IN THE HIGH COURT OF SOUTH AFRICA

EAST LONDON CIRCUIT LOCAL DIVISION CASE NO. EL 313/2016

ECD 813/2016

In the matter between:

BUFFALO CITY METROPOLITAN MUNICIPALITY **Applicant**

and

TRANSNET SOC LIMITED **First Respondent**

DRIFTERS RACEWAY THEME PARK (PTY) LTD **Second Respondent**

JUDGMENT

Bloem J.

[1] The applicant seeks an order that the respondents be interdicted from utilising an immovable property, described as Erf 5403, East London (the property), for any purpose other than transport usage, that they be interdicted from operating any illegal business or any activity in contravention of the Buffalo City Zoning Scheme Regulations (the zoning scheme regulations) while the property is zoned as “Transport Zone 1” and an order of costs. Despite the fact that the second respondent delivered a notice of intention to oppose the application, only the first respondent actively opposed the application.

[2] The applicant is the Buffalo City Metropolitan Municipality and the first respondent Transnet Soc Ltd, a wholly owned government company referred to in section 2 of the

Legal Succession to the South African Transport Services Act[1] (the SATS Act). The second respondent is Drifters Raceway Theme Park (Pty) Ltd, a company operating as a theme park undertaking activities such as a park, go-kart riding, quad bike riding and paintballing. The first respondent is the owner of the property but, in accordance with a lease agreement between it and the second respondent, the second respondent is in possession of the property whereon it undertakes the above activities.

[3] The applicant's case is that the second respondent's activities are in contravention of the zoning scheme regulations because the property is being used for purposes other than transport or railway or harbour or pipeline purposes or related activities, hence the need for an interdict. The first respondent opposed the application and sought its dismissal on the basis that the applicant is not entitled to an interdict because it did not meet the requirements thereof. It was submitted on behalf of the first respondent that should it be found that the applicant satisfied the requirements of a final interdict, the application should nevertheless be dismissed because, so the submission went, in terms of section 13 (4) of the SATS Act, the applicant shall be deemed to have consented to existing uses of the property. The issues are accordingly whether the applicant has satisfied the requirements of a final interdict and, if so, whether the first respondent can rely on section 13 (4) of the SATS Act.

Final interdict

[4] To obtain a final interdict an applicant has to satisfy firstly, that he has a clear right which he seeks to be protected by the interdict; secondly, that there has been actual unlawful interference with that right or he has a reasonable apprehension of unlawful interference with that right; and thirdly, that no other satisfactory remedy is available to

[1] South African Transport Services Act, 1989 (Act No. 9 of 1989).

the applicant.[2]

[5] Mr Rautenbach, counsel for the first respondent, submitted that the applicant failed to establish that it has a right, clear or even *prima facie*, worthy of protection. To establish its right the applicant relied on a certificate signed on 14 September 2015 by Kershan Naidoo who is employed by the applicant as a city planning technician in the Department of Spatial Planning and Development. In the certificate he stated that the property is zoned for Transport Zone 1 purposes in terms of the zoning scheme regulations. Mr Rautenbach submitted that the certificate does not serve as proof that the property was zoned as Transport Zone 1.

[6] Neither the Land Use Planning Ordinance,[3] the Spatial Planning and Land Use Management Act[4] nor the zoning scheme regulations provide how a municipality should prove the purpose for which a particular piece of land within its area has been zoned. The first respondent did not place evidence before the court to show that the property was probably not zoned as Transport Zone 1. It simply stated that the certificate does not constitute proof that the property was zoned as Transport Zone 1. There was accordingly a bare denial by the first respondent of such zoning. The applicant is the custodian of the information relevant to the zoning of property in its area. It accordingly should know the purpose for which any particular piece of land in its area may be used in terms of the zoning scheme regulations. In the absence of a legislative injunction as to the manner of proof of the purpose for which a piece of land was zoned, I can see no better proof than a certificate issued by a municipality official who has access to the relevant records under the municipality's control confirming the purpose for which that piece of land was zoned. In this case Mr Naidoo stated that the

[2] *Setlegelo v Setlegelo* 1914 AD 221 at 227 and *van Deventer v Ivory Sun Trading 77 (Pty) Ltd* 2015 (3) SA 532 (SCA) at 540C.
[3] Land Use Planning Ordinance, 1985 (Cape Ordinance 15 of 1985).
[4] Spatial Planning and Land Use Management Act, 2013 (Act No. 16 of 2013).

primary duty of the department in which he works is to manage the land use within the applicant's area and that he had reference to the relevant documents under the applicant's control. Reference to those documents caused him to certify that the property was zoned as Transport Zone 1. I am satisfied that the certificate issued by Mr Naidoo is sufficient to prove that the property was zoned as Transport Zone 1.

