

THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

- (1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED:

Date: **19th May 2021** Signature: _____

A handwritten signature in black ink, appearing to be "H. [unclear]", is written over a horizontal line.

CASE NO: 2148/2019

DATE: 19TH MAY 2021

In the matter between:

MAYFAIR RESIDENTS ASSOCIATION

MAHOMED, IMRAAN

EBRAHIM, SALIM

EBRAHIM, EBRAHIM

BHAMJEE, FEROZE SAYED

EBRAHIM, ZAZIRA

VORAJEE, RASHID AHMED MOHAMED

First Applicant

Second Applicant

Third Applicant

Fourth Applicant

Fifth Applicant

Sixth Applicant

Seventh Applicant

and

**CITY OF JOHANNESBURG
METROPOLITAN MUNICIPALITY**

**CITY OF JOHANNESBURG
PROPERTY COMPANY SOC LIMITED**

JOHANNESBURG ROADS AGENCY (PTY) LIMITED

CHUNG-FUNG (PTY) LIMITED

ANCHOR PROJECTS (PTY) LIMITED

First Respondent

Second Respondent

Third Respondent

Fourth Respondent

Fifth Respondent

- Coram:** Adams J
- Heard:** 8 & 9 March 2021 – The ‘virtual hearing’ of the application was conducted as a videoconference on the *Microsoft Teams* digital platform.
- Delivered:** 19 May 2021 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 10:00 on 19 May 2021.

Summary: Township – Johannesburg Town Planning Scheme, 1979, and City of Johannesburg Land Use Scheme, 2018 – definition of ‘public open space’.

Statute – Interpretation – regard to be had to the language used in the Schemes, the ordinary rules of grammar and syntax, as well as the context in which the provisions appear and the apparent purpose.

Nuisance – what constitutes – unlawful use of property attracting heavy traffic congestion in turn causing nuisance – this may give rise to actionable nuisance.

ORDER

- (1) The first respondent is ordered and directed to take the necessary steps to enforce the City of Johannesburg Land Use Scheme, 2018, in respect of Erf 56 Crown North Township (‘Erf 56’) and to ensure that the use of Erf 56 complies with the law and that it is only used for the purpose for which it has been zoned, that being as a ‘public open space’.
- (2) The first respondent is ordered and directed to take the necessary steps to prevent the fourth and fifth respondents, or any other person, from utilizing Erf 56 for any commercial or industrial activity or as a parking lot.
- (3) The fourth and fifth respondents are finally interdicted and prohibited from:

- (a) Initiating, undertaking, or continuing with the construction of any structure, including temporary structures made of metal or any other material, on Erf 56 Crown North Township ('Erf 56');
 - (b) Admitting any construction vehicles, forklifts or other heavy machinery for the purposes of carrying on any work, including construction work or the erection or moving of steel or any other temporary structure or shed on Erf 56;
 - (c) Intimidating or harming the third applicant in any manner whatsoever;
 - (d) Admitting any vehicles onto Erf 56 for parking or for any other reasons connected to the Dragon City Wholesale Mall or the Dragon City Group of Companies;
 - (e) Placing any shipping containers, metal sheds, or any similar structure on Erf 56;
 - (f) Conducting any business or activity on Erf 56 that causes a nuisance, including but not limited to: Conducting welding or metalwork; repairing or conducting work on trucks or vehicles; the operating and/or letting of shops in shipping containers or other structures; conducting warehousing or storage; the renting to or allowance of persons to stay overnight on Erf 56, either in a vehicle or in any other manner; and interfering with the flow of general traffic on Hanover Street and Park Drive in any manner, including by the causing, directing or allowing of any person to stop or direct the traffic on these roads in favour of traffic travelling in and out of erf 56 or to the Dragon City Wholesale Mall on Park Drive.
- (4) The fourth and fifth respondents, jointly and severally, the one paying the other to be absolved, shall pay the applicants' costs of this application, including the costs consequent upon the employment of two Counsel.

