the implementation of spatial policies, facilitates the efficient, economic and sustainable use of land, and protects areas against adverse development. Under the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA), the DMS is a “land use scheme” that is consistent with SPLUMA. This relationship is referred to in the fifth paragraph of the preamble to the By-law:

“WHEREAS section 2(2) of the Spatial Planning and Land Use Management Act (Act 16 of 2013) permits other legislation to prescribe an alternative or parallel mechanism, measure, institution or system on spatial planning, land use, land use management and land development in a manner consistent with that Act, and the City intends through this By-law to prescribe such a mechanism, measure, institution and system.”³¹

40. The DMS itself therefore provides a contextual framework for understanding what activities are permitted at a service station, as defined, within the allocated zoning. There are nine general categories of zoning, as well as various subzones. Each zoning comprises a zoning category, the purposes for which the land may be used, and the development rules that set out the permissible extent of the land use.³²

³¹ See also sections 24(2) and 25(1) of SPLUMA.

³² The Western Cape Land Use Planning Act, 2014, as provincial framework legislation, also addresses the minimum functions of a zoning scheme. Section 23 provides that the “purpose

41. The property's zoning, namely GB1, falls within the prescribed zoning category of "*general business*". General business zonings are "*designed to promote economic development in business districts and development corridors, and include a wide range of land uses such as business, residential and community uses, although industrial development is restricted*".³³
42. These zonings provide for general business activity and mixed-use development of a medium to high intensity. Different development rules apply to the different subzonings of GB1-GB7, particularly with regard to permitted height and floor space, to accommodate variations of built form within the city. Notably, very few restrictions relate to use because the express aim is to encourage a range of uses (with the proviso that industry is not permitted).³⁴ The GB zonings are therefore deliberately permissive, and allow for wide-ranging uses to promote economic development and diversification. The only restriction concerns industrial development, which is not relevant to the sale of LPG. This is because under the DMS industrial uses are generally concerned with manufacturing. A typical industrial use is a factory or similar place where items are made, assembled, processed, repaired, painted, packed, placed in cold storage, and so forth. Since the retailing of fuel, including LPG, is not a manufacturing or industrial use, the prohibition of industry in GB does not preclude the sale of LPG in that zoning.³⁵
43. The DMS prescribes "primary uses" and "consent uses" for each identified zoning. A primary use is permitted on the relevant property without the need first to obtain the City's approval - it attaches, in terms of Item 10 of the DMS, as of right to the zoning. A consent use is specified in the DMS but may only be acted upon with the express prior approval of the City, as stipulated in

of a zoning scheme is to at least- (a) make provision for orderly development and the welfare of the community; and (b) determine use rights and development parameters... "

³³ See the introduction to Chapter 9 of the DMS.

³⁴ See the introduction to Part 1 (General Business Subzonings) of Chapter 9 of the DMS.

³⁵ See the introduction to Chapter 10 of the DMS, as well as the introduction of Part 1 of Chapter 10, read with the definition of "*industry*" in item 1 of the DMS.

Item 13 of the DMS.³⁶

44. The DMS permits a wide range of primary uses for GB erven, namely *“business premises, dwelling house, second dwelling, boarding house, flats, place of instruction, place of worship, institution, hospital, place of assembly, place of entertainment, hotel, conference facility, service trade, authority use, utility service, rooftop base telecommunication station, multiple parking garage, private road, filming, veterinary practice and open space”*.³⁷
45. It is clear that these primary uses include a diversity of residential, business, and community uses. They allow large developments, such as schools, universities and research institutions (“places of instruction”), hospitals, hotels, and conference facilities, sports centres and stadiums (“places of assembly”), and amusement parks (“places of entertainment”). They also allow uses with potentially significant impacts on their surrounds, including gambling halls and nightclubs (“places of entertainment”), builders' yards and tyre fitment centres (“service trades”), veterinary practices, telecommunications infrastructure, water purification plants, waste-water pump stations, waste-water treatment works, recycling facilities and dumpsites (“utility services”); and fire stations, military bases, and police stations (“authority uses”).
46. The DMS permits, too, various consent uses for GB erven, namely *“adult shop, adult entertainment business, adult services, informal trading, expo centre, motor repair garage, warehouse, freestanding base telecommunication station, wind turbine infrastructure, transport use, helicopter landing pad and service station”*.³⁸
47. The variety in primary and consent uses reflects the DMS's goal of allowing many uses (other than industrial) on GB properties to promote economic

³⁶ For example, an owner may build a dwelling house on their single residential property as of right (because it is a primary use) but the same owner would have to obtain the City's consent to operate a guest house on that property.

³⁷ Item 59(a) of the DMS.

³⁸ Item 59(b) of the DMS.

development and diversification. The City submits that, in this context, allowing service stations to sell and store LPG as part of the retail supply of fuel in several zonings is a requirement of sensible land use planning.

Purpose

48. Turning to purpose: the purpose of the DMS's provisions regarding service stations is explained in the City's explanatory affidavit, and is undisputed.
49. Fuel is vital for everyone in society - there is almost no aspect of modern life that could function without it. Its everyday uses range from facilitating transport to providing heat. In the modern context, and particularly in a large city such as Cape Town, it is necessary to have a nearby source of fuel. Retailing fuel (including LPG) has become a well-integrated feature of modern urban areas, and such retail facilities are ubiquitous in residential, business and mixed-use areas. Societies accept, expect, and depend on them.³⁹ In Cape Town there are approximately 367 service stations located throughout heavily populated and trafficked residential, business, and other areas to maximise their functionality, utility, and accessibility.
50. The retailing of fuel necessarily includes the on-site storage of that fuel. Thus, a service station is permitted both to sell fuel and to store the fuel it intends to sell. LPG can be used as a fuel for vehicles and, given its reduced carbon emissions, is a comparatively green fuel that assists in combatting climate change. It should therefore be made available with other vehicular fuels, such as petroleum and diesel. LPG and other fuels (such as petroleum and diesel) constitute similar land uses (the supply of energy), have similar hazards and risks (including the storage of combustible substances, the emission of poisonous fumes, and the possibility of an explosion), have similar social and public benefits (providing essential energy sources and thereby supporting social and economic functioning), and similar spatial and safety requirements (such as sufficient space, appropriate infrastructure for delivery, transfer and

³⁹ As many a Capetonian running out of gas for the heater or stove on a rainy winter's evening would know.

storage). It is therefore logical, coherent and sensible for these fuels to be regulated in the same way, pursuant to the same controlling concept, that is, on the City's case, a "service station" and the associated development rules.

