IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE	**CIV. CASES NOS. 163/04 & 165/04**
In the matter between	
CITY COUNCIL OF MANZINI	**APPLICANT**
VERSUS	
R.A.C.O.E. And **ANSAR JUNIOR SCHOOL**	**RESPONDENT** **RESPONDENT**
CORAM	**SHABANGU AJ**
FOR APPLICANT	**M. VAN DER WALT**
FOR RESPONDENT	**MR. VILAKATI MR. M. DLAMINI**

JUDGEMENT 26th
February, 2004

On the 28 1 January, 2004 two applications brought by the applicant, the Manzini City Council, were heard simultan

1. Interdicting and restraining the respondents from operating as a school, as defined in the Education Act, Act 9 of 1981 wit

3. Interdicting and restraining the respondent from using Plot 155, (Plot 243) Manzini, in the Municipality and division of Manzini, for any purpose other than General Commercial purposes (Light Industrial purposes), as envisaged by the provisions of the zoning described as General Commercial (Light Industrial 1-2) referred to in the Manzini Development Code, established in terms of the Town Planning Act, Act 45 of 1961, with immediate effect, pending successful rezoning of the property in terms of Act, 45/1961.

The respondent in each case is described as "an enterprise, whose full and further particulars are unknown to the applicant advertising itself as a 'school' situate at Plot 243 (or Plot 155) respectively in Manzini. The last statement in each case of paragraph four which contains a description of the respondent, is to the effect that 'the full and further particulars of this enterprise are not known.' There is nothing in the description of the respondent in both cases to indicate that the respondents possess some kind of legal personality which makes them capable of being sued. A factor related to the fact that the order sought does not appear to be sought against either a legal or natural person is that it would serve no purpose for this court to issue an order against a thing as opposed to a person, because such an order cannot be enforced against any person. A school as such is a thing and not necessarily a person capable of bearing obligations. The orders sought by the applicant are interdicts which are intended to forbid the carrying on of certain activities in Manzini and in this sense they are orders *ad factum praestandum* meaning that they can be enforced by contempt proceedings for the committal of the defaulting judgement debtor. Since I am not satisfied that the respondents in each case is a person capable of being sued or is a person at all, the granting of any kind of interdict in these circumstances is not justified. Furthermore, the applicant could easily have ascertained the owners of the properties and the occupiers where applicable and proceeded against them. In either case the owner (s) of the property is a necessary party to the proceedings which brings me to the further related point of non-joinder. A party should be joined of necessity if they have a direct and substantial interest in any order the court might make,

or if such order cannot be sustained or carried into effect without prejudicing that party, unless the court is satisfied that he has waived his right to be joined. See PICK 'N PAY STORES LTD V. TEASERS COMEDY AND REVENUE CC. 2000(3) SA 645 at 651D. See also AMALGAMATED ENGEENERING UNION V. MINISTER OF LABOUR 1949(3) SA 637 (A). In the PICK 'N PAY CASE *supra* the learned judge Hussain J. observed:-

> *"According to Van Wyk, zoning is an aspect of Town Planning which is primarily concerned with certain restrictions or limitations on ownership and use of land. For this reason, zoning is a limitation or a condition restricting the exercise of ownership."*

On the basis of the aforegoing passage from the PICK 'N PAY case *supra* it appears to be accepted that Town Planning legislation which restricts, regulates or prohibits certain uses of land in respect of certain areas referred to in a Town Planning Scheme apparently promulgated in terms of Town Planning legislation, amounts to a detraction from the common law rights of ownership which attach to an owner in respect of his land. Any action which the local authority or anyone for that matters takes in order to forbid certain uses of land in accordance with Town Planning legislation must be notified to the owner of the land, being the person whose rights are going to be prejudicially affected. Indeed section 23 of the Town Planning Act, 45 of 1961 consistently with the aforementioned principle provides in so far as may be relevant to this case as follows;

> *"23 (1) Upon the coming into operation of an approved scheme the responsible authority shall observe and enforce observance of all the provisions of the scheme.*
>
> *2. Subject to this act, the responsible authority may at any time-*
>
> *(c) If any building or land is being used in such manner as to contravene any provision of the scheme, forbid such use; or*
>
> *(f) generally do anything necessary to give effect to the scheme. "*