JUDGMENT

Adams J:

[1] Erf 56 in Crown North Township in Johannesburg ('Erf 56' or 'the property') is a piece of land between Hanover Street and Park Drive, which was and presently still is zoned in terms of the City of Johannesburg Land Use Scheme, 2018, for use as a 'public open space'. It used to be a vacant lot, described by the applicants as a 'green belt' – a park visited and frequented by the residents from the surrounding areas. It was a green lung which lay nestled between the residential areas to the North and the industrial and commercial districts to the South. That was many years ago and only until about 2005 when the fourth respondent gradually started taking over occupation of the property by using the space *inter alia* as overflow parking space for its adjacent retail operations and business, styled 'Dragon City Wholesale Mall'. Later on the fourth respondent also erected structures of a temporary nature, in which certain of its employees were allowed to live.

[2] The first applicant is a voluntary association of residents from the residential areas surrounding Erf 56 and the other applicants all own or occupy properties and premises in the immediate vicinity. The first respondent is the City of Johannesburg ('the City'), a metropolitan municipality established in terms of the Municipal Structures Act 117 of 1998, and the owner of Erf 56, which also falls within its local authority jurisdiction. The second and third respondents are agencies of the first respondent. The first, second and third respondents I shall refer to collectively as 'the City of Johannesburg'. The fourth respondent ('Dragon City') is the owner of the Dragon City Wholesale Mall across the road (Park Drive) to the East of Erf 56, and the fifth respondent ('Anchor Projects') owns the property immediately adjoining Erf 56 to the South. The fourth and fifth respondents are related companies in that they have the same shareholders and directors.

[3] The applicants were unhappy with what was happening on Erf 56 and with the fact that they were being deprived of the use of a public open space where they could visit and be close to nature by using the space for recreation purposes. They contend that Dragon City and Anchor Projects, in conjunction with the City of Johannesburg, in invading the public open space as they did, acted unlawfully in that they contravened the City of Johannesburg Land Use Scheme, 2018 ('the 2018 Land Use Scheme'), and the Johannesburg Town Planning Scheme, 1979, which preceded the 2018 Land Use Scheme. The 2018 Land Use Scheme repealed and substituted the 1979 Town Planning Scheme, but both of these Schemes contain provisions relating to 'public open spaces' which were almost identical.

[4] The applicants apply in this opposed application, which came before me as a special motion, for an order interdicting the respondents from using the property for the purpose other than for what it is zoned, that being to be used as a 'public open space'.

[5] In their notice of motion, which was issued on the 29 January 2019, the particular interdictory relief sought by the applicants against the fourth and fifth respondents is for orders prohibiting them from:

- (1) admitting any vehicles onto Erf 56, Crown Mines, Johannesburg (Erf 56) for parking or for any other reasons connected to the Dragon City Wholesale Mall or the Dragon City Group of Companies;
- (2) placing any shipping containers, metal sheds or any similar structures on Erf 56;
- (3) intimidating or harming the third applicant in any manner whatsoever;
- (4) initiating, undertaking or continuing with the construction of any structure, including temporary structures made of metal or any other material on Erf 56;
- (5) admitting any construction vehicles, forklifts or other heavy machinery for the purposes of carrying on work, including construction work or the erection or moving of steel or any other temporary structure or shed on Erf 56;

- (6) conducting any business or activity on Erf 56 that causes a nuisance, including but not limited to: conducting welding or metal works; repairing or conducting works on trucks and vehicles; the running and/or letting of shops in shipping containers or other structures; conducting warehousing or storage; the rental or allowance of persons to stay overnight thereon, either in a vehicle or in any other manner.

[6] The applicants also seek an interdict prohibiting the fourth and fifth respondents from interfering with the flow of general traffic on Hanover Street and Park Drive in any manner, including by the causing, directing or allowing of any person to stop or direct the traffic on these roads in favour of traffic travelling in and out of Erf 56 or to the Dragon City Wholesale Mall on Park Drive.

