OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: 16450/2019

In the matter between: **Revised**

LJ TURNKEY INVESTMENTS (PTY) LIMITED Applicant

and

STELLENBOSCH MUNICIPALITY Respondent

JUDGMENT

KUSEVITSKY J

Introduction

[1] This application relates to a dispute regarding the lawful utilisation of Portion 9 (a portion of Portion 1) of the Farm Verblyf Der Gelukzaligen No 100, Municipality

and Division of Stellenbosch ("the property"). The Applicant, the owner of the property, seeks declaratory relief in terms of the land use of the property. The Respondent by way of a counter-application, seeks both declaratory and interdictory relief.

[2] Pursuant to the filing of the answering affidavit, the Applicant amended its notice of motion. Initially, the relief sought was directed at seeking declaratory relief relating to the use of the property, namely seeking: (a) a declaration that it was being utilised for '*residential purposes*'; and (b) a declaration that certain zoning certificates have no legal status and do not bind the Applicant. In terms of the amended notice of motion, the Applicant additionally seeks a declaratory order that the zoning of the property was '*undetermined*' for the periods as specified.

[3] In the counter-application, the Respondent seeks an order: (a) declaring that the property is zoned Agricultural and Rural (use as contemplated in Chapter 20 of Stellenbosch Municipality Zoning Scheme By-law, 2019 ("the Zoning Scheme By-Law"). It also seeks further interdictory relief by *inter alia* interdicting the Applicant from utilizing the property for student and/or any other rental accommodation in contravention of the provisions of Chapter 20 of the Zoning Scheme By-Law.

[4] In order to contextualise the legislative framework, it is necessary to detail the use of the property from its designated inception.

The background

(i) 1955 – 1986

[5] During 1955, the Divisional Council of Stellenbosch ("the Divisional Council") was vested with authority to approve the sub-division of, *inter alia*, agricultural land in the Stellenbosch area. The Respondent is the successor-in-title of the Divisional Council as far as the Stellenbosch municipal area is concerned.

[6] Prior to 1955, the property formed part of Farm 100, Stellenbosch, then known as Farm Knoweside. According to the Applicant, during the first half of 1955, application was made to the Divisional Council on behalf of the then owner of Farm Knoweside, for permission to sub-divide the farm whereby a portion of approximately half a hectare in size was to be registered as a separate portion to be known as "*Verblyf der Gelukzaligen*".

[7] The Divisional Council approved the sub-division on 2 June 1955 and inserted the following conditions:

> *"1. The land may not be subdivided without the written approval of the controlling authority as defined in Act No. 21 of 1940.*
> *2. The land shall be used for residential and agricultural purposes only and no store or other place of business or industry whatsoever may be opened or conducted on the land without the written approval of the controlling authority as defined in Act No. 21 of 1940.*
> *3. No building or structure whatsoever shall be erected on the land without the written approval of the controlling authority as defined in Act No. 21 of 1940."*

[8] When the Divisional Council approved the subdivision on 2 June 1955, the following condition was inserted into the Deed of Transfer:

"The Board agreed that this smaller area be approved as a minor subdivision in view of the fact that it is to be used by the Salvation Army for the purpose of establishing a retreat for European Women Alcoholics, and will be controlled in terms of Act 21 1940".

[9] On 23 September 1955, pursuant to the subdivision approval, the property was transferred to the Salvation Army Property Company ("the Salvation Army"). The Applicant states that pursuant to the subdivision, the Salvation Army became entitled to utilise the property for residential purposes and that the right was recorded in the aforementioned conditions. The property is just over half a hectare in size and a number of buildings and hostels were erected on the property over the years. The hostel on the property now serves as residence for students and homeless people. The Applicant avers that the property has been utilised for residential purposes, and that the property has not been utilised for agricultural purposes at all, given the size of the property and the fact that the aforementioned buildings were erected thereon.

[10] On 1 July 1986, the Applicant purchased the property from the Salvation Army and became the registered owner. It argues that the condition in terms of which the Salvation Army was entitled to utilise the property for residential purposes was transferred to the Applicant's title deed and that it is, too, entitled to utilise the property for residential purposes.