Then in subsection three of the abovequoted section 23, provision is made for the giving of notice to the owner and occupier of the building or land in respect of which the responsible authority proposes to take any action contemplated under subsection two, as follows:

> *"Before taking any action under subsection (2) the responsible authority shall serve a notice on the owner and on the occupier of the building or land in respect of which the action is proposed to be taken and on any other person who in its opinion, may be effected thereby, specifying the nature of, and the ground upon which it proposes to take that action. "*

Subsection (3) and subsection (4) of section 23 of the Town Planning is recognition by the legislature of what I have referred to above, namely the interests of the owner of the land in any action (including proceedings) which is aimed at restricting or regulating his common law right to use and enjoy his property as he deems fit.

Regarding this SILBERBERG AND SCHOEMAN, THE LAW OF PROPERTY 2nd edition at page 162 states;

> *"It has been suggested that ownership embraces the power to use, alter, destroy or alienate the thing concerned, to enjoy the fruits thereof, to prevent others from using it and to transfer to the thing, for example in respect of its use, to others, (i.e. provided his conduct is not contrary to statutory provisions and does not interfere with the rights of others). But even this does not constitute a complete list of the powers which may be conferred by ownership. Consequently, it is perhaps preferable to say that the right of ownership confers on the owner of a thing the power to do with his thing as he deems fit, subject only to the limitation imposed by public and private law. "*

Similarly in VOL. 27 THE LAW OF SOUTH AFRICA, page 98-9 edited by JOUBERT, PROFESSOR C.G. VAN DER MERWE contributing on the LAW OF THINGS, observes

> *"Ownership is in principle a most comprehensive right embracing, not only power to use (ius utendi), to enjoy the fruits (ins fruendi) and to consume the thing (ius abutendi)..."*

Then at page 99 paragraph 107 the learned author adds

> *"The potential power of an owner to deal with the object of his ownership as he pleases is subject to various limitations. These limitations can be divided into limitations imposed by public law and limitations imposed by private law. Public law restrictions are imposed on all owners of a particular kind of property either for the benefit of society as a whole or in the interests of certain sections of the community. Private law restrictions are those imposed by the owner himself, for example by granting a limited real right, like a servitude, to an outsider. Neighbour law restrictions are in turn divided into restrictions imposed in terms of the general concept of 'nuisance' and those imposed in terms of certain casuistic traditional neighbour law rules. "*

The Town Planning Act 45 of 1961 and the Town Planning scheme promulgated under the provisions of the Act is an example of the aforementioned public law restrictions on the owners use and enjoyment of his property. In light of this the court may have to stay the proceedings until the owner and the occupier of the premises are joined and properly cited as parties to the application.

Furthermore, in any event, as already observed it appears clearly that the applicant as the authority responsible for enforcing the provisions of the Town Planning Act and the scheme promulgated thereunder, is required before taking any action aimed at either forbidding any use to which the property is put or generally doing anything necessary to give effect to the scheme, is required to serve at least one months notice to owner and occupier of the premises, in terms of section 23 of the Town Planning Act 45 of 1961. The provisions of subsections (2), (3), (4) and (5) of the Town Planning Act appear to cover generally anything which the responsible authority may do for purposes of giving effect to the scheme. The expression in paragraphs (c) and (f) of-section 23 (2) of this Act is in my view wide enough to cover the present proceedings in which the applicant claims an interdict, for the purpose of forbidding the use of the premises as schools. It may be interesting to note that in the two cases to which I was referred by counsel for the applicant, namely, TZANEEN LOCAL TRANSITIONAL COUNCIL V. LOUW 1996 (2) SA 860 AND HUISAMEN & OTHERS V. PORT ELIZABETH MUNICIPALITY 1998 (1) SA 477E it was held that the requirement to give notice of the intended action to the owner (s) of the offending properties was part of separate statutory remedies and that it would not be necessary for the local authority to give such notice to the owners where the said local authority was not invoking its statutory remedies, but approached the court to seek an interdict. It was held in these cases that the local authority was entitled to seek and obtain an interdict to stop conduct which contravened the provisions of a Town Planning Scheme, without first having given notice of its intended action to the owners and occupiers of the premises. In the case of the TZANEEN LOCAL TRANSITIONAL COUNCIL V. LOUW ET UXOR AND ANOTHER1996 (2) SA 860 at 863 E - 4C the court's reasoning was as follows

