IN THE HIGH COURT OF SOUTH AFRICA

(EAST LONDON CIRCUIT LOCAL DIVISION)

CASE NO: EL 1038/08

ECD 2338/08

Heard on: 26 January 2010

Delivered on: 02 August 2011

In the matter between:

GEO NOWERS NO	**FIRST APPLICANT**
VENESSA ELIZE NOWERS *NO*	**SECOND APPLICANT**

and

SHEILA MARGARET BURMEISTER	**FIRST RESPODENT**
PETER BURMEISTER	**SECOND RESPONDENT**

JUDGMENT

Makaula J:

A. *Introduction:*

[1] The applicants instituted proceedings against the respondents seeking an order in the following terms:

1.1 That the respondents are ordered, within ten days of service of this order, to remove the structure erected on the common boundary of **Erven 10214** and **31352** and to comply in all further respects with the terms of the Deed of Servitude Annexure "E" hereto;

1.2 That the first respondent is interdicted and restrained from erecting any structure or permitting any tree, shrub or plant to grow to a height in excess of **0.6120** metres within ten metres of the common boundary between **Erven 10214** and **31352, East London,** as represented on the Line **AB** on diagram **SG Number 8565/77** and in contravention of the servitude, Annexure "E" hereto;

1.3 Further or alternative relief; and

1.4 That the respondents pay the costs of this application.

[2] The respondents opposed the application on various grounds and filed a counter application seeking the following reliefs:

2.1 Declaring that the servitude provided for in paragraph 2 on p. 4 of the Deed of Servitude (protocol no. 414) which is annexed to the Applicants' founding affidavit has been abandoned by the Applicants Trust and/or its predecessors, alternatively declaring that such servitude has been lawfully revoked by the First Respondent;

2.2 That the Registrar of Deeds take such steps as are necessary to effect the cancellation of the servitude in the records of the Deeds Registry;

2.3 Directing the Applicants to remove the garage on the north-west corner of **erf 10214** to within the building line stipulated in the municipal regulations and zoning scheme;

2.4 Directing the Applicant Trust to remove those portions of the swimming pool on **erf 10214** which extend beyond the building lines and onto municipal land;

2.5 Directing the Applicant Trust to demolish the second double garage and/or the entrance thereto;

2.6 Directing the Applicant Trust to remove the power supply which extends beyond the building line onto municipal land and the pole bearing the electrical flood light on municipal land;

2.7 Directing the Applicant Trust to reduce the height of the boundary wall adjacent to the courtyard on **erf 31352** by two courses of bricks and to make good;

2.8 Directing the Applicant Trust to remove the carport metal roof structure;

2.9 Directing the Applicant Trust to demolish the wall built on the pavement adjacent to the common boundary between **erven 10214** and **31352;**

2.10 Directing the Applicant Trust to remove the plinth and door-frame across the front of the carport;

2.11 Directing the Applicant Trust to remove the fence erected on municipal and/or state owned land;

2.12 Directing the Applicant Trust to pay the costs of this counter-application;

2.13 Further and/or alternative relief.

B. Parties:

[3] The first and second applicants are **Trustees** of **RVG Trust** *(the Trust)* and sue in their representative capacities as such.

[4] The first respondent is **Sheila Margaret Burmeister,** an adult female who resides at **1 Torquay Road, Bonnie Doon, East London.** The second respondent is **Peter Burmeister,** an adult male business person who is married to the first respondent and also resides at **1 Torquay Road, Bonnie Doon, East London**.

[5] The **Trust** is the registered owner of **Erf 10214, East London** situate at **3 Torquay Road, East London.**

[6] The first respondent is the registered owner of **Erf 31352, East London**, situate at **No 1 Torquay Road, East London**.

[7] The second respondent is married to the first respondent.

C. *The Properties:*

[8] The properties are adjacent to each other and are bordered on the western side by **Torquay Road** and on the eastern side by the **Nahoon River**.