[11] The Respondent on the other hand argues that this is not the case. They state that it is clear from the approvals that the intention of the subdivision was not to divest the property of its agricultural zoning. They argue that the sub-division was for a specific purpose, since it is common cause that the Salvation Army is a charitable, non-profit organisation and that a specific purpose that was meant to be achieved by

the sub-division was the charitable lodging and rehabilitation of the alcoholic women by the Salvation Army. Thus, they argue, the word *'residential'* was not meant to be a normal dwelling house, but rather a rehabilitation facility. They also argue that the further restrictions that *'no store or other place of business or industry whatsoever may be opened or conducted on the land without the written approval"* must also be seen in this light. They contend that it was never the intention that the property be used, as it is currently being used, as student lodgings for commercial gain.

[12] The zoning of the property during the specific time periods is of relevance. In 1955, when the property was created by sub-division, the Township Ordinance, No. 33 of 1934, was in force. It *inter alia*, distinguished between two types of land, that being urban and rural land respectively; the Township Ordinance of 1934 provided for the establishment of town planning schemes for local authorities and did not apply to rural land; the 1934 Township Ordinance did not, as far as rural land was concerned, provide for any of the following:

1.1.1. categories of residential use;

1.1.2. restrictions to residential use; or

1.1.3. conditional residential use, for instance, residential use on condition that such use was only allowed for *'the rehabilitation of European women alcoholics'*; and

1.1.4. until 1 July 1986, the use of the property in question was regulated and managed by means of the conditions set out in its title deed which entitled the Salvation Army to use the land for residential purposes.

(ii) *1 July 1986 (Land Use Planning Ordinance 15 of 1985)*

[13] On 1 July 1986 the Land Use Planning Ordinance 15 of 1985 ("LUPO") came into effect. The property fell within the ambit of the Section 8 zoning scheme

regulations. It was contended that in terms of section 14(1) of LUPO, the local authority was required to make a factual determination regarding the utilisation of the relevant property. Section 14(1) provides the following:

> "14(1) With effect from the date of commencement of this Ordinance all land referred to in section 8 shall be deemed to be zoned in accordance with the utilisation thereof, as determined by the council concerned."

[14] In terms of section 14(3) of LUPO, once the use has been factually determined, the local authority grants a zoning "permitting of the utilisation of the land concerned", which is the "most restrictive zoning".

[15] The Stellenbosch Local Municipality – Land Use Planning By-law, 2015[1] provides in section 13 thereof, for the determination of zoning by the Respondent. Section 13 (2) of the By-law states the following:

> 'when the municipality considers an application in terms of sub-section (1), it must have regard to the following –
>
> (a) the lawful utilization of land, or the purpose for which it could be lawfully utilised immediately before the commencement of the Land Use Planning Act if it can be determined'.

[16] The Applicant contends that on 1 July 1986, the property was utilised for residential purposes and, in terms of section 14(1) of LUPO, it was determined to be zoned residential. The Respondent, on the other hand contends that in 1991, when the Salvation Army made a building plan application for the construction of ablution facilities, a *determination*[2] was made in terms of section 14 of LUPO that the zoning was agricultural. This decision has not been challenged.

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[1] published in Provincial Gazette Extraordinary No. 751 dated 20 October 2015

[2] in argument, the submission was made that a 'determination' was made as opposed to a 'granting' of a zoning

[17] The Applicant argues that on 20 October 2015, the property was lawfully utilised for residential purposes and, if an application in terms of section 13(2) of the Land Use Planning By-law had been made to the Respondent, it would have been bound, by statute, to have regard to the fact that the property was lawfully utilised for residential purposes. It is common cause that the Applicant never made such an application at that time. The Respondent in its answering affidavit contends that when LUPO commenced, the Salvation Army did not approach the Respondent for a determination of the zoning of the property pursuant to section 14 of LUPO and states that presumably no such determination was made because there was no issue with the zoning and the use of the property. They state therefore that the land accordingly had no '*deemed zoning*' under section 14(1) and remained zoned for agricultural use as contemplated in the Section 8 Zoning Scheme Regulations, as it had been merely developed with a dwelling house and associated outbuilding in conformation with what was allowed on agricultural land in terms of the zoning scheme.

Was a determination made?