[7] The issue in this matter is whether there has been a contravention of the City of Johannesburg Land Use Scheme, 2018 ('the 2018 Land Use Scheme'), and the 1979 Johannesburg Town Planning Scheme, which preceded it. It is trite and generally accepted that the purpose of these Town Planning Schemes is to lay down guidelines for the future spatial development of the area in such a way as will most effectively promote the order of the area and the general welfare of the community concerned. The schemes also include zoning schemes, the general purpose of which are to determine use rights and to provide for control over use rights and over the utilisation of land in the area of jurisdiction of a local authority.

[8] Therefore, the question to be answered is whether it is lawful for Dragon City and Anchor Projects to use Erf 56, which is zoned for use as a 'public open space', as a parking lot for vehicles (including trucks and other heavy duty vehicles) and as premises on which they house large marine containers used for storage and as retail outlets.

[9] These questions should be answered and the issues in this matter decided against the factual backdrop, which is summarised succinctly in the paragraphs which follow. In that regard, the facts in this matter are, in my view, by and large common cause and I say so notwithstanding assertions to the contrary by Dragon City and Anchor Projects. The real dispute between the parties lies in the

interpretation of the applicable legislative and regulatory provisions and its application to the facts.

[10] However, before I deal with the facts, it may be apposite at this point to briefly refer to the most relevant legislative provisions to place in context the issues which require adjudication.

[11] As already indicated, Erf 56 is zoned as a 'public open space'. In terms of the Johannesburg Town Planning Scheme, 1979, a 'public open space' is defined as follows:

"public open space" means land zoned public open space, which is used by the public as open space, park, garden, square or for any game, sport, recreation or cultural activity or other uses as may be permitted by the City Council and includes restaurants, cafés, refreshment rooms and any apparatus, facility, structure or building which in the opinion of the City Council is necessary or expedient for the purposes of such open space.'

[12] In terms of *Use Table 'C'* to the 1979 Town Planning Scheme, the purposes for which buildings could be erected and used on open public spaces or the purposes for which such land may be used were limited to use as a 'public open space'. Under the heading 'Purposes for which buildings may be erected and used and the purposes for which land may be used only with the consent of the City Council', the Table stated 'none', meaning no such uses are authorised. As regards the purposes for which 'public open spaces' may not be used or buildings thereon erected or used, the Table expressly provides that public open spaces are not be used for any purpose other than as a public open space.

[13] In sum, a 'public open space' is to be used only as such and the use thereof for any other purpose is expressly prohibited. Therefore, in terms of the 1979 Town Planning Scheme, there is an absolute prohibition against the use of land which is zoned as a 'public open space' for any purpose other than as a 'public open space' with or without the consent of the City Council. And s 67 of the Scheme provides that any person who contravenes or fails to comply with any provision thereof shall be guilty of an offence.

[14] At the time that this application was launched by the applicants during January 2019 the Town Planning Scheme, 1979, was in force. It has

subsequently been replaced by the 2018 Land Use Scheme, which contains provisions which mirror the provisions contained in the 1979 Scheme, except that the wording relating to the definition of 'public open space' has been changed, although the substance of the definition remains the same. The definition of 'public open space' in the 2018 Scheme reads as follows:

"Public Open Space" means the use of a building/s and/or land which is under the ownership of the Council or other public authority, with or without access control, and which is set aside for the public as an open space for recreation, place of assembly, games, sport or cultural activity; including a park, playground, public square, picnic area, public garden, nature reserve, outdoor or indoor sports stadium, and includes associated buildings and uses as permitted by the Council, including restaurants, cafés, golf course, and any apparatus, facility, structure or building which in the opinion of the Council is necessary or expedient for the purposes of such open space.'

[15] Therefore, in terms of the laws applicable, it is clear that land which is zoned as a 'public open space' should only be used for that purpose, that being as an open space to be used by the public. Or, as more accurately provided for in the 2018 Scheme, a 'public open space' is land set aside for the public as an open space for recreation, place of assembly, games, sport or cultural activity, and therefore can and should only be used for such purpose.

[16] I'll revert to that aspect of the matter later on in my judgment. Suffice at this point to say that I agree with the submission by Mr Ohanessian SC, who appeared in this matter on behalf of the applicants with Mr Ben-Zeev, that the City of Johannesburg could never have granted any permission to any person to use Erf 56 for any other purpose. It was never open to the City to consent to Erf 56 being used as a parking lot or to house shipping containers or to operate retail shops – it could only be used as a 'public open space', which includes it being utilised as a park, playground, public square, picnic area, public garden, nature reserve, outdoor or indoor sports stadium, and associated buildings and uses.