[9] On the 30th August 1985 a restrictive servitude was registered over the property of the first respondent which was then described as **erf 10213, East London** but which has since been renumbered **31352,** in favour of **erf 10214**. Page 4 of the Deed of Servitude over **erf 31352** reads that **erf 10213**;

> ". . . shall be subject to a Servitude restricting the Owner or his Successor – In-Title from erecting any structure or growing any tree, shrub or plant that exceeds a height of 0,6120 metres within the area ten metres wide, of the north-western boundary of which is represented by the line AB on Diagram SG No. 8565/7.
>
> Subject to the condition that this restriction shall not apply to any structure or tree, shrub or plant in existence as at the 1st January, 1978."

D. ***The facts:***

[10] It is worth-mentioning at this stage that it is common cause that the relationship between the applicants and the respondents is really bad to an extent that it is the genesis of the various applications between them.

[11] During or about 2002 the applicants raised a portion of the common boundary wall between the two properties by approximately 1 metre in the entrance area facing the street. Applicants contend that it did so for aesthetic reasons as **erf 31352** encroaches on **erf 10214**. The second respondent approached the municipality authorities regarding the construction of that wall. The applicants contend that the municipal inspectors found nothing wrong with the wall.

[12] During 2006 the applicants demolished the existing house on their property and constructed a new one. The cost of the construction of the new dwelling was about **R7 000 000.00**. They also installed a security system which encompassed security cameras.

[13] During October 2008 the first applicant noticed that there was a metal structure *(the structure)* which was erected on the common boundary wall between their properties. The structure was covered in a sack like material. He went to the structure to examine it and as he was shaking it to check whether it was properly fixed, the son of the respondents confronted him alleging that what he was doing amounted to malicious injury to their property. He further told the first applicant that the reason they installed that structure was because the camera which the first applicant had installed on the south western corner of the property invaded their privacy. The first applicant explained to him that the camera was a fixed camera focused on his lawn and not their property.

[14] In an effort to resolve the concern of the respondents, the first applicant approached the **Protek Security Company** to investigate the positioning of the camera. On 19th November 2008, **Protek Security Systems** compiled a report which was annexed as annexure **C** to the papers together with the photographs reflecting the positioning of the camera and photographs obtained from the camera which confirm that in no way was it directed at the respondents' property. The report was therefore sent to the respondents under a covering letter by his attorneys. The respondents according to him never responded and hence he approached the court because the structure

erected by the respondents really constituted a nuisance in that it detracts from the beauty and aesthetic appeal of his erf and unfairly, unreasonably and materially interferes with the use and enjoyment of his property. The applicants contend that the structure fall within the restricted area and contravenes the terms of the servitude referred to above.

[15] The applicants further contend that the respondents have also allowed numerous shrubs to grow beyond the height referred to in the restrictive servitude which are blocking the view they have been enjoying to the **Nahoon River** in a south easterly direction thus contravening the conditions of the servitude.

[16] The respondents confirm that the relationship between them and the applicants soured over the years. They blame the deterioration of the relationship on the applicants. They aver that since they took occupation of their property, the present existing vegetation within the servitude area has continued to grow to heights far in excess of the height referred to in the servitude without any complaints from either the applicants of their predecessors. The respondents allege that the newly built double storey building was constructed on a higher level *(approximately 500 mm)* than the previous dwelling and is approximately five metres forward towards the river than the previous dwelling. The respondents therefore contend that the servitude area is now irrelevant to view from the new dwelling on **erf 10214**, that being so because the servitude as agreed upon and registered was plainly designed to preserve such view as the previous dwelling had of the

Nahoon River to that extent possible. Relying on the comparison of the photographs taken of the previous dwelling the respondents contend that the effect of the new dwelling is that the view is no longer across the area of **erf 31352** which is the subject of the servitude. The respondents submit that the ultimate effect of this is that the purpose for which the servitude was initially granted has fallen away and the construction of the new dwelling manifests a clear intention to abandon the servitude.