51. It is for these reasons that the legislative policy of the City, and the purpose of the DMS, is to allow the retailing of fuels (whether for vehicles or otherwise, and whether in the form of petroleum, diesel or LPG) from a "service station", to regulate these activities in the same way. In the present matter, for example, the building plans approved the LPG facility for cylinder filling, cylinder storage and auto gas filling. This is because the relevant legislation regulates the retailing of LPG for vehicles (that is, Autogas) and LPG for non-vehicular consumption in the same manner in respect of service stations. The City's policy further aims to allow service stations to operate from a wide range of zonings, including industrial, local business, general business, mixed-use, RI and transport zones.
52. The applicant has not disputed any of these allegations.⁴⁰ A belated attempt was made in his heads of argument to question the validity of the City's evidence on context and purpose on the basis that the City's deponents did not have the requisite knowledge to provide such evidence. However, on the papers none of the City's deponents' allegations regarding knowledge and authority were denied, nor did the applicant dispute that the explanatory affidavit had properly been delivered on the City's behalf. The last-ditch attempt to undermine such evidence is therefore without merit.
53. The applicant argues that the "retail supply of fuel" in the definition of "service station" only permits the supply of fuel to vehicles, and does not allow the retail supply of fuel for other purposes. He contends that the various activities included in the definition of a service station are wholly concerned with aspects of maintaining and operating motor vehicles.'
54. I do not agree with this contention. At a basic level, a service station is

⁴⁰ *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235F.

permitted to have an “ancillary shop”, and there is no requirement that such a shop may only retail goods that pertain to the maintenance and operation of motor vehicles. Such shops commonly retail food, beverages and other goods that have nothing to do with vehicular requirements. Textually, the By-law does not restrict the supply of fuel to vehicles.

55. Such a restriction would be inimical, too, to the context and purpose of the DMS referred to above. The uncontradicted evidence on the papers is that fuel in many forms is vital and that, for sound purposes of land-use management, the DMS permits various fuels (petroleum, diesel, and LPG) to be retailed for various purposes (use in homes, businesses, and vehicles) at service stations. On the applicant’s interpretation, a service station would not be allowed to supply essential fuel to operators of generators, boats, farm equipment or other machinery that run on diesel or petrol. This restriction would serve no rational or legitimate purpose, and the proposed interpretation is untenable.
56. In any event, as counsel for the City submitted, the operative phrase in the definition of “service station” is “the retail supply of fuel”. This includes the various examples mentioned in the definition (such as trading in motor vehicles and exhaust fitment), but is not exhaustive of the concept. The DMS does not distinguish LPG from other fuels, and it does not distinguish fuel for vehicles from fuel for other purposes. There is no specific zoning or land use dedicated to the sale of non-vehicular LPG. LPG that is retailed to the public to heat their homes and cook their food is as important as fuel for vehicles: it serves a vital social and economic function and is subject to similar logistical and safety concerns. The applicant does not dispute that LPG for non-vehicular purposes is a necessary form of fuel that should be widely accessible to individuals and businesses across Cape Town. He concedes, too, that restricting the availability of LPG would be unsound land use planning. Yet, the effect of his proposed interpretation of the DMS would be to exclude the sale of LPG for non-vehicular purposes from Cape Town.

Safety aspects

57. The applicant is adamant that his challenge in relation to the sale of LPG at the property is rooted in reasonable safety concerns, given the location and expansion⁴¹ of the property. It is therefore necessary to consider the aspects relevant to these concerns, including the planning law governing risk activities and RI zonings.

Zoning, land use, and activity

58. In his heads of argument, the applicant submits that the principal questions which must be determined by the Court are (a) whether the DMS should be construed such that a risk industry is permitted on any land unit where it is not specifically prohibited and is ancillary to some expressly permitted use; and (b) whether the land use "service station" encompasses a general permission to store and sell LPG in any quantities.
59. These questions have already been addressed in broad terms at the hand of text, context, and purpose, but it is necessary to delve deeper into the differences between zonings, land uses, and activities as contemplated in the DMS.⁴² This is because the same activity may fall within different land use purposes, and permitted in various zonings.
60. One of nine general zoning categories defined in the DMS are the industrial zonings set out in Chapter 10. These zonings "*are designed to accommodate manufacturing and related processes, ranging from general industrial uses which may have some impact on surrounding areas, to hazardous or noxious*

⁴¹ The applicant maintains that it is common cause that the risk of an explosion has been materially increased by the expansion of the LPG facility, although there is a dispute regarding the likelihood of the explosion. This is not correct on the papers. The applicant refers in this regard to the City's affidavit which alleges that the first respondent's risk assessment understates the risk of an explosion on the property, because there is no suitable parking for an LPG tanker, there is traffic congestion and insufficient parking and the assessment did not account for the increased risk of collision or tanker damage. The first respondent expressly denied and substantively addressed these allegations in its answering affidavit. Issues pertaining to the risk of an explosion are thus not common cause.

⁴² The applicant appears, for example, to conflate "risk activity" (an activity) with "risk industry" (a zoning) to make his argument that a risk activity is not permitted within a zoning other than RI.

*uses which have a potentially high impact and must be carefully managed. Industrial development has particular requirements for road and waste infrastructure, and industrial-zoned land should generally be reserved for industrial purposes to optimise this infrastructure and mitigate potential impacts. In the General Industrial zoning two different subzonings accommodate variations of built form, and opportunities are provided for consent uses associated with industrial areas, such as factory shops. A specific zoning is provided for noxious and risk industries”.*⁴³

61. There are two General Industrial (GI) subzonings, and a “specific zoning ... for noxious and risk industries” (that is, RI zoning), which “provides for those industries which are noxious in terms of smell, product, waste or other objectionable consequence of their operation, or which carry a high risk in the event of fire or accident”.⁴⁴ One of the primary uses⁴⁵ for RI-zoned property is a “risk activity”, which is defined⁴⁶ as “an undertaking where the material handled or the process carried out is liable to cause combustion with extreme rapidity, give rise to poisonous fumes, or cause explosion, and includes major hazard installations and activities involving dangerous and hazardous substances that are controlled in terms of national legislation”.
62. There is no dispute that the operation of an LPG facility such as the one conducted at the property constitutes a “risk activity”. There is, however, no “risk activity” zoning under the DMS. Instead, such an activity is permitted as a primary use on properties with an RI zoning⁴⁷ and is expressly excluded from other land uses, namely a business premises, industry, home occupation, and various single residential uses.⁴⁸ In other words, although “risk activity” is a primary use right in the RI zoning, this does not mean that risk activities are not permitted in other zonings, whether as primary use or

⁴³ See the introduction to Chapter 10 of the DMS.