[7] According to the zoning scheme regulations, the primary purpose for which a piece of land which has been zoned as Transport Zone 1 can be used is for transport uses. It is the applicant's case that, because the second respondent uses the property for a purpose other than for which it was zoned and because the first respondent, as the owner of the property, allows the second respondent to do so, its right to develop and manage the land within its area in a co-ordinated and harmonious manner in terms of the zoning scheme regulations is being interfered with by the respondents. In all the circumstances I am satisfied that the applicant established on a balance of probability that it has a clear right which requires protection. Mr Rautenbach's submission to the contrary is accordingly not sustained.

[8] Mr Rautenbach submitted that the applicant is not entitled to an interdict because another satisfactory remedy is available to it. In this regard he referred to item (aa) of Schedule 1 of the Spatial Planning and Land Use Management Act. That schedule provides for matters to be addressed in provincial legislation. Insofar as it is relevant to this application, item (aa) provides that such legislation "*may provide dispute resolution measures relating to any matter prescribed in terms of this Act*". It needs to be pointed out that this point was not raised in the first respondent's answering affidavit. The first respondent adopted the attitude in the main answering affidavit that "*the existence of alternative remedy does not arise insofar as there is nothing unlawful*

perpetrated by the respondents requiring the intervention of this Honourable Court". There was accordingly no need for the applicant, in reply, to deal with the dispute resolution measures referred to in item (aa) of Schedule 1. All that item (aa) does is to state that provincial legislation may provide dispute resolution measures. It does not create dispute resolution measures. Mr Rautenbach did not point to dispute resolution measures already in existence which could have been used to resolve the dispute between the parties. I am unaware of such measures. He also did not refer to Eastern Cape legislation contemplated in the preamble of Schedule 1 which provides for dispute resolution measures. I do not agree with the submission that item (aa) provides a satisfactory alternative remedy for the applicant. I am satisfied that the applicant has established, on a balance of probability, that it cannot obtain adequate redress in some other form of relief.

[9] In all the circumstances, the applicant has satisfied the requirements of a final interdict.

First respondent's reliance on section 13 (4)

[10] Section 13 has been described as "*somewhat complicated*".[5] The SATS Act commenced on 6 October 1989, except for Chapters 2 to 7 thereof which commenced on 1 April 1990. Until the SATS Act was amended by the Legal Succession to the South African Transport Services Amendment Act (the 1995 Amendment Act),[6] it had been amended on at least ten previous occasions. The purpose of the 1995 Amendment Act was to provide for the integration of land belonging to the first respondent and the Passenger Rail Agency of South Africa[7] into conventional land use

[5] *410 Voortrekker Road Property Holdings CC v Minister of Home Affairs and others* [2010] 4 All SA 414 (WCC) at 427f-g.
[6] South African Transport Services Amendment Act, 1995 (Act No. 43 of 1995).
[7] The Passenger Rail Agency of South Africa was established in terms of section 22 of the SATS Act.

control systems. Section 1 of the 1995 Amendment Act substituted section 13 of the SATS Act, as it then was, with an entirely reformulated one. The substitution took effect on 23 September 1995 with retrospective effect from 1 April 1995.

[11] It is deemed necessary to reproduce the provisions of section 13 before and after the substitution. Before the substitution section 13 read as follows:

> "Section 13 – Property Development
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> (1) Subject to the provisions of subsection (2), the Company shall be entitled, up to a date five years after the date referred to in section 3(1), to develop, to cause to be developed, to use and to let its immovable property for any purpose, including the construction and exploitation of buildings and structures for commercial purposes, notwithstanding the fact that the immovable property concerned is either not zoned or is zoned or intended for other purposes in terms of an applicable township construction or development scheme, guide plan or statutory provision.
>
> (2) Immovable property may be developed in terms of subsection (1) only–
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> (*a*) after an agreement has been reached with the local authority concerned; or
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> (*b*) should such agreement not be reached, in terms of permission granted by the Administrator of the province concerned subject to such conditions as he may consider appropriate; or
>
> (*c*) should the development be in conflict with an approved guide plan, with the approval of the Administrator referred to in section 6A (12) of the Physical Planning Act, 1967.
>
> (3) The local authority–
>
> (*a*) with which an agreement is reached in terms of subsection (2) or with which an agreement was reached in terms of section 9(26) of the South African Transport Services Act, 1981, prior to the operative date of this Act; or
>
> (*b*) which exercises jurisdiction over property in respect of which permission or approval is obtained in terms of subsection (2) from the Administrator concerned,
>
> shall record, in connection with the use of the immovable property agreed upon or in respect of which permission or approval is obtained in terms of subsection (2), a suitable zoning for such immovable property, whereafter such zoning shall be regarded as the zoning of the property for all purposes."