[17] The second thrust of the respondents' argument is that the applicants built a boundary wall which is far above the height of **0.6120 metres** required by the servitude. The wall in certain sections is as high as **2.63 metres** and therefore renders the servitude meaningless. The point the respondents make is that had the original dwelling still existed, any view it may have had across **erf 31352** would have been completely blocked by the wall. Even the construction of this wall constitutes the clearest evidence of abandonment of the servitude alternatively of a waiver of any rights to rely upon the terms thereof.

[18] The respondents submit that the applicants failed to establish that some of the trees, shrubs and plants which are above the height of **0.6120 metres** were not in existence as at 1 January 1978 as required by the terms of the servitude. That is so because the shrubs which were planted by them form part of the vegetation in the servitude area and their removal would not have any significant impact.

[19] It is common cause that after the completion of the new dwelling, the applicants installed **CCTV** cameras all around their property. Of much concern and that which led to the present application, is the positioning of a camera which is a darkened glass dome type fitted approximately two or three metres from the common boundary higher than the boundary wall. The respondents submit that they are concerned by the position of that camera as it is in such a position and height that its area of coverage clearly includes their yard, entertainment area, the municipal area in front of their property lounge and dining room. Of much concern to the respondents is that they have a daughter who is a young lady and who is conscious of her privacy when swimming and tanning in a costume. Because of their bad relations, the respondents aver that they were extremely concerned that their privacy was being invaded by the applicants more so that they could not be able to see when the camera was pointed in their direction.

[20] It is worth mentioning that there was at some stage correspondence which was exchanged between the parties regarding the concerns the respondents had. Their engagement bore no fruits hence the respondents decided to erect the structure.

[21] In an effort to resolve the issue of the camera amicably, the respondents aver that they contacted the installer of the cameras **AVG** who gave them a response which they could not accept. **AVG** informed them that the camera was pointing away from their property. Despite the assurance by **AVG** and the applicants that the camera was not pointing in their direction, the

respondents did not accept that based on the attitude and behaviour of the applicants and decided to put up the structure in a way which would blend with the boundary wall. The respondents deny that the structure is unsightly. The respondents tendered to remove it on condition that the issue of the camera can be resolved. The respondents submit that they came up with suggestions which would make them feel comfortable with the camera but the applicants did not heed them.

Furthermore, the respondents claim that they responded through their attorneys to the letter annexing the report from **Protek** requesting an extension of time until 5 January 2009. But to their surprise, the applicants launched this application and did not afford them an opportunity to respond on a matter which they feel could have been easily resolved.

[22] The respondents in answer went home in trying to highlight the history of their relationship. I feel I cannot traverse that part of the papers unless I would overburden this judgment because it runs into a number of pages. Suffice for me to state that the intention to do so was to try and gainsay the version of the applicants as to the history and unreasonableness of their conduct.

[23] In reply the applicants contend that they have a view over the property of the respondents which is obscured by the structure erected by the respondents. Applicants allege further that the new dwelling was moved forward by **3.6 metres** and the ground level was raised by **170 centimetres**.

Applicants deny that the servitude *was "designed to preserve such view as that dwelling had of the river to the extent that this was possible".*

[24] The applicants submit that they were entitled to exploit and make use of the benefits of the servitude as they saw fit without the contrived limitation suggested by second respondent. The applicants deny that the purpose of the servitude had fallen away or that the construction of the new dwelling manifested an intention to abandon the servitude for the reasons that originate from the history of the servitude which are that (a) the dwelling on applicants' property encroaches across the boundary line between applicants' property and respondents' property, (b) upon a plain reading of the Deed of Servitude, applicants' property is subject to a servitude of encroachment in favour of respondents' property and as a reciprocal obligation respondents' property is subject to a servitude preserving the view from applicants' property over respondents' property thus meaning that it is not open to the respondents to contend that, that which is in favour of the respondents is presumed and that which is in favour of the applicants is cancelled.

[25] The applicants further aver that the boundary wall adjacent to the area of the servitude, the first ten metres, measures: **1.24 metres** for the **first 2.34 metres; 1.96 metres** for the last portion thus suggesting that it is not obscuring the view but the structure does.