[18] I do not think that it can be disputed that the zoning of the property will determine whether the Applicant and the Respondent in its counter-application, is entitled to the relief that it seeks. Central to this question is whether a determination in terms of section 14 of LUPO was made or not. To re-cap, the Applicant contends that the sole factual dispute is whether the predecessor-in-title of the Applicant, i.e. The Salvation Army, on a date or dates not identified by the Respondent, applied to the Respondent, or its predecessor-in-title for a determination of the zoning of the

property in terms of section 14 of LUPO. This is in terms of the amended notice of motion. The Respondent has taken issue with this relief, contending that initially, it was the Applicant's case that it sought a declarator in terms of the land-use and now its case has morphed, in reply, seeking relief in terms of the zoning of the property. I will return to this aspect in due course.

[19] Much was made in argument as to whether the 'determination' made by the Respondent and the Respondent's predecessor-in-title amounted to a decision for purposes of administrative action which would make it susceptible to review proceedings, either under review under the common law or under the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). The Applicant argued that the Respondent purposefully in its papers ensured that the word 'determination' was used in order to bring it in line with the provisions of section 14(1) of LUPO which, as stated before, provides that all land shall be deemed zoned in accordance with their utilization, as *determined* by the Council. The Applicant argues that these determinations taken in 1991, 2011 and 2018, on Respondent's version, could not trigger proceedings under PAJA because PAJA does not operate retrospectively. The Applicant argues that the contention by the Respondent that a 'granting' was done subsequently, does not *prove* that a granting was done because, so it was argued, no evidence was provided to indicate that it amounted to a granting.

[20] During 1986, the Salvation Army applied to the Divisional Council for building plan approval for the construction of a garage on the property. In 1991, a further building plan application was brought to the Divisional Council for the construction of ablution facilities. The application was approved in a letter of approval which I will

deal with more fully hereunder. The Respondent says that it is clear that the Divisional Council made a determination of the zoning of the property under section 14 of LUPO at that stage, as the first page of the letter of recommendation reflects the zoning of the land to be "*Landbousone I ingevolge Artikel 14 van Ordonnansie 15 van 1985.*"

[21] They also contend that PAJA would not have been applicable for the said periods in 2011 and 2018 because PAJA is not retrospective. In 1991, there was no PAJA. They also contend that for a review to be triggered, there needs to be knowledge of the decision. They aver that there is no evidence to support this allegation. Finally, it was argued at the hearing that on Respondent's version, a determination is not administrative action and therefore not reviewable. They finally contend that they cannot contest a zoning that does not exist. I am not in agreement with these contentions for the reasons that follow.

[22] First of all, the rules relating to making out a case in reply is trite.[3] In *casu*, the Applicant's case has manifestly diverged from its initial relief in its notice of motion. The Applicant's founding affidavit is devoid of any evidence to support the relief that it seeks. Then, it sought to cure this defect by filing an amended notice of motion and thereafter, impermissibly in my view, filed a consolidated affidavit as a replying affidavit in the main application and an answering affidavit in the counter-application. As I have stated, none of the relief that it seeks is found in the founding affidavit and it does not behove an applicant to attempt to bolster a deficient case in reply and in its heads of argument. In this matter however, the Applicant has amended its notice

[3] Tity's Bar and Bottle Store v ABC Garage and Others 1974 (4) 362 (TPD)

of motion to reflect the additional relief. A court naturally has a discretion as to whether to permit such conduct if it is in the interest of justice to do so and if the granting of a cost order against such a party might alleviate the prejudice suffered by the opposing side.

[23] I am of the view that the Applicant's arguments are not sustainable. A decision making body or authority who exercises its functions in terms of the powers granted to it, makes a decision, whether one chooses to call it a decision or determination. And it it trite that any decision or determination made by such a statutory authority is susceptible to an appeal, either in terms of its internal appeal processes within that regulatory framework, or in terms of PAJA. It would be an absurd proposition to suggest that decisions made, whether one chooses to call it a determination, is not a decision. This view is supported by the dictionary definitions of the word '*determinations*' and '*determine*' in the Concise Oxford English Dictionary, being the "process of determining something; cause to occur in a particular way; be the decisive factor in". The court of Appeal in *Martins v De Waal and Others* 1963 (3) SA 788[4] held that the word 'determination' should be interpreted in its widest sense, relying on the Afrikaans dictionary definition of the word '*vestelling*' in Krizinger and Steyn's *Groot Woordeboek*, 7th ed., and the meaning assigned thereto being the following: "establishment, fixation; proof and 'provision and declaration."