⁴⁴ Referred to in the introduction to Part 2 of Chapter 10 of the DMS.

⁴⁵ Item 74(a) of the DMS.

⁴⁶ In Item 1 of the DMS. My emphasis.

⁴⁷ Item 74(a) of the DMS lists the primary RI uses as noxious trade, risk activity, crematorium, rooftop base telecommunication station, free standing base communication station, private road, open space, filming and additional use rights, being a factory shop.

⁴⁸ Items 1, 23(a), and 26(1)(ii) of the DMS.

consent use. I think that counsel for the City is correct in submitting that if risk activities were only permitted on RI-zoned properties, it would be redundant for the DMS expressly to exclude them from land uses that are permitted on GB, GI, and single residential zones.

63. A risk activity may therefore lawfully take place where it is not prohibited, and where the permitted land uses (whether labelled “risk activity” or not) allow or necessarily entail the activity in question. Hospitals, for example, require LPG and other chemicals that can combust with extreme rapidity, producing poisonous fumes or causing explosions. They also feature activities that involve hazardous substances that are controlled under the Hazardous Substances Act 15 of 1973 (HSA), such as x-ray units, non-invasive blood-pressure monitors, and diagnostic exercise devices. The operation of a hospital therefore entails “risk activity” – this is not disputed on the papers. Yet, a “hospital” is a land use directly regulated by the DMS, and is a primary use in one Community, multiple GB, and several mixed-use zonings.⁴⁹ It is, respectively under Items 40(b) and 46(b) of the DMS, a consent use in General Residential zonings, and in one Community zoning. As long as the relevant development rules are complied with, a hospital - as risk activity – may thus be operated in various zones, and not only on RI-zoned properties.
64. In the present matter it is not disputed that the retail and storage of fuel can cause extremely rapid combustion, give rise to poisonous fumes, or cause an explosion. It is undeniably a risk activity. The retail supply of fuel however also falls within the permitted activities of a service station. It may therefore take place as a primary use on GI properties, and as a consent use on properties with Local Business 2, GB, mixed-use, RI, and Transport 1 zonings.
65. Did the expansion of the LPG facility's storage capacity on the property in 2020 render it liable to being restricted to properties with RI zonings? The

⁴⁹ See Item 48(a), Item 59(a), and Item 63(a) of the DMS.

applicant says it did.⁵⁰

66. The DMS does not, however, restrict the large-scale storage of a hazardous substance to RI-zoned properties. Rather, the DMS anticipates that it may take place in other zonings. Item 124 of the DMS empowers the City to require an owner to have a risk management plan to the City's satisfaction if:

*“(a) the owner applies for an approval under this By-law or a building plan approval under the National Building Act; and
(b) the use or ancillary activity involves the storage of a hazardous substance that may result in an installation being declared a major hazardous installation in terms of occupational health and safety law.”*

67. This provision is not limited to the RI zoning, but is generally applicable. If the storage of such hazardous substances were limited to RI-zoned properties, there would have been no need to make Item 124 of general application.
68. The applicant argues that there is no justification for excluding risk activities from the GI zone, but permitting them in other zones designed for lower-intensity use, such as general and local business. As is clear from the context and purpose of the DMS referred to earlier, however, there are good reasons why the retailing of fuel should be and is permitted on properties with general and local business zonings. The scheme of the DMS, its express provisions, and its implications therefore establish that the same activity may fall within different land use categories and be permitted under different zonings. An activity that falls within the definition of a “risk activity” is not limited to RI properties. Fuel (including LPG) may be retailed (that is, sold and stored) wherever it is lawful to operate a service station, which includes properties with industrial (General and Risk), business (Local and General),

⁵⁰ The applicant claims that the City does not as a rule approve building plans with LPG retail operations with a capacity of greater than 1 500kg, and that the City has not responded substantively to this allegation save to state that it does not necessarily refuse such building plan applications. This is not correct: the City's deponent explains that there is no such rule regarding LPG operations with a capacity of greater than 1 500kg, and that the capacity has been used as the threshold for determining when to require risk assessments rather than whether to refuse or approve building plans. *Plascon Evans* applies.

mixed-use, and transport zonings.

69. The applicant contends that this interpretation is absurd because it permits a service station freely to undertake any risk activity whatsoever. This is not correct. Permitting the “retail supply of fuel”, including “the sale of [LPG] or similar fuel” at a risk-activity level does mean that any risk activity (for example, explosives factories) is permitted. In any event, as discussed earlier, permitting a service station to undertake the risk activity in question is not absurd, but compatible with the structure of the DMS. The DMS permits various activities that fall within the definition of a “risk activity” to be conducted outside of the RI zoning, across multiple zonings, across the metropolitan area, and on widely accessible and highly trafficked properties.
70. The rule of law requires that laws be coherent, clear, stable, and practicable.⁵¹ It is lawful and sensible for the owner of land, pursuant to a consent to operate a service station, to be permitted to undertake any activity that is covered by the definition of a “service station”. The DMS allows a service station to engage in the retail supply of fuel, and it is therefore lawful and sensible for the relevant owner to be permitted to sell fuel, including LPG.