> *"In respect of section 42 of the Town Planning and Township's Ordinance Mr. Kemp has a two-fold argument: firstly, he says that the applicant should have observed the audi alteram partem rule before invoking section 42 and, secondly, he says that the letter of demand by the attorney which was issued in terms of section 42 should have stated a dme within which the building operations had to be ceased, or at least a reasonable time. The letter to the second respondent merely said that the activities had to be ceased forthwith. I must accept that, before the applicant could set the provisions of section 42 into operation, it had to give notice to the respondents of its intention to do so. After all, if the provisions of that section were to be rendered applicable to the respondents, it could have serious implications for them, such as possible criminal liability and the duty to remove building work. (See PRETORIA CITY COUNCIL V. OSMAN OMAR (PTY) LTD 1959 (4) SA 439 (T) at 441 D-H). It is obvious from the affidavit of the Town Clerk, though not from the notices sent to the respondents, that the applicant had intended to set the provisions of section 42 in motion. It also appears from the prayers set out in the notice of motion. In as much as the applicant relies on relief in terms of section 42 I am therefore of the view that such relief cannot be granted. The matter does not, however, end there."*

Having stated the above, the learned Judge proceeded to say the following regarding the appropriateness of seeking and obtaining of an interdict where the section 42 notice has not been previously sent to the owner;

> *"The activities conducted by the second respondent on the property are obviously illegal. In my view, the applicant is clearly by common law entitled to an interdict merely to interdict those activities. In ALBERTON TOWN COUNCIL V. ZUANNI 1980 (1) SA 278 T at 278 the full bench held in respect of a by-law similar to section 42 % that a local authority who wishes to compel an offending property owner to demolish an illegal structure on his property is confined to the particular by-law for relief. The court, however, accepted without deciding so, that the local authority could still obtain an interdict merely to interdict the infringement. See at 282 J. In CITY COUNCIL OF JOHANNESBURG V. BERGER 1939 WLD 87 at 90-1 it was held that a local authority can interdict an offending property owner even though it has a specific remedy in terms of the bye laws. See also JOHANNESBURG CITY COUNCIL V. LILIANNE (PTY) LTD 1946 WLD 206 at 213 and BRITS TOWN COUNCIL V. PIENAAR N.O & ANOTHER 1949 (1) SA 1004 (T) @ 1016-18 and 1031-2. I agree with that approach. I cannot see how the provision in legislation of a specific remedy for the cessation of illegal building work and its removal can ever exclude a local authority's right merely to interdict an infringement of building regulations or a Town Planning Scheme. If such a right is to be excluded, it should be excluded expressly. "*

The provisions of section 42 (2) of the Town Planning and Townships Ordinance referred to in the abovequoted passages appears at page 279D-E in the case of ALBERTON TOWN COUNCIL V. ZUANNI 1980 (1) SA 278 (T). The wording of section 42 (2) of the Town Planning and Townships Ordinance is different from the wording of the provisions of section 23 of the Town Planning Act 45 of 1961 which I have to consider in

this matter. The provisions of section 23 of the Town Planning Act, 45 of 1961, one must accept, confers upon the local authority itself not only the power to forbid the use of a building or land when such building or land, is used in such manner as to contravene any provisions of the scheme, but the power under paragraph (f) to *"generally do anything to give effect to the scheme."* It seems to me that the power conferred on the local authority under paragraph (f) of section 23 subsection (2) of the Town Planning Act, 45 of 1961 is wide enough to cover the instituting of legal proceedings to seek an interdict aimed at forbidding the use of a building or land in such a manner as to contravene any provision of the scheme. In any event it would be absurd and would render the provisions of subsections three and four of section 23 of the Town Planning Act 45 of 1961, nugatory, if the local authority would be able to forbid the use of a building or land in a manner allegedly contravening any provision of a scheme, by obtaining an interdict from the court, without giving prior notice to the owner or occupier as envisaged by section 23 (3) and (4) of the said Town Planning Act 45 of 1961. If I hold that a local authority which seeks to forbid the use of land in a particular manner by directly seeking- and obtaining an interdict from this court would be entitled to do so on the basis of its common law right to seek and obtain an interdict such local authorities would always be able to avoid giving notice to the owners and occupiers by simple approaching the court for an interdict. On • the basis of the aforegoing I do not consider that the abovementioned South African cases are relevant in respect of our Town Planning Act, 45 of 1961 which is worded differently. In any event even if the giving of the section 23 notice cannot appropriately be regarded as a condition precedent to anything that the local authority may do generally to give effect to a scheme, at the least, whether such notice has been given or not will in my view be an important consideration on whether the court should exercise its discretion in favour of granting an interdict in a particular case.