E. ***Counter claim:***

[26] In the counter-application the respondents claim that the double garage on the north-west boundary of the applicants' property encroaches on the lateral building line of which a neighbours' consent was required together with that of the municipality before such encroachment. The respondents further contend that the existing double garage crosses the building line inside and that required a municipal consent to be lawful. In respect of the swimming pool the respondents complain that part of the swimming pool constructed by the applicants lies upon municipal land and is constructed across the building line and for which municipal consent was also required. Furthermore the respondents complain of a power supply which runs beyond the building line of applicants' property to a pole upon which is fitted a light allegedly without the approval of the municipality. It is further part of the counter-application by the respondents that the common boundary wall erected by the applicants adjacent to their kitchen area has been erected in excess of the required height and should have sought their permission before doing so. The respondents seek the removal of a metal frame above the carport of the applicants' property and further removal of the plinth and door-frame across the front of that carport. The counterclaim is based on the opinion given by **Mr Webber** who practises as an **Architect** regarding the **Land Use Planning Ordinance Act 15 of 1985** *(LUPO)* and the contravention of the **Buffalo City Zoning Scheme** *(the Zoning Scheme).* **Mr Webber** in his affidavit filed of record opined that he found it extremely doubtful that the municipality would have approved the carport as it appears on the plans and constructed. The

respondents further require that the extension of the common boundary wall be demolished. The respondents complain of the fence which has been erected on the municipal and/or state land towards the **Nahoon River**.

[27] In answer the applicants respond to the contentions by the respondents pertaining to the garages, the swimming pool, the boundary wall, the carport and the wall on the pavement by alleging that they were constructed in terms of the building plans which were submitted and approved by the municipality. The applicants contend that the municipality would not have approved the building plans if it was not agreeing with the contraventions referred to or complained of by the respondents. The applicants state that the power line was removed a long while ago.

[28] The respondents further argue that the onus is on the applicants to establish that the servitude remains operative and binding on the respondents more so that the respondents have pertinently placed in issue that the servitude has been abandoned or revoked by the applicants. The respondents contend that the abandonment *per se* is clear between the parties and that it is difficult to conceive of any clearer indications of an abandonment of a servitude in the circumstances than by the applicants themselves constructing a boundary wall significantly higher than the height provided for in the servitude in circumstances where the servitude area is pertinently no longer required for the purposes of maintaining a river view which was initially rational for such servitude. It is further clear, so it was argued on behalf of the respondents, that the applicants have for so many

years permitted trees and shrubs in the servitude area and on the municipal property adjacent thereto to grow to a height many times in excess of the limit in the servitude area without complaining or objecting and have only now sought to register objections opportunistically, by reason of the dispute between themselves.

F. <u>Analysis</u>:

[29] Before I should deal with whether the applicants have proved that the actions of the respondents by erecting the structure amount to nuisance or not, I feel it is necessary to evaluate the reasons for the erection of the contraption by the respondents.

[30] At least there is agreement between the parties to some extent that the wall where it runs across the servitude area is higher than the required height. It is apparent from the photographs submitted by the applicants that the shrubs, foliage and the vegetation have grown beyond the height of the wall and the structure in the servitude area. I am unable, on the evidence tendered and the photographs submitted, to agree with the applicants that the structure obstructs their view to the **Nahoon River**. It is the trees, foliage and vegetation that obscure their view.

[31] The reason proffered for the erection of the structure is the uncertainty about the direction of the camera which is above the boundary wall. The applicants submitted a letter from **Protek** which seeks to allay the fears of the

respondents that the camera is focused on their property. I am of the view that an affidavit by technicians from **Protek** confirming the contention by the applicants would have been sufficient to prove the direction of the camera. In the absence of such proof I am unable to find that the fears of the respondents are unfounded. Consequently, the actions of the respondents in erecting the structure cannot be said to be unreasonable.

G. Nuisance:

[32] In the sphere of neighbour relations, nuisance includes conduct whereby a neighbour's health, well-being or comfort in the occupation of his land is interfered with.[1]

[33] In *Holland v Scott*,[2] **Buchanan J** formulated the following test for nuisance;

> ". . .[T]he plaintiff must show that the inconvenience complained of is in fact more than fanciful, more than one of mere delicacy or fastidiousness; that it was inconvenience materially interfering with ordinary comfort, physically, of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions."