The extent of a “risk activity” under the DMS

71. The applicant argues, in his heads of argument, that a risk activity under the DMS does not include something with the potential to cause a modest explosion, but only major incidents such as would qualify the particular property as a major hazard installation or attract the strictures of national legislation to control dangerous and hazardous substances. He submits that the definition of risk activity “*clearly envisages undertakings that have the potential to cause grave harm to life and property*”.
72. The DMS’s definition of what constitutes a risk activity is quoted above. It

⁵¹ *Qwelane v South African Human Rights Commission and another* 2021 (6) SA 579 (CC) para 148.

defines what a risk activity is, and then provides two examples.⁵² It clearly does not limit the definition to those examples. A “risk activity” is any activity that may cause rapid combustion, create poisonous fumes, or cause an explosion. There is no stipulation that the combustion, fumes or explosion, or the effects thereof, must be major or in some other way substantial. The fact that an installation is not a major hazard installation (about which I say more later in this judgment) does not necessarily mean that the undertakings in relation thereto are not risk activities.

73. The national legislation referred to in the DMS includes the HSA, in terms of which the relevant Minister may declare any substance, mixture or electronic product that might cause “*injury, ill-health or death*” to be a hazardous substance.⁵³ The Minister has declared numerous hazardous substances, including medical, dental, and veterinary x-ray units, electron microscopes, visual display units, tanning lamps, microwave ovens, certain two-way walkie-talkie radios, non-invasive blood-pressure monitors, and diagnostic exercise devices such as treadmills.⁵⁴ Thus, the applicability of national legislation on hazardous substances does not indicate that the activity in question poses a risk of major damage. Instead, it includes many instances of minor damage such as (to use counsel’s examples) an explosion from a microwave, a burn from a tanning bed, or an injury sustained on a treadmill.
74. The concept of “risk activity” under the DMS is thus wider than what the applicant proposes in his heads of argument. Any quantity of LPG could cause “*combustion with extreme rapidity, give rise to poisonous fumes, or cause explosion*”. The effect of the applicant’s interpretation is that all LPG - regardless of quantity - may be sold only from RI zonings. This flies in the face of his concession on the papers that restricting the retail supply of LPG to RI zones would be “unsound” land use planning.⁵⁵

⁵² “...includes...”

⁵³ Section 15 of the HSA.

⁵⁴ See the Schedule to Group III (Declaration of Group III Hazardous Substances) published under GN R1302 in *Government Gazette* 13299 of 14 June 1991.

⁵⁵ The applicant states that “*I do not suggest that the retail supply of LPG should be confined to properties zoned ‘Risk Industry’. I am in agreement with Ms. Dube that such a scheme would be undesirable.*”

75. The evidence establishes that the retail of LPG cannot be limited to RI zones, because doing so would be unsound, impractical, and cause undue hardship.⁵⁶ The RI zoning is focused on manufacturing, not retailing. The public, when conducting everyday retail activities such as purchasing fuel, should not have to frequent RI zonings – in fact, the primary uses for RI zonings do not permit retail activity. RI-zoned properties must be remote and isolated, which is the opposite of what is required for the retailing of LPG and other fuels. There are very few (about 8) RI-zoned properties across Cape Town, and they are isolated at a substantial distance from residential and mixed-use areas. These RI properties accommodate uncommonly hazardous or noxious land uses, such as the Koeberg nuclear reactor, the ammunition manufacturing plant in Paardevelei, the Strandfontein landfill, and the Ankerlig power station in Atlantis. From a spatial planning perspective they plainly should not be interspersed with ordinary residential, business, and community land uses. There are no RI-zoned properties in the residential and commercial centres of the Southern, Table Bay, and Northern Districts of the City.
76. On the applicant's interpretation of the DMS, the only property in Cape Town from which an LPG facility could operate is the Astron Refinery. It is common cause that that is the only RI property where a factory shop could lawfully retail LPG. This is a nonsensical and impractical interpretation of the DMS, particularly given the undisputed importance of ensuring that LPG is widely and easily accessible across the metropolitan area.
77. By way of summary on this aspect, the applicant's argument that "*confining risk activities to the risk industry zone ... is also the only sensible way of interpreting the relevant provisions*" cannot be sustained. His argument is, simply put, that operating the LPG facility constitutes a risk activity. This means that the DMS requires that the LPG facility can only be operated from

⁵⁶ The City's evidence in this respect is met with what amounts to a bare denial, and the applicant has not established that such evidence is untenable or far-fetched. It must thus be accepted under *Plascon-Evans supra*.

land with an RI zoning, and the first respondent's operation is there unlawful because the property is zoned GB1. As indicated, however, something that constitutes a risk activity is not confined to RI zonings. The fact that the first respondent's LPG facility is a risk activity therefore does not make it unlawful.

78. In oral argument the applicant submitted that the breadth of the definition of "risk activity" makes it "*difficult to determine where the category's outer limits lie*". He accepted that, because a wide range of substances have been declared as hazardous under the HSA without any reference to threshold quantities, the effect of including the controlled substances subset is to extend the designation "risk activity" to a wide range of activities that do not pose an inherent risk to the public and may not pose an appreciable risk at all. Thus, so the argument goes, a literal interpretation of the term "risk activity" would require that many innocuous commercial activities (and even certain household activities) are deemed risk activities.
79. The applicant maintains that this wide interpretation of what a risk activity entails would render the operative provisions of the DMS relating to risk activities nugatory. The establishment of a class of activities designated "risk activities" and the stipulation that they may occur in a specific zone would serve no purpose at all. This runs contrary to the well-established principle that a Court must give effect to every word or clause used in a statute on the basis that the legislature did not intend them to be superfluous, void, insignificant, or repetitive.⁵⁷
80. The applicant suggests that the way in which to avoid this is by interpreting "risk activity" in a manner that incorporates a threshold standard for deeming a particular undertaking a "risk activity". The core statement in the definition, namely an "*undertaking where the material handled or the process carried out is liable to cause combustion with extreme rapidity, give rise to poisonous fumes, or cause explosion*" should be treated as the characteristic that qualifies a particular process or enterprise as a risk

⁵⁷ *Sedgefield Ratepayers' & Voters' Association v Government of the Republic of South Africa* 1989 (2) SA 685 (C) at 701A.

activity. The combustion, emission of poisonous fumes, or explosion contemplated in this core statement should be taken to denote serious incidents which have the potential to cause impacts beyond the boundary of the property in question. The categories laid down after the words "and includes", that is, major hazard installations and "*activities involving dangerous and hazardous substances that are controlled in terms of national legislation*" should be construed as refinements to the core statement. Thus, the definition of "risk activity" should be construed such that it contemplates operations or processes that tend to create a risk of serious incidents of combustion, emission of poisonous fumes or explosion, and these operations or processes must either be "major hazard installations" or controlled by legislation relating to dangerous or hazardous substances.