Before I proceed any further I should mention that I am in agreement with the principle stated in the passage quoted from the TZANEEN LOCAL TRANSITIONAL COUNCIL case *supra* to the effect that a local authority who wishes to compel an offending property owner to demolish an illegal structure on his property is confined to the particular bydaw for relief. Applying that particular principle to the present case the

remedies, functions and duties of the council as a local authority to preventing uses of land or buildings in a manner which contravenes a Town Planning scheme, are defined in the relevant statutory provisions namely the Town Planning Act 45 of 1961 and the regulations promulgated thereunder. As was stated in the cases cited in the TZANEEN case *supra,* for instance in ALBERTON TOWN COUNCIL 1980 (1) SA 278 at 280, the applicant's remedies duties and rights, if any, are defined in the laws and bye laws governing its operations and functions, in this case, the Town Planning Act an the Town Planning Scheme promulgated thereunder, and to such remedies it is confined. Whether the applicant would be entitled to other common law remedies such as an interdict, for instance, would depend on whether on an examination of the statutory provisions defining its functions it can be said that it is thereby conferred with a clear right in respect of which it would be entitled to seek protection from this court in the event there is an interference with the exercise of that right on the part of the person to be interdicted and there is no other available remedy by which the applicant local authority can be protected with the same result. See SETLOGELO V. SETLOGELO 1914 AD 221 on the requirements of an interdict. It is only once such requirements are shown to exist in any particular case that the court will have a discretion to consider whether it is appropriate in the present case, having regard to other considerations to grant an interdict. It was argued on behalf of both respondents that the applicant has not satisfied the requirements of an interdict in as much as it has not shown a clear right which is being violated by the respondents and that it has not shown the absence of an alternative or adequate remedy. This objection was expressly raised by Mr Thwala in submissions on behalf of his client. Mr Vilakazi in his own submissions adopted the submissions made by Mr Thwala. On the other hand counsel for the applicant sought to meet this objection by making the submission that the applicant is entitled to apply to court to compel a respondent to comply with a code such as the Manzini Development Code and also by virtue of the common law. An ancillary part of counsel's submission is that the Applicant is in terms of paragraph 1.1. of the Manzini Development Code appointed as "the local and responsible authority for enforcing and carrying into effect the provisions of the Manzini Development Code." Two cases were cited and relied upon by counsel in support of the

submission that the applicant is entitled to apply to court to comply with a code such the Manzini development code when it is being contravened or by virtue of the common law.

These are the cases of the TZANEEN LOCAL TRANSITIONAL COUNCIL V. LOUW 1996(2) SA 860 and HUISAMEN & OTHERS V. PORT ELIZABETH MUNICIPALITY 1998(1) SA 477(E). Now the provisions of paragraph 1.1. of the Manzini development code to which I was referred by counsel for the applicant is a compliance with section 12 of the Town Planning Act, 45 of 1961 which requires that "every town planning scheme shall define the area to which it applies and specify the local authority responsible for enforcing and carrying into effect the provisions of the scheme." The Town Planning Act 45 of 1961 therefore requires that a 'local authority' be appointed in the scheme for the purpose of enforcing and carrying into effect the provisions of a Town Planning scheme. The applicant is such a 'local authority' which the Town Planning Act, 45 of 1961 envisages may be appointed for the aforementioned purpose. This becomes apparent when the definition of 'local authority' in section 2 of the Town Planning Act, 45 of 1961 is read in the context of section 2 and 9 of the Interpretation Act 21 of 1970 together with section 4 of the General Administration Act 11 of 1905. The scope of the functions and powers of the applicant (as a local authority appointed in terms of section 12 of the Town Planning Act, 45 of 1961) in carrying into effect the provisions of the town planning scheme (ie, the Manzini Development Code) is defined mainly in section 23 of the Town Planning Act 45 of 1961. Section 23 subsection one provides as follows, in these regard;