[12] After the substitution section 13 reads as follows insofar as it is relevant to this

application:

"Section 13 Integration of Company's land into conventional land use control systems

(1) In this section–

(*a*) 'ancillary uses' means the use of land, a building or a structure which is ancillary to the transport uses of such land, building or structure, or which is directly related to or incidental to serving the interests of the commuting public, including the use of such land, building or structure for offices, shops and recreational, business and residential purposes;

(*b*) 'competent authority' means any person or body administering a zoning scheme in terms of any law;

(*c*) 'effective date' means 1 April 1995;

(*d*) 'existing use' means the actual use of land owned by the Company as at the effective date;

(*e*) 'other zone' means any land use zone in terms of a zoning scheme within the operation of which the land in question is situated, and which is not a land use zone permitting specifically transport uses or ancillary uses;

(*f*) 'transport uses' means the use of land, a building or a structure for the operation of a public service for the transportation of goods (including liquids and gases) or passengers, as the case may be, by rail, air, road, sea or pipeline, including the use of such land, building or structure as a harbour, communication network, warehouse, container park, workshop, office or for the purposes of security services connected with the aforegoing;

(*g*) 'zoning scheme' means any town planning or zoning scheme administered by a competent authority relating to the zoning or reservation of land into areas or zones to be used exclusively or mainly for residential, business, industrial, local authority, governmental or any other purposes.

(2) As from the effective date, all land owned by the Company and shown on maps of a competent authority or otherwise described in terms of a zoning scheme–

(*a*) as land used generally for transport or railway or harbour or pipeline purposes or related activities, but which is not so shown or described as being part of any other zone, shall be deemed to have been zoned for transport uses in terms of such zoning scheme as of right and without having to obtain the consent of any competent authority;

(*b*) as being part of any other zone, shall be used in accordance with the uses which are permitted in respect thereof and be deemed to have been zoned also for transport uses in terms of such zoning scheme as of right and without having to obtain the consent of any competent authority.

(3) As from 12 months after the effective date, the land referred to in subsection (2) shall also be deemed to have been zoned for ancillary uses in terms of the zoning scheme in question as of right and without having to obtain the consent of the competent authority in question.

(4) (*a*) Any competent authority contemplated in subsection (2) shall–

(i) with effect from the effective date, be deemed to also have consented in terms of an applicable zoning scheme to existing uses if the existing uses at that date exceed the ambit of uses permitted in terms of subsection (2); and

(ii) with effect from 12 months after the effective date, be deemed to also have consented in terms of an applicable zoning scheme to existing uses if the existing uses at that date exceed the ambit of uses permitted in terms of subsections (2) and (3).

(*b*) The onus of proving existing uses shall be on the Company.

(*c*) The competent authority in question shall classify any proven existing uses in terms of the land use zones provided for in terms of the applicable zoning scheme and the classification shall be deemed to be a zoning of the land for all purposes.

(*d*) In addition to any such existing uses, any use which is not an existing use but which falls within the scope of uses permitted in relation to the relevant land use zone into which the existing use has been classified, shall also be permitted in relation to the land in question without further consent being required: Provided that any major expansion of an existing use in respect of the extent of the floor area or of the intensity of the existing use shall require the prior consent of the competent authority in question.

(5) (a) Subsections (2), (3) and (4) shall not apply to land owned by the Company in respect of which a local authority was, in terms of section 13(3) as it applied prior to the date of the commencement of the Legal Succession to the South African Transport Services Amendment Act, 1995, obliged to record a suitable zoning, and such local authority shall, to the extent that such recording was not yet effected as at that date, remain so obliged.

(*b*) Any recording effected pursuant to the said section 13(3) or paragraph (a) shall be deemed to be a zoning of such land for all purposes.

(6) . . .

(7) . . ."