[24] The Respondent contends that between 1955 and 2019, the Respondent made various administrative decisions relating to the property to the effect that it is

[4] at 789F-H

zoned as agricultural land. It argues that none of the decisions have ever been challenged and neither has Respondent challenged it now. The Respondent asserts, correctly, that every administrative decision, even unlawful ones, have consequences until set aside by a court under review.[5] They argue that the *Oudekraal* principle is fatal to the relief sought by the Applicant. The Respondent lastly contends that, over and above the aforementioned deficiencies in the Applicant's papers, that the Applicant furthermore does not challenge the empowering provisions and therefore the legal scheme as it stands must be applied. Finally, that because declaratory relief is discretionary in nature, it must under the circumstances be refused because of the Applicant's failure to invoke the provisions of PAJA and has continued to act in disregard of the Respondent's constitutional rights to regulate planning matters in its jurisdiction by ignoring the legal scheme.

Evaluation

[25] In 1991, the Salvation Army knew that in terms of the title deed conditions and restrictions, that it needed to apply to the Respondent for a departure or exemption from those conditions. The letter of exemption was followed by the application on the prescribed form to the Western Cape Regional Services Council: Stellenbosch Office. On the application form, the Salvation Army records the details of the property as Farm/Erf 100/9 situate in Klapmuts Road, Stellenbosch. Under the heading 'General Information', the type of building is recorded as an 'addition' and more importantly, the following question and answer posed is the following: '*Is*

[5] Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA) at paras 26 and 27 and MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute 2014 (3) SA 481 (CC) at 102-103 and 104-105

building for bona fide farming purposes? Yes'[6]. In the letter of reply by the Divisional Council for Stellenbosch dated 30 July 1991, the description of the property is designated as a *farm*, i.e. 'Plaas 100/9 Stellenbosch'. The zoning of the farm is also deemed as Agricultural.[7] The letter lists the reason for the application, stating that the Salvation Army requests the construction of outbuildings to house toilets for their staff and that the proposed building will encroach the 30m building line exclusion from the boundary of the *farm*. The Motivation records that because of the existing buildings on the farm, the proposed new structure cannot be built in another position on the farm. The approval granted on 12 September 1991 was only in respect of the departure of the designated building line. Importantly, the caveat to the approval stated that the approval of the departure was not a general waiver of the existing conditions precedent.[8] The Afrikaans provision states as follows:

> *'1. Die goedkeuring moet geag word slegs die afwyking te dek'*

[26] It is therefore evident that on this basis alone, the Respondent's predecessor-in-title had made a determination as to the land use of the property. It is also evident, factually, that at this point, both parties, i.e. the Salvation Army and the Stellenbosch Council was *ad idem* that the property was designated and zoned as 'agricultural'. It is clear that at the very least, the decisions of 2011 and 2018 fell within the ambit of PAJA.

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[6] own emphasis

[7] *Sonering* (Zone) : *Landbousone* 1 (Agriculatural)

[8] The Afrikaans provision states as follows:

> *'1. Die goedkeuring moet geag word slegs die afwyking te dek waarvoor aansoek gedoen word en moet nie vertolk word as magtiging om van enige ander Raadsvereiste of wetlike bepaling af te wyk nie.'*

[27] I am also not persuaded that the Applicant's selective reading of the condition in the title deed citing 'residential purposes' is sufficient to augment a conclusion that the property is zoned as 'residential'. If one has regard merely to the 1991 Letter of authorization, it is clear that the property contained buildings and outbuildings. In terms of the provision, this is where the initial rehabilitation facility was housed and the provision inserted to reflect that it could be utilised for 'residential purposes.' The Applicant however selectively ignores the remainder of the prohibitory condition which states that '*no store or other place of business or industry whatsoever may be opened or conducted on the land without the written approval of the controlling authority as defined in Act 21 of 1940.*' It is trite that Statutes must be interpreted with due regard to their purpose and must understood holistically. This however does not mean that ordinary meaning and clear language may be disregarded, for interpretation is not divination and courts must respect the separation of powers when construing Acts of Parliament.[9]