81. The problem with the applicant's interpretation is that it ventures into rewriting the By-law rather than interpreting it. The separation of powers doctrine precludes this court from rewriting a statute so blatantly in the absence of a constitutional challenge.
82. The preceding discussion shows that there is no scope within the text, context, and purpose of the By-law to limit the content of what a risk activity entails in the way suggested by the applicant. The By-law, within the framework of other relevant legislation, contains its own limitations and safeguards. In any event, when pressed on the issue counsel for the applicant was unable to suggest how exactly the court – or the City - should stipulate what the "outer limit" of a risk activity would be in every particular context, and how it would practically be determined in applying the By-law. The proposed threshold would be nebulous and vague, and would violate a foundational constitutional value of the rule of law to which I have referred, namely that laws should be coherent, clear, stable, and practicable.⁵⁸
83. I understand that the applicant is driven to advocate for this interpretation

because of the constraints he faces – both under the text of the By-law and as a result of the evidence and concessions on record - in his contention that the first respondent's LPG facility is unlawful, but his proposed interpretation is, respectfully, patently without merit.

The regulatory framework for the safety of LPG facilities

84. The safety of these operations is regulated both under the DMS and other applicable laws.
85. I have already referred to the requirement, in Item 124 of the DMS, of a risk management plan in respect of any use or ancillary activity that involves the storage or keeping of hazardous substances that may result in an operation being declared a major hazard installation. This applies even if the zoning and development rules would otherwise permit the use or activity in question. It is the mechanism through which the City, from a municipal planning perspective, regulates safety concerns for the storage of hazardous substances (and not by restricting such storage to RI-zoned properties).⁵⁹
86. The City's Community Fire Safety By-law, 2002 (as amended) has numerous provisions to ensure a fire-safe environment. These include various stipulations for the storage of LPG, depending on the capacity of the installation. The applicant contends that because the Fire Safety By-law distinguishes between "bulk storage depots" and "small LPG installations", so too must the DMS. However, the provisions and concepts of the Fire Safety By-law cannot merely be imported into the DMS so as to interpret the latter.⁶⁰ The Fire Safety By-law has its own specialised regulatory framework to ensure the safety of installations such as service stations. That framework is separate from the Planning By-law's specialised municipal planning framework. This does not detract from the applicability of the Fire Safety By-

⁵⁹ During the most recent Item 124 notification and publication process required by the City in respect of the first respondent's operation, interested parties were notified of the application. Only the applicant filed an objection.

⁶⁰ *Independent Institute of Education (Pty) Ltd v KwaZulu-Natal Law Society and others* 2020 (2) SA 325 (CC) paras 14-26.

law to the first respondent's facility.

87. Section 36 of the Fire Safety By-law states in terms that “[n]otwithstanding the provisions in either the Hazardous Substances Act or the Occupational Health and Safety Act, this Chapter⁶¹ regulates flammable substances in the local government sphere so as to prevent and reduce fire hazards or other threatening dangers.” Thus, before constructing a new installation, or altering an existing installation for the storage and use of a flammable substance, the provisions of chapter 8 of the Fire Safety By-law had to be complied with. An owner or person in charge of premises may not store or use a flammable gas in excess of 100kg, or 200 litres of a flammable liquid of certain identified danger groups unless he or she has obtained a flammable substance certificate in terms of section 39 of the Fire Safety By-law.
88. This the first respondent did. The controlling officer, on behalf of the City, issued a flammable substance certificate in relation to the property on 14 December 2020, permitting the storage and use of flammable substances in terms of section 38(1) of the Fire Safety By-law, in respect of LPG and identified petrol and diesel.
89. Section 38(5) of the Fire Safety By-law empowers the controlling authority to suspend or revoke an approval or a certificate where the usage is not in accordance with the certificate, and 38(6) to issue an order to remove the flammable substance or installation from premises where, in its opinion, the flammable substance is stored or utilized for any process or in a manner which is hazardous to life or property, or in circumstances where an installation is unauthorised.
90. Under section 7(1)(b)(ii)(bb) of the NBR, the City must take into account safety considerations when considering building plan applications, and must refuse an application unless it is satisfied that the building will not be

⁶¹ That is, chapter 8.

dangerous to life or property.⁶² In scrutinising such applications, the City applies the South African National Standards 10087, which provide safety and other standards for handling and storing LPG in domestic, commercial and industrial installations.

91. These provisions all apply to the first respondent's LPG facility, and constitute a comprehensive framework for regulating safety, irrespective of the zoning of the property in question.
92. According to the applicant, the respondents' interpretation of the DMS would allow *"industrial scale LPG operations in public spaces with significant human traffic, in multiple zones throughout the City - and without any clear rationale rooted in the principles of good planning reflected in the DMS"*. From what is set out above, this is plainly not so. Service stations are common throughout the City. Even when they do not retail LPG, they contain large storage facilities for hazardous substances such as petroleum and diesel, and thus entail a risk activity. As indicated, those facilities are subject to stringent safety requirements. It is therefore acceptable for them to feature across multiple zones and in public places with significant human traffic. There is no reason why the first respondent's facility should be treated differently. The applicant, in fact, does not dispute that the property is well-located for a service station and the retail supply of LPG.
93. The safety concerns that arise in respect of LPG installations therefore do not require such installations, of whichever scale, to be restricted to RI-zoned properties.
94. The applicant nevertheless argues that the sale of LPG is lawful *"so long as it does not involve volumes that would render the cylinder LPG supply operation a major hazard installation"*.

⁶² *Turnbull-Jackson v Hibiscus Coast Municipality and others* 2014 (6) SA 592 (CC) paras 72-95.