[34] In *Prinsloo v Shaw*,[3] **De Wet JA** said:

> "The standard taken must be the standard not of the perverse or finicking or over-scrupulous person, but of the normal man of sound and liberal tastes and habits."

1 Silberberg and Schoemann's ,The Law of Property, Third Edition, p 168
2 1882 EDC 307 at 332
3 1938 AD 570 at 575

[35] The test applicable is an objective weighing-up of the interest of the various parties and taking into account all the relevant circumstances.[4]

[36] In the instant matter it is apparent that the structure is directly opposite where the camera complained of is located. It is a size reasonably necessary to block the view of the camera towards the respondents' property. It has been further painted to blend with the colour that is on the wall as it appears from the colour photographs. It does with respect not appear to be unsightly as contended by the applicants. It is clear from the papers that the respondents have tried to prevail upon the applicants to do something about the camera by either painting the glass dome on the side facing them or simply swaping the camera with another etc. The respondents tendered at their expense to do anything which would satisfy them that the camera is not pointing in their directions and thus spying on them.

[37] Having regard to the reason for the erection of the structure, I am of the view that the conduct of the respondents is not unreasonable and cannot in the circumstances adumbrated above be said to have been actuated by malice or any bad intentions for that matter. It further cannot be gleaned from the evidence and the photographs that the structure complained of has been erected with a view to prevent the view across the property of the respondents to the **Nahoon River**. The photographs reveal clearly that the structure is below and covered by the foliage, shrubs and vegetation that have overgrown in the servitude area. The foliage, shrubs and vegetation are far taller than

4 *Gien v Gien* 1979 (2) SA 1113 (T) at 1122 and *Dorland v Smits* 2002 (5) SA 374 (C) at 384B

the structure and cannot serve any measure in obscuring the view that the applicants used to enjoy. It is common cause that even the boundary wall is higher than the required height. I say this in the backdrop of the submission by the applicants that the new dwelling has been built on a higher ground and brought forward a bit.

[38] There is uncontroverted evidence that shows that some of the shrubs in the servitude area have been there before both the applicants and the respondents took occupation of their respective properties. It is not in dispute that, the shrubs, foliage and vegetation in the servitude area also include those which have been planted by the Municipality as well. The respondents correctly in my view, make the point that it would be impossible for it to cut that which was planted by them.

[39] A servitude is a *uis in re aliena* or limited real right which entitles its holder *entior* to the use and enjoyment of another person's property or to insist that such other person shall refrain from exercising certain powers flowing from his right of ownership over and in respect of his property which he would have if the servitude did not exist.[5] The servitude that obtains in this matter is a praedial servitude in that it confers a benefit on the dominant tenement *(applicants' property)* and imposes a corresponding burden on the servient tenement *(respondents' property).*

[40] A servitude can be terminated through abandonment if proof of the intention to abandon can be inferred from the conduct of the *dominus,*

5 Silberberg and Schoemann's (*supra)* p 367

provided that such conduct is consistent only with an intention to abandon the servitude.

[41] The servitude in the instant matter prevents the *". . . erection of any structure or . . . that exceeds a height of **0.6120 metres** within the area of ten metres wide."* Though the parties do not agree on the height of the boundary wall, but it is obvious that it is above the required height in terms of the servitude. The servitude further prevents the growing of any *"tree, shrubs or plant"* in excess of **0.6120 metres.** The trees, shrubs or foliage in the servitude area is far in excess of the required height. This has been the position for some time, if I have regard to the evidence. The conduct of allowing the shrubs and foliage to grow beyond the required height contravenes the conditions of the servitude.

[42] I find that the conduct of the applicants to build a wall in excess of the required height and their allowing trees, shrubs and plants to grow in contravention of the provisions of the servitude, amounts to an abandonment of the provisions thereof.