[28] Therefore, such as was the case before, the Applicant has to apply for a departure or removal of the restriction and gain permission and approval from the Respondent to run its student accommodation business for profit. The Salvation Army was given an entitlement to use the property for residential purposes within a specific context and the right to use the residential component attaching to agricultural land has not disappeared. It most certainly does not behove the Applicant to by-pass the regulatory provisions governing the property and it is most certainly not the function of a court to usurp the function of decision-making institutions. This finding therefore also put paid to the relief claimed in the amended

[9] Kubyana v Standard Bank of South Africa 2014 (3) SA 56 (CC)

notice of motion that the zoning of the property was 'un-determined'. As I have found, it is clear that a determination has been made that the property is zoned as 'agricultural.'

[29] I am therefore in agreement with the Respondent that failing a challenge to this determination of the property, that the Applicant's relief in terms of a declaratory order must fail.

Zoning Certificates

[33] The final relief claimed by the Applicant is the declaration that the zoning certificates have no legal status; are not determinative of Applicant's rights; do not constitute a certification of the zoning applicable to the property; and do not bind the Applicant.

(iii) 2011 – 2015

[34] In the founding affidavit, the Applicant makes two contentions. It states that on or about 11 December 2018, the Directorate: Planning and Economic Development of the Respondent generated or issued a document bearing the heading 'Zoning Certificate' purportedly in respect of the property. In the document, the Applicant contends that the primary use of the property is indicated to be 'agricultural' with no reference to the fact that the Applicant is entitled to, and in fact utilises the property for residential purposes. A second letter was similarly produced on 9 April 2019

indicating the primary use as Agriculture, with consent use for various land uses allowed[10] with the consent of the Council.

[35] On the Applicant's version alone on this aspect, it is quite apparent that approval was sought and granted for the departure of the initial restriction that '*no store or other business or industry whatsoever may be conducted or opened without the written approval of the controlling authority*', since the various land use listed now includes the operation of a farm stall and farm store, service trade and tourist facilities.

[36] The Respondent states that in 2011, the Salvation Army approached the Respondent and sought confirmation of the zoning of the property. On 7 October 2011, the Respondent issued the zoning certificate to remain agricultural, confirming the 1991 position. This decision was not challenged by the Salvation Army. The Salvation Army again approached the Respondent during 2015. The Respondent states that as no application for the change in land use had been submitted, the Respondent did not have to reassess its initial determination and on 23 September 2015, it issued another zoning certificate confirming the existing zoning of the property as Agriculture 1. The Respondent argues that the Salvation Army knew precisely what rights were attached to the property when it sold the land to the Applicant less than a year later. It contends that no rezoning applications have ever been lodged with the Respondent and therefore the zoning of the property has remained.

[10] Some land uses listed includes inter alia additional dwelling units, farm stall farm store, riding school, nursery, guesthouse, aquaculture etc.

[37] The objective facts in this regard is that since the inception of LUPO, the property has been determined as being agricultural on no less than three occasions. The argument belatedly presented by the Applicant in its replying affidavit to the effect that its rights disappeared at some undisclosed date is without merit. So too is the relief claimed to the extent that it seeks this court to make a declaration that those certificates are not legally binding on the Applicant. The Respondent in its answering affidavit stated that the certificate in itself has no legal effect and that it is merely *prima facie* evidence of the underlying decision – the determination of the use of the property and the resultant zoning thereof, which constitutes administrative action. The Respondent does not dispute that the certificate itself has no binding legal status and has never disputed same. This is why it contends that the relief sought in paragraph 3 of the notice of motion was unnecessary.

[38] I am in agreement with the Respondent's contention that the zoning certificates are *prima facie* proof of the existence of underlying administrative action taken either by Divisional Council or by the Respondent.