[17] That brings me back to the salient facts in the matter.

[18] The position at present is that Erf 56 is no longer a 'public open space' by any definition. Far from it. It is now a piece of land, which has been paved and which is for all intents and purposes occupied by Dragon City and Anchor Projects

and is used by these entities for commercial and industrial purposes. The space has also been fenced off and the public do not have access to the property as they would have had if the property was being used as a 'public open space'. It is being used by Dragon City and Anchor Projects for the parking of vehicles, including heavy vehicles and trucks, and it also houses huge commercial shipping containers, used for purposes of storage and in certain circumstances for retail purposes and as selling points for certain products.

[19] The foregoing is a culmination of developments which started off as long ago as 2005, when, at the instance of Dragon City, graders and other heavy machinery were used on Erf 56 to level the ground with a view to paving the space for parking purposes. Grass, shrubbery and all other greenery were also being removed from the land.

[20] This process was completed during 2006 and after the whole area of Erf 56 had been paved, it was initially utilised only to park light vehicles belonging to the customers of Dragon City paying patronage to the Wholesale Mall. Soon thereafter, heavy vehicles were also being parked on the property. The trucks were parked both during the day and at night and the site became noisy at all times.

[21] Dragon City also started placing large shipping containers on the site, which were being used for storage and which were also rented out to persons for storage and for retail purposes. During this time and whilst Dragon City, in total disregard of the Town Planning and Land Use laws of the City of Johannesburg, were using Erf 56 for every purpose other than that for which it was lawfully zoned, the applicants and other residents of the surrounding areas complained bitterly to and continuously raised with the City their concerns about the flouting of the Zoning Schemes by Dragon City. So, for example, during October 2012 the third applicant, who also happens to be an attorney, addressed a *communiqué* to the City of Johannesburg and to Dragon City, demanding that they immediately stop the illegal construction on Erf 56, which was apparently aimed at erecting some or the other permanent building or structure. Dragon City

complied with the demand and reverted back to using Erf 56 for parking and storage purposes only.

[22] On 17 August 2012 the City of Johannesburg and Dragon City concluded a written lease agreement in terms of which Dragon City leased from the City of Johannesburg Erf 56 for a period of three years from 1 September 2012 to 31 August 2015. Clause 9.2 of the lease agreement specifically provided that the lease area would be leased to the lessee for 'parking purposes'. On the expiration of the written lease agreement, Dragon City continued to occupy the said property in terms of and pursuant to a monthly tenancy presumably based on the same terms and conditions contained in the written lease agreement. At more or less the same time (on 19 November 2012) the City of Johannesburg also granted Dragon City permission to pave Erf 56, which incidentally had been done some five years prior to that date, and to store containers on the said property. Needless to say, Dragon City and Anchor Projects, in opposing this application place substantial reliance on the lease agreement with the City of Johannesburg and the latter's consent that containers could be stored on the premises.

[23] However, as rightly contended by the applicants, the reliance by Dragon City and Anchor Projects on the lease agreement is misguided. The point is that the City of Johannesburg is bound by the zoning provisions of the 2018 Land Use Scheme, which expressly provides that a 'public open space' cannot be used for any purpose other than as a public open space. I deal with this aspect of the matter later on in the judgment. Suffice to state at this point that the Johannesburg City could not and did not consent to Dragon City contravening the Land Use Scheme. It bears emphasising that it was never open to the City to consent to Erf 56 being used as a parking lot, as it purported to do, or to store shipping containers, or to operate shops: it could only be used for the purposes of a 'public open space'.

[24] Moreover, the City of Johannesburg leased Erf 56 to Dragon City on the express proviso that it complies with the applicable zoning laws. In that regard, clause 10 of the lease provided that Dragon City was not to contravene 'any of the provisions of any of the town planning schemes applicable to the property'.