95. A major hazard installation is one defined in the OHSA⁶³ as an installation that “(a) *where more than the prescribed quantity of any substance is or may be kept, whether permanently or temporarily; or (b) where any substance is produced, processed, used, handled or stored in such a form and quantity that it has the potential to cause a major incident*”. A major incident, in turn is “*an occurrence of catastrophic proportions, resulting from the use of plant or machinery, or from activities at a workplace*”.
96. The DMS does not impose such limit. Whether an operation constitutes a major hazard installation is not relevant to whether a land use permits the sale of LPG, but the designation of a facility as a major hazard installation would impose additional compliance duties. Section 39(2)(a) of the By-law provides that an approval in terms of the By-law “*does not release anyone from their duty to obtain any other authorisation required by ... another law, and to comply with all laws ...*”
97. In the first respondent’s case, when an amendment of the conditions of the existing approval was sought in 2011 and again in 2020, a risk consultant was appointed to prepared risk assessment in terms of the relevant major hazard installation (MHI) regulations at the time,⁶⁴ as well as the SANS 1461: 2018 Codes of Practice. Petrol, diesel and LPG are all considered hazardous substances as they are highly flammable. Although the proposed expansion of the LPG storage in 2011 was from 1 to 5 tonnes, and therefore well below the threshold of 25 tonnes for purposes of notification under the General Machinery Regulations,⁶⁵ petrol, diesel and LPG have the potential to cause onsite and offsite incidents, which can only be determined by way of a quantitative risk assessment. Under the MHI regulations, an assessment must be undertaken every five years. In assessing a site, all toxic and

⁶³ Section 1 of the OHSA, and see the Major Hazard Installation regulations, 2022 promulgated under the OHSA, published under GN R2989 in *Government Gazette* 47970 of 31 January 2023, read with the explanatory note published under GenN 2841 in *Government Gazette* 51628 of 20 November 2024.

⁶⁴ Published under R692 in *Government Gazette* 22506 (30 July 2001), promulgated under the OHSA.

⁶⁵ Published under R1521 in *Government Gazette* 11443 (5 August 1998): see regulation 9 read with Schedule A.

flammable products or substances are considered. The first respondent's operation is classified as a so-called "low hazard" MHI.

98. The applicant refers to the first respondent's LPG facility as one of "industrial scale operations". The DMS does not distinguish between "industrial scale" and lesser LPG operations – that much is clear from what has already been discussed. In interpreting the By-law, this court cannot draw such a distinction, as this would amount to impermissible legislating by a court.⁶⁶ Where in any event would one, in interpreting the By-law, draw the line between what is industrial scale and what not?
99. The DMS provides, in relation to service stations, only that the activity in question must be the retail of LPG. In the present case, the first respondent's facility significantly expanded its capacity from 5 tonnes to 42 tonnes pursuant to the approval of the 2020 building plans. The expanded capacity is, however, still aimed at retailing LPG, and therefore falls within the parameters of the DMS. Even service stations that do not sell LPG contain large storage facilities for hazardous substances such as petroleum and diesel, constituting a risk activity. There is no reason for distinguishing between the storage of petroleum and diesel, on the one hand, and LPG, on the other, and the DMS contains none.

Conclusion

100. In these circumstances, and on a proper interpretation of the By-law, the consent use approval granted by the City to the first respondent to operate a service station from its GB1-zoned property means that the first respondent is permitted to retail LPG for vehicular and non-vehicular use. The first respondent may lawfully do so in respect of the quantities of LPG that can be stored in the infrastructure built in accordance with the approved building

⁶⁶ See *Cbisuse supra* para 48: "Judges must hesitate 'to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation'" (referring to *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18).

plans, and in compliance with other associated approvals.

101. The definition of “service station” has been amended expressly to provide for the “sale of LP gas or similar fuel”. The amendment notwithstanding, the storage and sale of LPG on the property was lawful prior to the 2025 amendments to the By-law. These activities remain lawful after 1 October 2025.
102. The applicant has failed to show that the operation of infrastructure for the storage and supply of LPG on the property is unlawful. He is therefore not entitled to the declaratory relief sought.
103. It is common cause that the first respondent has, on the court’s interpretation of the By-law, the necessary land use permissions to operate infrastructure for the storage and supply of LPG on the property. Its operations are not “*manifestly unlawful*”, as submitted by the applicant. The applicant has therefore not established the requirements for the grant of an interdict.

Costs

104. The issue of costs remains.
105. The applicant accepts that he was not seeking to enforce a constitutional right in launching the application. His concession is correct because neither in his affidavits nor in his heads of argument does he assert a constitutional right or challenge the constitutionality of any law or conduct. The applicant nevertheless argues that the issues raised in this application are matters of public interest and, in accordance with the so-called *Biowatch* rule,⁶⁷ no costs

⁶⁷ *Biowatch Trust v Registrar Genetic Resources and others* 2009 (6) SA 232 (CC) para 21: “In *Affordable Medicines* this Court held that as a general rule in constitutional litigation, an unsuccessful litigant in proceedings against the state ought not to be ordered to pay costs”. See too *Biowatch* para 16: “In my view it is not correct to begin the enquiry by a characterisation of the parties. Rather, the starting point should be the nature of the issues. Equal protection under the law requires that costs awards not be dependent on whether the parties are acting in their own interests or in the public interest. Nor should they be

order should be made against him in relation to the City's⁶⁸ costs.

106. He submits that the dispute as crystallized and ventilated regarding the interpretation of the DMS does raise an issue of public importance with an essential constitutional dimension. He was of the view that the City was implementing the DMS in a manner that is contrary to the clear terms of the DMS, nullifying the regime established for “risk activities”. Thus, the core dispute concerned a question of principle which would have ramifications for the residents of Cape Town for so long as the contentious provisions of the DMS remain in operation. The challenge goes directly to the lawfulness of the manner in which the City is administering the DMS, which amounts to an exercise of public power.
107. The applicant refers to *Harrielall v University of KwaZulu-Natal*,⁶⁹ in which the Constitutional Court held that the *Biowatch* principle found application in the context of an unsuccessful review in terms of the Promotion of Administrative Justice Act 3 of 2000 because (among other reasons) it concerned an exercise of public power. The applicant relies on the following extract from the case:

“[17] The constitutional issues raised by the case are two-fold. First, a review of administrative action under PAJA constitutes a constitutional issue. This is so because PAJA was passed specifically to give effect to administrative justice rights guaranteed by section 33 of the Constitution. Moreover, when the University determined the application for admission, it exercised a public power.