[43] As correctly pointed out by **Mr Ford SC**, for the respondents, the abandonment in order to bind third parties, would have to be published. I therefore do not find anything to hinder the granting of prayers 1 and 2 of the counter-claim in view of the finding that the applicants by their conduct have abandoned the servitude.

[44] The applicants have argued that the respondents do not have *locus standi* to bring an application where they seek orders prayed for in paragraphs 3-11 of the counter-application. Reliance is sought by the applicants on the **National Building Regulations and Building Standards Act 103 of 1977** which, so they argued, provides for the requirement of and approval of plans for the construction of any building by the **Local Authority**, in this instance the **Buffalo City Municipality** *(the Municipality).* The applicants contend that the respondents, if aggrieved by the approval of their building plans, should have sought a review of that decision and not follow the process they embarked on. The applicants make the point that the Municipality approved their building plans years before, consequently, they relied on such approval when they built the new dwelling. In a nutshell, the applicants argue that the effect of what is sought by the respondents amounts to a review of the approval of applicants building plans in circumstances where the Municipality has not been joined in the proceedings.

[45] The respondents on the other hand, argue that the actions of the applicants in contravening the Building Regulations are unlawful and therefore they have a legal right to prevent that which is unlawful. If the court does not uphold their counter-application in respect of prayers 3-11 that would amount to confirmation of a behaviour which is unlawful. The respondents contend that they have a substantial interest in the issues arising from the applicants' unlawful actions and the corresponding entitlement to bring these proceedings.

[46] The respondents rely mostly on the affidavit by **Mr Webber** in contending that the applicants have contravened the relevant regulations and legislation. **Mr Webber** in his affidavit testifies that for the applicants to have built their new dwelling as they did, they should have made an application in terms of **Section 15 of LUPO and the Zoning Scheme Regulations**. **Section 15** basically requires that an application be made if there is to be an alteration of the land use restrictions applicable to a particular zone in terms of the scheme regulations concerned. Such an application may be granted or refused by an Administrator if authorised thereto by scheme regulations or a council. Such an application would have to be advertised if in the opinion of the town clerk or secretary any person may be adversely affected.

[47] It is common cause that such a procedure was not followed by the applicants or the Municipality. The respondents submit that the applicants' dwelling has not been built according to the plans allegedly approved by the Municipality. Respondents refer to the swimming pool which has been moved forward onto Municipal Land contrary to the alleged approved plan and many other facets of the building which are not subject of the counter-application. The respondents state in their replying affidavit that the Municipality erred in its approval of the building plans because there has been a clear contravention of the building regulations and they, as neighbours, have not consented to the contravention as it affects them. The respondents strongly contend that they have a substantial interest in this matter and have legal rights to prevent the contravention of the by-laws which are meant to protect them as the people who live in that area or zone and would never allow the

abuse of State and Municipal land.

[48] It is my view that at the helm of this application is the conduct of the Municipality which has led to the exacerbation of the relationship between the parties. The failure lies at the door step of the Municipality for failing to enforce the regulations and legislation relevant to the construction of this new dwelling.

[49] Be that as it may, the courts have a duty to prevent unlawful activity where to refuse such relief would amount to confirmation of such an activity.[6]

[50] The respondents served the Municipality with the papers in this matter but it seems they decided not to join as a party. The respondents allege that the Municipality has instructed the respondents' attorneys to *". . . proceed against the owners of the property (presumably the applicants herein) for violation of the National Building Regulations and Standards Act."* This has not been denied by the applicants. As shown above, the respondents have made out a case establishing that they have a substantial interest in issues arising from the contravention of **LUPO and the Zoning Scheme**.

[51] It is now trite that **LUPO and the Zoning Schemes** are meant to protect the interests of the community to which they apply.[7]

[52] It cannot be gainsaid that the applicants have failed to comply with the

6 See: *Chapmans Peak Hotel (Pty) Ltd & Another vs Jab & Annalene Restaurants CC t/a O'Hagans* 2001 (4) ALL SA 415 (C) page 422 C-D para 27
7 *Pick 'n Pay Stores Ltd vs Teazers Comedy & Revue CC* 2000 (3) SA 645 (W) at 653 H and *BEF (Pty) Ltd vs Cape Town Municipality & Others* 1983 (2) SA 387 (C) at 401 B-F cited therein

provisions of **Section 15 of LUPO** referred to in paragraph 48 above. The applicants have further failed to comply with certain provisions of the **Zoning Scheme** as alluded to by **Mr Webber**.