[25] Further demands were addressed subsequently by the third applicants, all of which requested that Dragon City desist from its unlawful use of Erf 56, failing which, so the demands indicated, further legal action would be taken against them.

[26] During November 2018 the applicants' attorneys sent a letter of demand to the City of Johannesburg, again demanding that it takes the necessary steps to enforce the town planning scheme in respect of Erf 56, to remove all unlawful structures from that property, and to take immediate steps to stop the nuisance emanating from Erf 56. At the same time a similar demand was addressed to Dragon City.

[27] Not surprisingly, no response to these demands was received and during January 2019 the applicants caused this application to be issued. I interpose here to mention that only Dragon City and Anchor Projects are opposing this application. The City of Johannesburg did not give notice of its intention to oppose the application and one can only but assume that they will abide the court's decision. It is however instructive that the City has opted not to deal with the assertion by the applicants that it (the City) has failed to discharge its statutory duties to ensure compliance with the Town Planning and Land Use Schemes.

[28] The applicants also complain that the unlawful use of Erf 56 has given rise to a nuisance that the applicants, who reside adjacent to, or near Erf 56, cannot reasonably be expected to tolerate. They are entitled, so the applicants claim, to an order abating the nuisance.

[29] Howsoever one views this matter, there can be no doubt that Erf 56 is at present being used and has since about 2005 been used in contravention of the applicable zoning provisions of the City of Johannesburg Town Planning and Land Use Schemes, which is binding on all citizens and inhabitants of Johannesburg and the City itself. In that regard, see: *Intercape Ferreira Mainliner (Pty) Ltd and Others v Minister Of Home Affairs And Others*¹. The purposes for which Erf 56 has been used for the last approximately fifteen years clearly fall

¹ *Intercape Ferreira Mainliner (Pty) Ltd and Others v Minister Of Home Affairs And Others* 2010 (5) SA 367 (WCC)

outside the scope of a public open space as defined in either the 1979 Town Planning Scheme or the 2018 Land Use Scheme. These uses are accordingly unlawful, and the applicants are entitled to the relief that they seek.

[30] Dragon City and Anchor Projects contend that 'public open space' should be interpreted broadly so as to mean that the City may put any public open space to such use as will serve the best interest of the area. A so called 'public good' use. I disagree. There is no merit in this contention if regard is had to the language used in the Schemes and in the light of the ordinary rules of grammar and syntax, as well as the context in which the provisions appear, the apparent purpose to which it is directed and the material known to those responsible for its production.

[31] The interpretation proposed by Dragon City and Anchor Projects cannot be sustained. In both the Town Planning Scheme and in the Land Use Scheme the zoning is defined as a public open space. This is clear from the examples of uses that are given: a park, a garden, a square. There is no mention in either definition of the public good or the best interest of the area. On the contrary, in both schemes the uses that may be permitted by the Council are limited to those that are 'necessary or expedient for the purposes of such open space'.

[32] I also agree with the applicants' submission that the interpretation suggested by Dragon City and Anchor Projects would lead to an absurdity. It would mean that the Municipality could erect a factory, an airport, or sewerage works on land zoned as a public open space provided that it believed that this was purportedly necessary for the public good. The interpretation offered by the Dragon City respondents would frustrate the very purpose of the Schemes.

[33] Therefore, as already indicated, I am of the view that the interpretation contended for by Dragon City and Anchor Projects cannot be sustained. The current use of the property by them is unlawful.

[34] Dragon City and Anchor Projects also submit, on the basis of the Town Planning Ordinance 17 of 1939, which empowers the City of Johannesburg to lease land that it owns, that it is authorised to override its own zoning legislation. Mr Ohanessian contends that the power to lease does not override the zoning of a property. I find myself in agreement with this submission. There is no merit in

the argument by Dragon City and Anchor Projects and one needs look no further than the express wording of the provisions of the Schemes, which specifically prohibits the use of 'public open space' – with or without permission from the City of Johannesburg – for purposes other than as space to be accessed and used by the public for specific events, such as for picnics, etc.