[18] According to jurisprudence of this Court, the review of the exercise of public power is now controlled by the Constitution and legislation enacted to give effect to

determined by whether the parties are financially well endowed or indigent or, as in the case of many NGOs, reliant on external funding. The primary consideration in constitutional litigation must be the way in which a costs order would hinder or promote the advancement of constitutional justice.”

⁶⁸ The Constitutional Court has endorsed the view that the *Biowatch* rule would not apply to an applicant in a review application as regards the costs incurred by an opposing respondent who is a private party: see *Independent Community Pharmacy Association v Clicks Group Ltd* 2023 (6) BCLR 617 (CC) para 306.

⁶⁹ 2018 (1) BCLR 12 (CC) paras 17-18. The applicant also refers to *Norkie v Public Protector and another* [2024] ZAWCHC 36 (13 February 2024) para 37, which entailed a legality review.

it. It is not controversial that a review of administrative action amounts to a constitutional issue.”

108. The applicant thus contends that the *Biowatch* principle may in appropriate cases find general application where an applicant advances a challenge to an exercise of public power, as he says that he has done.
109. The problem for the applicant is that he never did challenge the City's administrative action. He did not seek any review relief.⁷⁰ On the contrary, his founding affidavit confirms that “*no relief is sought against the City*”, and none of his affidavits allege that any aspect of the City's administration of the DMS is unlawful. His attack was based purely on his interpretation of the DMS. What is plain throughout every iteration of the applicant's case as the litigation progressed, is that he remained focused on the interpretation of the impugned provisions of the By-law. The court's determination of the correct interpretation of a statute is not an administrative action, and the interpretive task does not entail the exercise of public power by the City.
110. The applicant's reliance on *Harrielall* is thus misplaced because his application is not one for judicial review.⁷¹ In any event, in *Harrielall* the Constitutional Court found that the litigation dealt with constitutional issues for two reasons. The first was that the case was a review of administrative action under PAJA, which is a constitutional issue since it gives effect to the right to administrative justice under section 33 of the Constitution, and the review of the exercise of public power is controlled by the Constitution. The second reason was that the applicant sought to protect her fundamental right of access to further education under section 29(1)(b) of the Constitution.⁷² The

⁷⁰ In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* 2004 (4) SA 490 (CC) the Constitutional Court remarked at para 25 that in a challenge to administrative action, PAJA is of application and the case cannot be decided without reference to it.

⁷¹ *Norkie*, in turn, simply reiterates that the *Biowatch* rule applies to applications for judicial review. In *Norkie*, the Court declined to award costs against the applicant because he was not a lawyer, had drafted the papers himself, and appeared in person at the hearing. The applicant suffers from no such handicaps. He is an attorney himself, and has at all times been represented by both other attorneys and counsel.

⁷² *Harrielall supra* para 19.

applicant's case does not stand on either of these two legs.

111. That leaves the applicant's claim (raised only in relation to costs) that the application was brought in the public interest. The first respondent initially challenged the applicant's *locus standi* but, given the narrowing of the issues, it was not necessary to determine this aspect. Nevertheless, as the City pointed out, whether the litigation is in the public interest is not the test under *Biowatch*. The applicant did not assert public interest standing, and his arguments do not purport to protect the public interest.
112. To establish that a case is brought in the public interest, a court must be satisfied that the applicant in question is "*genuinely acting in the public interest*".⁷³ This can only be established if sufficient facts in respect of the various considerations that pertain to "*genuine public interest*" have been proven, or are at least alleged and undisputed. These facts would need to pertain to, among other things, the nature of the relief sought, whether there is another reasonable manner in which the challenge could have been brought, the range of persons who could be affected by the court's order, the possible benefit of the litigation to the public at large, whether the applicant has a pecuniary interest in the litigation, and the opportunity that affected persons have had to put forward evidence and argument.
113. The applicant did not make out any case in this respect. On the contrary, it is clear that the applicant litigated in his own interest. These proceedings should therefore not be treated as public interest litigation.⁷⁴
114. In *National Home Builders Registration Council v Xantha Properties 18 (Pty) Ltd*⁷⁵ the Supreme Court of Appeal held as follows:

"[26] *The general rule laid down in Biowatch applies in constitutional matters*

⁷³ *Lawyers for Human Rights and another v Minister of Home Affairs and another* 2004 (4) SA 125 (CC) paras 14-18.

⁷⁴ See *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and others* 2013 (3) BCLR 251 (CC) para 31.

⁷⁵ 2019 (5) SA 424 (SCA) paras 26-27. See also *Bo-Kaap Civic and Ratepayers' Association v City of Cape Town* [2020] 2 All SA 330 (SCA) paras 82-86.

involving organs of state, and operates to shield unsuccessful litigants from paying costs to the State in order 'to prevent the chilling effect that adverse costs orders might have on litigants seeking to assert constitutional rights'. But as has previously been stressed, the mere labelling of litigation as 'constitutional' is insufficient. For the rule to apply the issues should be genuine and substantive and raise constitutional considerations relevant to their adjudication. The rule thus does not mean 'risk-free constitutional litigation and a court in the exercise of its discretion must consider the scope and character of the litigation.

[27] In the present case, the respondent sought a declaratory order freeing it from the obligation to pay a substantial sum of money. The litigation has, in truth, been nothing more than a commercial dispute in which the respondent sought to evade the clear provisions of the Act. Constitutional considerations played no part and I see no reason for the respondent not to bear the costs of the proceedings."

115. I have alluded to the first respondent's allegations that the applicant instituted the litigation to stifle competition. In the applicant's heads of argument these allegations are labelled vexatious and unfounded. A striking-out application was threatened but did not materialise. The applicant himself claims to be motivated by protecting his personal property interests: he states that he brings this application because he is a resident of Melkbosstrand who lives in close proximity to the first respondent's LPG facility, and because he has a "business engaged in the wholesale distribution of liquefied petroleum gas".
116. It appears from the papers that the applicant has an interest in, and is involved in the operations of, a wholesale LPG business, Easishoppe (Pty) Ltd. On the applicant's own interpretation of the DMS, Easishoppe engages in a "risk activity" contrary to section 35(2) of the By-law. It is uncontested on the papers that Easishoppe is not a service station, and its premises are not zoned RI. The first respondent's allegations to the effect that under the 2022 MHI regulations all sites on which LPG in excess of 20 tonnes is stored are classified as major hazard installations, and that the applicant's own LPG retail facility in Montague Gardens qualifies as a MHI under the new regulations, are similarly uncontradicted. On the papers, Easishoppe itself does not comply with the applicant's interpretation of the DMS.