Respondent's Counter – application

[39] Finally, turning to the counter-application of the Respondent. In the notice of motion, the Respondent *inter alia* seeks an order, declaring the property is zoned for Agricultural and Rural use as contemplated in Chapter 20 of the Respondent's Zoning Scheme By-Law; interdicting and restraining the Applicant from utilising the property for student and/or any other accommodation in contravention of the provisions of Chapter 20 of the By-law; directing the demolition of the shade ports on

the property to the extent that they cannot be regularised so as to comply with the requisite building regulations, Municipal by-laws and zoning scheme by-laws and finally an interdict prohibiting the Applicant from occupying or using the garage for the purposes of accommodation until such time as the requisite building plans and approvals therefore have been granted in accordance with the relevant legislation.

[40] It was conceded during the hearing of the matter that the Applicant's has complied with the certain of the relief claimed notably prayers 3, 5 and 6 of the notion of motion. In Respondent's heads of argument, it is only prayers 1, 2 and 4.2 that needs adjudication.[11]

[41] The main contentions are the following. In 2016 the Applicant purchased the property for R1.5 million. The zoning was therefore already determined before purchase. At no stage has any party made application for a rezoning of the property. Since 2013 the Respondent has, in terms of the Municipal Property Rates Act 6 of 2004, valued the property as Agricultural. No objections have been made to the valuations. In 2018, when the Respondent received a complaint that the Applicant was using the property as student housing, two warning notices were issued.

[42] On 7 June 2019, the Respondent states that the Applicant was advised by its then attorneys that it should bring a PAJA review. This contention is however not entirely correct. What is apparent is that on 7 June 2019, STBB Somerset West wrote a memorandum on the issue of the zoning certificate. This memorandum was sent to the Respondent on the Applicant's behalf when the Applicant ostensibly

[11] fn 63 thereof

attempted to persuade the Respondent to change the zoning of the property. The memorandum suggested two alternatives. One of the alternatives was for Respondent to withdraw the certificate and substitute it with a 'correct' one. The other alternative was for the Applicant to bring a judicial review in terms of PAJA to set aside the 'contentious certificate'.

[43] Various notices were sent to the Applicant about its unlawful use of the property. In the main application, the Applicant refers, in an attempt to resolve the issues with the Respondent, to various meetings that took place between the parties, without resolution to any of the issues. The Applicant stated that notwithstanding these attempts to rectify the so-called zoning certificates, the Respondent on 12 June 2019, issued a notification to the Applicant in which it was contended that a *'land use contravention'* was taking place on the property.

[44] On 12 June 2019 the Respondent issued another warning notice regarding the unlawful use of the property. The Respondent avers that this notification however was not the first notification to the Applicant in respect of its unlawful use of the land. It states that on two prior occasions, notices had been sent, on the 5 April 2018 and on 29 October 2018. Both notices refer the Applicant to the unauthorised land use in the conduction of student accommodation in contravention of sections 15(1) of the By-laws, and of utilizing land in a manner other than prescribed by a zoning scheme without the approval of the Municipality. The Applicant was then instructed in terms of section 87 to cease the unlawful utilisation of land without delay.

[45] On 28 September 2018 another inspection was conducted on the property. The Applicant was again warned to cease the activity without delay in terms of

section 87(2) of the By-laws. Notwithstanding the aforegoing, and in particular the notices, the Applicant proceeded to make alterations to the property without having approved building plans; and erected advertising boards also without seeking approval. Further notices were sent on 28 November 2019.

[46] The Respondent contends, over and above the non-compliance as explained above, there are two reasons for the counter-application: the first is that the title deed conditions of the property make it plain that it cannot be used for commercial gain, such as student accommodation; and secondly, the current agricultural zoning of the property prevents it being utilised as student accommodation.

[47] Pursuant to a property inspection, the Applicant confirmed that the entire property is being used as accommodation, not only for students, but also other tenants. Short-term rentals are also provided. There are also 27 parking bays located on the property of which some are covered by shade cloth. In terms of section 85(1) of the Respondents' Municipal Planning By-law, it requires the Respondent to enforce compliance therewith. The contraventions of the Applicant are as follows: There has been contravention of the National Building Regulations and Building Standards Act 103 of 1977 ("the Building Act"). The Applicant has converted a garage into a cottage without approved building plans; Because there were no approved building plans, the cottage has been occupied without the Respondent issuing a completion certificate. Thus, there has been non-compliance with section 14 of the Building Act; The Applicant has also erected signage in contravention of its own title deed. These sign boards have subsequently been removed.