[35] The applicants are accordingly entitled to an order enforcing the applicable Scheme, and to an order interdicting Dragon City and Anchor Projects from using Erf 56 unlawfully. From this unlawful conduct on the part of these entities flow the nuisance complaints by the applicants. As rightly pointed out by the applicants, the use of Erf 56 in a manner that is contrary to the applicable Scheme is in itself unlawful and must be brought to an end. Moreover, it causes a nuisance that the applicants cannot reasonably be expected to bear. They are entitled to an order abating this nuisance.

[36] Neighbours have a right to the use and enjoyment of the property that they occupy or upon which they reside. In that regard see: *Alaclas Investments v Milnerton Golf Club* 2008². Additionally, section 24(a) of the Constitution provides that the applicants have a right to an environment that is not harmful to their health or well-being. In order to determine whether a nuisance is actionable the question before me is whether the nuisance is unreasonable and cannot be expected or tolerated in the circumstances. This requires a test not only of what a reasonable person would tolerate, but more importantly 'an objective evaluation of the circumstances and milieu in which the alleged nuisance has occurred'. (*PGB Boerdery Beleggings (Edms) Bpk v Somerville 62 (Edms) Bpk*³).

[37] In making this determination the court may take into account any relevant factors, including the type of locality in which the nuisance emanates. In an area suitable for residential occupation, including an urban area, other users of property in that area must be accommodating of the rights of residents; and the degree of its persistence and the times when the noise is heard.

² *Alaclas Investments v Milnerton Golf Club* 2008 (3) SA 134 (SCA) at paras 15 and 24

³ *PGB Boerdery Beleggings (Edms) Bpk v Somerville 62 (Edms) Bpk* 2008 (2) SA 428 (SCA) at para 9

[38] The nuisance suffered by the applicants arises from Erf 56 being used by Dragon City and Anchor Projects as a parking lot for their shopping mall, as well as from the operation of shops, which, in turn, result in noise and fumes and smells of vehicles moving unlawfully on and off Erf 56, and idling on the property during the day and at night.

[39] In *Intercape* (supra) the applicants complained of a nuisance arising from the respondent operating a refugee office in the applicants' vicinity. Among other things, it was alleged that the refugee office attracted large crowds of persons, causing, among other things, an unreasonable level of noise. Rogers AJ held as follows at para 150:

'As regards noise, the court must apply common sense. One knows as a matter of human experience that large crowds of people waiting or hoping to be helped, and no doubt often frustrated, will generate substantial noise.

[40] Applying this reasoning *in casu*, and having regard to the photographic evidence placed before me, I come to the conclusion that harm and consequent nuisance to the applicants arise from the commercial use of Erf 56 as a parking lot and to operate shops, which has led to the massive influx of traffic, including commercial vehicles in the form of large trucks, and the presence of a large number of persons on Erf 56. Human experience teaches us that this would generate a substantial amount of noise, fumes and traffic that would disturb residents that live adjacent to the property, as well as those that live nearby – the very definition of nuisance.

[41] I am also of the view that the nuisance suffered by the applicants is unreasonable in the circumstances and they cannot be expected to tolerate this level of nuisance. This is so because the character of Crown North, and in particular where the applicants reside, is residential in nature. As rightly pointed out by the applicants, one of the purposes of maintaining Erf 56 as a public open space is to create a natural break and a buffer between the residential area of Crown North and the commercial and industrial areas to the South. The nuisance is also perpetual. It is felt all day by the applicants, and also at night.

[42] In sum, I am of the view that the current use of Erf 56 is in conflict with its zoning under the applicable Scheme. The applicants are residents within the immediate vicinity of Erf 56 and are entitled to the protection of the Scheme. They are entitled to relief in the form of an interdict prohibiting the unlawful use of Erf 56. In addition to this, the use of Erf 56 gives rise to a nuisance that the applicants cannot reasonably be expected to tolerate. They are entitled to an order of abatement.

[43] The only effective order that may be given in this matter is to prohibit the use of Erf 56 for the purposes of parking vehicles, storing containers, or conducting shops or other commercial or industrial activities.