117. On the first respondent's version, this litigation has been an attempt to thwart a competitor. Either way, the applicant's arguments, which aim to restrict the retail of LPG to remote and inaccessible areas, are contrary to the public interest, and harmful to sensible spatial planning. The applicant has given no consideration at all to, for example, the impact of the relief sought on other service stations and LPG facilities in Cape Town, as well as other institutions, such as hospitals, that have large LPG installations.
118. In these circumstances, the applicant does not qualify for *Biowatch* protection. As indicated in *Biowatch*⁷⁶ itself:

"[24] ... the general approach of this Court to costs in litigation between private parties and the state, is not unqualified. If an application is frivolous or vexatious, or in any other way manifestly inappropriate, the applicant should not expect that the worthiness of its cause will immunise it against an adverse costs award. Nevertheless, for the reasons given above, courts should not lightly turn their backs on the general approach of not awarding costs against an unsuccessful litigant in proceedings against the state, where matters of genuine constitutional import arise. Similarly, particularly powerful reasons must exist for a court not to award costs against the state in favour of a private litigant who achieves substantial success in proceedings brought against it.

[25] Merely labeling the litigation as constitutional and dragging in specious references to sections of the Constitution would, of course, not be enough in itself to invoke the general rule as referred to in Affordable Medicines. The issues must be genuine and substantive, and truly raise constitutional considerations relevant to the adjudication. ..."

119. I have mentioned that the applicant's case shifted as the litigation progressed. The applicant is not a layperson. He is a qualified attorney, and states that he has *"been primarily engaged as a regulatory/legal consultant to LPG dealers and distributors in and around Cape Town for the last 12 years. As such, [he is] thoroughly acquainted with the structure and regulation of the industry."* The manner in which he has conducted this litigation is, however,

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At paras 24-25.

far from satisfactory.

120. The applicant's case in his founding papers was that the only land use permitted for the operation of the LPG facility is RI, precisely because the activity is a risk activity. In his replying affidavit and in his first set of heads of argument he argued for the first time that the LPG facility's status as a MHI triggered the requirement of a rezoning. The question framed at this stage was "[o]n a proper construction, does the City of Cape Town's Development Management Scheme permit the operation of a facility of the nature and scale of the one in issue on a property that is not zoned 'risk industry'?" Then, in response to the explanatory affidavit delivered by the City, the applicant attempts to have it both ways. He admits that a service station is a risk activity, but argue that a "correct" interpretation of "service station" understood in the context of a "more liberal" policy regime for this use resolves the issue.
121. Whilst the applicant initially accepted material aspects of the City's interpretation of the DMS, he later reverted to his contention that all risk activities are limited to properties with RI zoning. His answer to the City's explanatory affidavit introduced the submissions that service stations may not have bulk LPG storage facilities or retail LPG to anyone other than vehicle operators. Neither of these arguments had been foreshadowed in his founding or replying affidavits, and the City had to deliver a further affidavit to deal with this new material.
122. In his heads of argument, the applicant effectively ignores his earlier concession that risk activities are permitted across multiple zonings under the By-Law, including GB1. His affidavits, however, constituted not only his evidence but also his pleadings, and the concession on affidavit regarding risk activities therefore took that issue out of contestation between the parties.⁷⁷ The City, utilising public funds, was nevertheless required to present argument on the issue, as well as on the new argument raised on the

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Molusi and others v Voges NO and others 2016 (3) SA 370 (CC) paras 27-28.

eve of the hearing to the effect that the court should, through an act of interpretation, introduce a new threshold of materiality into the DMS. This contention had not been foreshadowed on the papers, but was in any event without merit, as indicated earlier in this judgment.

123. In *Endangered Wildlife Trust and another v DG (Acting) Department of Water and Sanitation and another*⁷⁸ the Supreme Court of Appeal dealt with the considerations regarding the need to safeguard scarce judicial resources and public funds where *Biowatch* does not apply:

“[126] There are further considerations that justify a costs award against the appellants. The respondents ask for an order that the appellants pay the costs incurred in the High Court and on appeal. The DG's costs are paid out of public funds, ultimately by taxpayers. In addition to an unmeritorious appeal and the vexing of the second respondent, scarce and valuable judicial resources have been wasted on a misconceived appeal, to the detriment of other litigants with cases which have real merit. All of this, in the specific circumstances of this case, constitute an abuse of the court process. Judicial resources in this country are barely sufficient to afford justice without unreasonable delay in deserving cases, and should not be wasted on misconceived litigation....”

124. There is, in the circumstances, no reason why the normal rule as to costs should not be followed, namely that costs should follow the event in relation to the costs of both respondents. The first respondent sought attorney-client costs, but I am not inclined to grant punitive costs.
125. In the exercise of my discretion, I am of the view that counsel's fees should be taxed on Scale C as contemplated in Rule 67A⁷⁹ of the Uniform Rules of Court. The costs of two counsel, in relation to the City, was justified. The DMS is a complex legal instrument. The City had to explain not only how the various provisions of the DMS intersect, but also the justifications underlying the By-law's regulatory approach and policy choices, and the content, import

⁷⁸ [2025] ZASCA 69 (29 May 2025) para 126. My emphasis.
⁷⁹ Which applies to work done after 12 April 2024.

and function of various other legal regimes that regulate service stations. The shifting sands of the applicant's arguments complicated this task.

Order

126. In the premises, the application is dismissed, with costs, including the costs of two counsel in relation to the City. Counsel's fees are to be taxed on Scale C.

P. S. VAN ZYL
Acting Judge of the High Court

Appearances:

For the applicant:

Ms J. Blomkamp

Instructed by:

Chris Fick & Associates Attorneys

For the first respondent:

Ms L. A. de la Hunt

Instructed by:

L Truter & Associates Inc. Attorneys

For the second respondent:

Mr R. Paschke SC and Mr A. Pillay

Instructed by:

Fairbridges Wertheim Becker Attorneys