[13] In paragraph 36 of *410 Voortrekker Road Property Holdings CC v Minister of Home Affairs and others*[8] Binns-Ward J said the following about the effect that the

[8] Referred to in footnote 5 above.

reformulated section 13 had on the initial version, with which interpretation I respectfully agree:

> "The effect of the initially applicable version of section 13 of the SATS Act was that the zoning of affected land fell to be determined by agreement with the local authority, subject to the overriding say of the Administrator in the event that such agreement could not be reached. The substituted section 13 conserves the effect of any agreement reached under the initially created regime (see section 13(5)). The zoning of land in respect in which an agreement in terms of the initially applicable version of section 13 had not been concluded falls to be determined in terms of section 13(2)–(4) of the currently applicable version of section 13 of the SATS Act. The result is that the railway properties are zoned for "transport uses" and "ancillary uses", as defined in section 13(1) of the SATS Act in its current form, and that they may, to the extent justified by the facts, in addition be used for "existing use", as defined in section 13(1)(e). (own underlining)

[14] The first respondent alleged that the property has been used for commercial purposes since September 1995. It adduced evidence to show that for the period between 1 September 1995 and 31 October 1998 it entered into lease agreements with one Shane Delport for the use of the property for the sale of second hand furniture. After the expiry of that period the first respondent attempted to develop the property as a shopping complex, but those attempts failed. It then entered into a lease agreement with Tritans Cartage CC for the period between 1 September 2003 and 31 August 2010 for the use of the property for the storage and sale of building material, at the expiry of which the first respondent entered into negotiations with the second respondent, culminating in the present lease agreement which was concluded on 22 May 2014. The first respondent alleged that throughout the use and subsistence of these leases the applicant did not object to the use of the property for a purpose other than for transport uses. The first respondent's case is that, because the applicant was aware or ought to have been aware that the property was actually utilised for

commercial purposes at the effective date,[9] the current commercial use of the property is unassailable.

[15] The applicant denied that it was aware or should have been aware of the commercial use of the property as at the effective date. The applicant's contention is that the first respondent did not prove[10] that the property was utilised for commercial purposes as at the effective date because, so the applicant alleged in reply, the first respondent did not take steps to bring to the applicant's attention such commercial use. Failure to prove an existing use other than a use for which the property was zoned as at 1 April 1995 means that the first respondent is not entitled to the protection offered by section 13 (4)(a)(i) of the SATS Act.

[16] In terms of section 13 (4)(a)(i) of the SATS Act a competent authority, like the applicant, shall, with effect from 1 April 1995, be deemed to have consented to existing uses if the existing uses at that date, namely 1 April 1995, exceeded the ambit of uses permitted in terms of section 13(2). I agree with the applicant that the first respondent failed to prove the existing use of the property as at 1 April 1995. The first respondent adduced evidence to show the purpose for which the property was used only from 1 September 1995. In other words the first respondent did not show the purpose for which the property was used for the period between 1 April 1995 and 31 August 1995. The first respondent is accordingly not entitled to the protection afforded by section 13(4)(a)(i).

[17] In terms of section 13(4)(a)(ii) of the SATS Act a competent authority shall, with effect from 1 April 1996 (that is with effect from 12 months after 1 April 1995), be deemed to

[9] 1 April 1995 in terms of section 13(1)(c) of the SATS Act.
[10] In terms of section 13(4)(b) the onus of proving existing uses shall be on the applicant. In terms of section 13(1)(d) 'existing use' means the actual use of land owned by the first respondent as at 1 April 1995.

have consented to existing uses if the existing uses at that date, namely 1 April 1996, exceeded the ambit of uses permitted in terms of section 13(2) and (3). The applicant's evidence is that as at 1 April 1996 the property was utilised for commercial purposes, namely the sale of second hand furniture. The first respondent's case is that the applicant must therefore be deemed, in terms of section 13(4)(a)(ii), to have consented to the utilisation of the property for commercial purposes. In the context in which the words "*be deemed to also have consented*" are used, I interpret them to mean that it must be accepted that the applicant, as the competent authority, consented to the uses to which the property was put as at 1 April 1996, unless the contrary is proved by the applicant.[11]