> *"Upon the coming into operation of an approved scheme the responsible authority shall observe and enforce observance of all the provisions of the scheme. "*

Then in subsection 2 of the aforementioned section 23 which was quoted earlier in this judgement the following provisions which I now quote in full are contained:

> *"Subject to this Act, the responsible authority may at any time-f a) remove, pull down or alter, so as to bring into conformity with the provisions of the scheme, any building or other structural work which was in existence when the*

scheme came into operation and which does not conform to the provisions of the scheme, or the demolition or alteration of which is necessary for carrying the scheme into effect; or

(2) *remove, pull down or alter so as to bring it into conformity with the provisions of the scheme, any building or other structural work erected or carried out in contravention of any provision of the scheme; or*

(3) *if any building or land is being used in such manner as to contravene any provision of the scheme, forbid such use; or*

(4) *if any building or land has since the scheme came into operation been put to any use which contravenes any provision of the scheme, forbid such use; or*

(5) *execute any work which it is the duty of any person to execute under the scheme in any case where delay in the execution of the work has occurred and the efficient operation of the scheme has been or will be in the opinion of the responsible authority thereby prejudiced; or*

(6) *generally do anything necessary to give effect to the scheme."*

From the above provisions of section 23 what appears is that in subsection one an obligation or duty is imposed on the local authority responsible both .to "observe and enforce observance of all the provisions" of a scheme in respect of which it has been appointed. Subsection two then enumerates what the local authority may *do* in enforcing observance of all the provisions of the scheme. In terms of subsection two of section 23 the local authority may *itself* remove, pull down or alter, so as to bring into conformity with the provisions of the scheme, any building or other structural work which is carried out or erected in contravention of any provision of the scheme, regardless whether such work or building was in existence or not when the scheme came into operation. Similarly regarding the uses to which land or buildings may be put to, the responsible local authority, such as the applicant, may *itself* forbid such use on the basis that the said use contravenes some provision of the scheme, regardless whether such land has been put into similar use before the scheme came into operation or not. The local authority is also empowered to *itself* generally do anything necessary to give effect to the scheme. It may well be that the local authority may not call upon the owner or occupier of the land or building himself to remove, pull down or alter the building or structural work on any land which does not conform with the provisions of a scheme. The right to so remove, pull down or alter is on the responsible local authority itself. Similarly the power to forbid the

use of land or a building in a manner which contravenes some provision of a scheme is conferred upon the responsible local authority itself and does not include the right or power to require the owner or any other person to forbid the use. (see ALBERTON TOWN COUNCIL V. ZUANNI 1980 (1) SA 280 (T). From this, it may well be that the responsible local authority cannot in the exercise of its powers under section 23 obtain an order compelling the owner or the occupier to remove, pull down or alter any building or other structural work, so as to ensure that they do not contravene any provision of the scheme. Similarly it is possible that the responsible authority may not purport to be acting under the provisions of section 23 of the Town Planning Act 45 of 1961 when it simple approaches this court to seek an order forbidding the use of land or a building in a manner which contravenes the scheme, (see the ALBERTON TOWN COUNCIL case *supra).* The responsible local authority must itself forbid the use of land or a building which contravenes the provisions of the scheme, in its opinion. The responsible local authority is also given the right, by subsection (5) of the same section to recover from the person in default any expense reasonably incurred in doing any of the acts it is authorised to do under section 23 (2). In the ALBERTON TOWN COUNCIL case *supra* an application for an order compelling respondent to demolish the erections was refused on the basis that section 42 (2) of the bye laws "did not authorise the council to call upon the owner to demolish or remove the building, nor did it empower the court to direct an owner of property to demolish his property." It was held that the council's remedy was to itself demolish and remove the building, and then recover the costs from the owner. See ALBERTON TOWN COUNCIL case *supra* at 279 F and 282F-G. However what is more important is that before taking any action under section 23(2) the responsible local authority is required to give one month or six months notice of its intended action to the owner and occupier of the land or building. Whether the notice required is for a period of six months or one month will depend on whether the building or land which it proposes to remove, pull down or alter was in existence or the building or land the use of which it proposes to prohibit was being put to use for the same purposes before the scheme came into operation. Where the land or building was the time of the coming into operation of the scheme already being used for the purpose which the responsible local authority proposes to forbid or prohibit then the responsible local