[44] As was held in *Intercape*, 'the relief which would typically flow from a finding that a person is using premises contrary to the zoning scheme is an order interdicting the unlawful use. The relief which would typically flow from a finding that a person is causing an unlawful nuisance is an order for the abatement of the nuisance in the form of an appropriately worded interdict.'

[45] The same principles apply in this matter. The applicants are entitled to an effective remedy in the form of an order that brings the unlawful commercial activities on Erf 56 to an end.

[46] There is one other aspect which requires my attention and that relates to the applicants request for a *mandamus* directing the City of Johannesburg to take the necessary steps to enforce the Town Planning Scheme. Not only is the City the custodian of that Scheme, and therefore has a legal duty to enforce it, but it is also the owner of Erf 56 and is therefore responsible for ensuring that the use of Erf 56 complies with the law.

[47] As rightly submitted by Mr Ohanessian, the City of Johannesburg is an organ of state that is obliged to respect, protect, promote and fulfil the rights in the Bill of Rights. It is also obligated, under section 152(1) of the Constitution, to, among other things, ensure a safe and healthy environment and to encourage the involvement of communities and community organisations in the matters of local government. The City therefore has a constitutional obligation to enforce the

applicable land use scheme and to ensure the applicants' right to an environment that is not harmful to their health or wellbeing.

[48] Lastly, the applicants also seek an order enforcing Regulation 319(1) of the National Road Traffic Regulations, 2000, which provides as follows:

‘No person shall wilfully or unnecessarily prevent, hinder or interrupt the free and proper passage of traffic on a public road.’

[49] This relief sought by the applicants is premised on the basis that from time to time when traffic along Park Drive and Hanover Street is congested, certain persons direct the traffic with a view to alleviating the congestion. The congestion *inter alia* results from the unlawful use by Dragon City and Anchor Projects of Erf 56. These respondents then attempt to rectify the situation by having person employed by them to direct traffic. This conduct, whilst possibly not in accordance with the letter of the law, does not, in my view, falls within the ambit of regulation 319(1). I cannot see how the conduct of these individuals amounts to wilfully or unnecessarily preventing or hindering or interrupting the free flow of traffic. On the contrary, in their own peculiar way, they are attempting to assist the free and proper passage of traffic on the public road.

[50] As averred by Dragon City and Anchor Projects, at peak times the traffic is so heavy on Hanover Road and Park Drive that it has become necessary for them at times to act in the same manner as Outsurance points men do and render vitally necessary assistance to the general traffic. Effectively they are taking steps to alleviate the traffic congestion – albeit caused as a result *inter alia* of their unlawful use of Erf 56 – and they are therefore not creating a nuisance.

[51] I am therefore not persuaded that the applicants have made out a proper case for this particular relief prayed for. They are accordingly not entitled to this relief.

Costs

[21] The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so. It follows that Dragon City and Anchor Projects, who actively opposed the application, should pay the costs of the applicants.

[22] The applicants contend that the City of Johannesburg should also be held liable for their costs. This is so, according to the applicants, because the City, which is the owner of Erf 56 as well as the custodian of its own zoning laws, should have ensured that Erf 56 was being used lawfully and in a manner that did not cause a nuisance to the neighbouring residential areas.

[23] In that regard, the applicants referred the Court to *Biowatch Trust v Registrar, Genetic Resources and Others*⁴. In that matter, Sachs J noted that there are matters that require the state to perform a regulating role, in the public interest, between competing private parties. He held that the successful private litigant was entitled to costs against the organ of state in that matter. Similarly, so the applicants submit, *in casu* the City of Johannesburg was not just required to play only a regulating role, but it was also the owner of Erf 56, which means that it was constitutionally obligated to ensure that private entities, like Dragon City and Anchor Projects, comply with the laws of the City. It failed to discharge that duty and therefore, so the argument on behalf of the applicants is concluded, the City should be held liable for the applicants' costs jointly with Dragon City and Anchor Projects.