[53] The following provisions of **Section 3.4.3 of the Zoning Scheme** provide:

> "(b) The Council may approve the erection of an outbuilding that exceeds the side and rear building line by means of a departure subject to:
>
> i) compliance with the street building line;
> ii) no doors or windows being permitted in any wall situated within 1 meter of such building line; and
> iii) consent of the affected neighbours.
>
> (c) The Council may also permit the erection of screen and yard walls and pergolas or similar unroofed ornamental structures within the building lines of the erf subject to such structures being erected in such manner and of such dimensions as in the opinion of the Council would not be likely to cause injury to the amenities of neighbouring properties, provided that the heights of such structures shall not exceed 1,8 metre unless accompanied by a building plan.
>
> (e) No portion of a swimming pool may be erected nearer to the erf boundary than the maximum depth of the pool, or 2,0 metre whichever is the more restrictive."

[54] **Section 4.15 of the Zoning Scheme** requires council approval for the building of any carport that would exceed a street or side building line and stipulates conditions under which such could be done. In the instant matter, the swimming pool built contravenes the **Zoning Scheme** in that it extends beyond the building line. Council approval should have been obtained.

[55] It is uncontroverted that the building plans approved a single *'double garage'* but what has been built is two *'double garages'.* **Mr Webber** pertinently makes the point that it is *"illegal to have the whole frontage of one's property providing access to it thereby preventing the public from parking in front of the property".* This result in visitors not being able to park in the space in front of the applicants' property necessitating them to park in front of the respondents' properties. He doubts if such contravention would have been approved by the Municipality based on his past experience. Be that as it may, the *'double garage'* on the north-west corner of **erf 10214** does encroach on the building line and there has been no Municipal and neighbours' consent to such contravention. Even the *'second double garage'* has been shown to breach the boundary and site boundary lines. There is no consent to this breach as well.

[56] **Section 4.15.9 of the Zoning Scheme** requires that *"written confirmation, from the adjoining owner(s) of both adjoining land units if a street building line will be exceeded, to the effect that they have no objection to the proposed carport, shall be obtained."* The respondents complain of the south west corner, occupying a section of the area demarcated as servitude, that it is roofed with a metal structure, draining towards gutters (over) their property. The respondents never consented to this as is required by **Section 4.15.9 of the Zoning Scheme** referred to.

[57] The applicants did not deal in detail with the issues raised by the

respondents in the counter-claim, more so with regard to compliance with the provisions of **LUPO and the Zoning Scheme**. The only aspect raised by the applicants is that the building plans were approved by the Municipality. With respect, I am of the view that the approval of the plans does not suffice as a justification for the non-compliance with the provisions of **LUPO and the Zoning Scheme**. It is my finding that the respondent have made out a case for the grant of the orders prayed for in paragraph 3-11 of the notice of motion.

Consequently I make the following order:

1. **The application is dismissed with costs;**

2. **The reliefs sought in the counter-application are granted;**

3. **The applicants are ordered to comply with orders granted in 2.3, 2.4, 2.5, 2.6, 2.7, 2.8, 2.9, 2.10 and 2.11 of the notice of motion within 362 days of the date hereof;**

4. **The applicants are ordered to pay the respondents' costs in the counter-application.**

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M MAKAULA

JUDGE OF THE HIGH COURT

Counsel for the Applicants:	Adv D H de la Harpe
Attorneys for the Applicants:	Drake Flemmer & Orsmond Tewkesbury House 22 St James Road **EAST LONDON**
Counsel for the Respondents:	Adv A E S Ford SC
Attorneys for the Respondent:	Bax Kaplan Inc Clevedon House Selborne **EAST LONDON**