[18] The applicant alleged that during the period in question the first respondent made it aware neither of the leases on which the first respondent relied nor of the use of the property. The applicant relied on various documents to show that during or about 2000 the first respondent sought to have the property rezoned for business use, the contention being that if the applicant had consented to the rezoning, there would have been no need to have such rezoning. With respect, that contention misinterprets the deeming provision contained in section 13(4)(a). Upon its proper construction subsection 13(4)(a) does not mean that the property must be deemed to have been zoned for the actual use to which it was put as at 1 April 1995 or 1 April 1996. In terms of that subsection a competent authority shall be deemed to have consented to the actual use to which the first respondent put the property as at 1 April 1995 or 1 April 1996. It therefore means that a competent authority is deemed to have consented to the land being used for the actual purposes to which it was put as at 1 April 1995 or 1 April 1996. It does not mean that the land is zoned in accordance with

[11] *Rex v Haffejee and another* 1945 AD 345 at 353 confirmed in *S v Rosenthal* 1980 (1) SA 65 (AD) at 77A-B.

its actual use as at those dates. In this case, the fact that the applicant is deemed to have consented to the property being used for business uses as at 1 April 1996 does not mean that the property was zoned for business uses. Nothing accordingly prevented the first respondent from applying for a portion of the property to be rezoned as a business zone, because, although the applicant was deemed to have consented to its use for business purposes, the property was not zoned as a business zone.

[19] Although the applicant did not refer to section 13(5) of the SATS Act or the provisions thereof in its replying affidavit, Mr Cole, counsel for the applicant, submitted in his heads of argument and at the hearing that the provisions of that subsection make it clear that section 13 of the SATS Act is not applicable to the dispute. In my view section 13(5) has three jurisdictional facts. The first is that the land in question must be owned by the first respondent. The second is that the land owned by the first respondent must be in respect of which a local authority was obliged to record a suitable zoning in terms of section 13(3) of the SATS Act as it applied prior to the date of commencement of the 1995 Amendment Act. Thirdly, the local authority shall remain obliged to record a suitable zoning to the extent that such recording was not yet effected as at the date of the commencement of the 1995 Amendment Act.

[20] Before the commencement of the 1995 Amendment Act a local authority was obliged, in terms of the initial section 13(3) of the SATS Act, to record a suitable zoning for the immovable property in cases where it has reached an agreement with the first respondent in terms of section 13(2)(a); or where it exercised jurisdiction over the immovable property in respect of which the relevant Administrator's permission or approval was obtained in terms of section 13(2)(b) or (c).

[21] The recording was required to be in connection with the use of the immovable property

owned by the first respondent in respect of which there was an agreement with the local authority or permission or approval from the Administrator. After the recording by the local authority such zoning was regarded as the zoning of the property for all purposes.

[22] Section 13(5)(a) as read with section 13(3) means that a condition precedent that must be complied with before a local authority could record a suitable zoning was an agreement between it and the first respondent regarding the development of the immovable property in question or permission or approval from the Administrator regarding such development. Absent such agreement, permission or approval, a local authority could not record a suitable zoning.

[23] In my view, in the facts of this case, the applicant cannot rely on section 13(5)(a) for the submission that subsections (2),(3) and (4) do not apply to the property. Section 13(5)(a) places a burden on the applicant to show that, because it had an agreement with the first respondent or because the Administrator had given permission or approval, it recorded a suitable zoning for the property with the result that such zoning shall be regarded as the zoning of the property for all purposes. The applicant failed to show that it reached an agreement with the first respondent or that the Administrator's permission or approval had been obtained in respect of the development of the property. As Binns-Ward J put it, the zoning of land in respect of which an agreement in terms of the initial section 13(3) had not been concluded must be determined in terms of the current section 13(2), (3) and (4) of the SATS Act. There is accordingly no merit in Mr Cole's submission that, because of section 13(5)(a), subsections (2), (3) and (4) of the SATS Act do not apply to the property.

[24] On the facts, the applicant is in terms of section 13(4)(a)(ii) deemed to have consented

to the property being used for business purposes as at 1 April 1996. That being the case, the applicant has failed to make out a case for the relief sought in the notice of motion. The application must in the circumstances be dismissed. There is no reason why costs should not follow the result.

[25] In the result, the application is dismissed with costs.

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G H BLOEM
Judge of the High Court

For the applicant:	Adv S H Cole, instructed by Gravett Schoeman Inc Attorneys, East London
For the first respondent:	Adv J G Rautenbach SC, instructed by Mfinci Bahlmann Incorporated, Cape Town and Malusi & Company Attorneys, East London
For the second respondent:	No appearance
Date heard:	26 April 2017
Date of delivery of the judgment:	9 May 2017