[24] At first blush, there appears to be merit in the applicants' contention. However, I am not persuaded that this matter is of a constitutional nature or that the *Biowatch* principle finds application. Moreover, the City of Johannesburg opted not to oppose the application and, in my view, this is an indication that it has seen the folly of its ways and realised, albeit belatedly, that the use of Erf 56 by Dragon City and Anchor Projects was unlawful. Also, and to their credit, when they leased Erf 56 to Dragon City during 2012, the City of Johannesburg did give notice to Dragon City that it was required to ensure that it complied with the zoning provisions of the Town Planning and Land Use Schemes of the city. This Dragon City failed to do.

[25] For these reasons, I am of the view that no costs order should be granted against the City of Johannesburg. I do however intend awarding costs against

⁴ *Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 (CC) at para 28

the fourth and fifth respondents, jointly and severally, the one paying the other to be absolved, in favour of applicants.

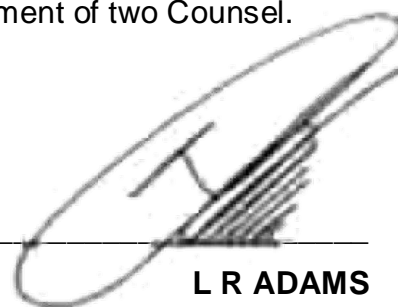
Order

[26] Accordingly, I make the following order: -

- (1) The first respondent is ordered and directed to take the necessary steps to enforce the City of Johannesburg Land Use Scheme, 2018, in respect of Erf 56 Crown North Township ('Erf 56') and to ensure that the use of Erf 56 complies with the law and that it is only used for the purpose for which it has been zoned, that being as a 'public open space'.
- (2) The first respondent is ordered and directed to take the necessary steps to prevent the fourth and fifth respondents, or any other person, from utilizing Erf 56 for any commercial or industrial activity or as a parking lot.
- (3) The fourth and fifth respondents are finally interdicted and prohibited from:
 - (a) Initiating, undertaking, or continuing with the construction of any structure, including temporary structures made of metal or any other material, on Erf 56 Crown North Township ('Erf 56');
 - (b) Admitting any construction vehicles, forklifts or other heavy machinery for the purposes of carrying on any work, including construction work or the erection or moving of steel or any other temporary structure or shed on Erf 56;
 - (c) Intimidating or harming the third applicant in any manner whatsoever;
 - (d) Admitting any vehicles onto Erf 56 for parking or for any other reasons connected to the Dragon City Wholesale Mall or the Dragon City Group of Companies;
 - (e) Placing any shipping containers, metal sheds, or any similar structure on Erf 56;
 - (f) Conducting any business or activity on Erf 56 that causes a nuisance, including but not limited to: Conducting welding or metalwork; repairing or conducting work on trucks or vehicles; the operating and/or letting of

shops in shipping containers or other structures; conducting warehousing or storage; the renting to or allowance of persons to stay overnight on Erf 56, either in a vehicle or in any other manner; and interfering with the flow of general traffic on Hanover Street and Park Drive in any manner, including by the causing, directing or allowing of any person to stop or direct the traffic on these roads in favour of traffic travelling in and out of erf 56 or to the Dragon City Wholesale Mall on Park Drive.

- (4) The fourth and fifth respondents, jointly and severally, the one paying the other to be absolved, shall pay the applicants' costs of this application, including the costs consequent upon the employment of two Counsel.

A handwritten signature in dark ink, appearing to be 'L R ADAMS', is written over a horizontal line. The signature is stylized with a large, sweeping loop on the left and a more compact, scribbled end on the right.

L R ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	8 th and 9 th March 2021 – in a ‘virtual hearing’ during a series of videoconferences held on the <i>Microsoft Teams</i> digital platform
JUDGMENT DATE:	19 th May 2021 – judgment handed down electronically
FOR THE APPLICANT:	Adv T Ohanessian SC, together with Advocate O Ben-Zeev
INSTRUCTED BY:	Webber Wentzel, Sandton
FOR THE FIRST, SECOND AND THIRD RESPONDENTS:	No appearance
INSTRUCTED BY:	No appearance
FOR THE FOURTH AND FIFTH RESPONDENTS:	Adv G Farber SC, together with Adv J L Kaplan
INSTRUCTED BY:	Ian Levitt Attorneys, Sandton