[48] The Respondent contends, in pursuance of interdictory relief, that it has a clear right to prevent the continuous contravention of the relevant zoning scheme provisions. This continuous breach constitutes the injury in that the Applicant is using the property in violation of the zoning provisions of the scheme. I am satisfied that the Respondent has met the requisite requirements for an interdict. Most certainly the courts cannot condone self-help to the extent that blatant disregard for the rules and zoning scheme regulations are condoned. Deliberate infringements of these regulations amount to offences under the By-laws and until such time as the Applicant complies with the necessary legislation. I can see no reason why they should not be interdicted from so utilizing the property until they have fully complied.

Costs

[49] The Respondent seeks a punitive cost order against the Applicant. They aver that despite legal advice given to them, and being advised by the Respondent that they should have pursued review proceedings under PAJA, they still persisted with their application. The Respondent also contends that the Applicant filed a striking out application which was later abandoned. This conduct, in and of itself in my view does not warrant a punitive cost order. However, the further conduct of the Applicant deserves censure by this court.

[50] The main application was launched on 16 September 2019. The Respondent's answering affidavit was filed on 13 November 2019. On 17 September 2020, the Applicant lodged a land use application to the Respondent on the prescribed form. The application was made for the determination of the zoning of the

property pursuant to the provisions of section 13 of the Scheme's By-laws. Interestingly to note, the Applicant stated in that zoning application, that there was no pending litigation. That was of course misleading since by this time, these proceedings had already been instituted by the Applicant on 16 September 2019.

[51] When no response had been forthcoming by Respondent, the Applicant lodged an appeal to the Respondent on 9 December 2020. In that letter of appeal, the Applicant complained of the Respondent's lack of response and acceptance of the land development application in respect of the property, which was the very same relief that the Applicant had sought in the main application. On 21 December 2020, the Respondent replied to that letter of appeal. They admonished the Applicant for not specifying in the application that there was pending litigation, knowing full well that there was. They also took issue, *inter alia* with the fact that in the Applicant's zoning application, there was an acceptance that the property was zoned and which position was contrary to their position advanced under oath in these proceedings to the effect that the zoning of the property was 'un-determined'.

[52] On this basis, I am in agreement that a punitive cost order should be awarded against the Applicant. The Applicant ignored initial advice to challenge the zoning *via* review proceedings and they did not do so. The various notices to desist the unlawful utilisation of the property and to comply with the relevant legislation was sent to the Applicant from 2018. The Respondent in its reply to the Applicant's letter of appeal advised the Applicant that, pending the existing litigation, which traversed the same issues with regard to the same property as the zoning application, that it could not determine the zoning application. The Respondent thereafter proposed

that the Applicant withdraw the litigation and follow the prescribed land use application that it had now pursued by virtue of the zoning application. This was on 21 December 2020. This was not done.

[53] Every citizen and entity has to conform to the rules and statutory regulations in their usage of land and it is not open to anyone to conduct itself or themselves in a manner which amounts to judicial self-help. Despite this blatant disregard for the law, and in defiance of the position that it knew it should have followed given the aforementioned zoning application, the Applicant still persisted with this application, and this court was confronted with a record of over 1000 pages. I am not going to state the obvious - Court are already challenged with limited resources and time. As I have stated, it is this latter conduct of the Applicant that deserves the court's censure and which warrants a punitive cost order against it.

[54] In the result, the following Order is made:

ORDER:

1. The main application is dismissed with costs on an attorney and client scale.
2. The Respondent's counter-application is granted in respects of paragraphs 1, 2 and 4.2 of the Notice of Motion.
3. The Applicant is ordered to pay the costs of the counter-application.

D.S KUSEVITSKY

JUDGE OF THE WESTERN CAPE HIGH COURT

On behalf of the Applicant	**Adv. DJ Coetsee**
Instructed by	**CA Friedlander (Mr Bell)**
On behalf of the Respondent	**Adv. A Nacerodien**
Instructed by	**Webber & Wentzel (Mr Esterhuizen)**