THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT)

Case No: 7715/12

In the matter between: Reportable

THE BERG RIVER MUNICIPALITY **APPLICANT**

And

ZELPY 2065 (PTY) LTD **RESPONDENT**

Coram: ROGERS J

Heard: **28 FEBRUARY 2013**

Delivered: **8 APRIL 2013**

JUDGMENT

ROGERS J:

Introduction

[1] The respondent company ('Zelpy') is the owner of property within the area of jurisdiction of the applicant municipality ('the Municipality'). The Municipality seeks a final interdict preventing Zelpy from occupying or using certain buildings on the property constructed in violation of s 4 of the National Building Regulations and Building Standards Act 103 of 1977 ('the Act') until an occupancy certificate has been issued by the Municipality in terms of s 14(1) of the Act.

[2] Zelpy opposes the interdict application and has filed a counter-application in which it seeks an order directing the Municipality to take a decision on Zelpy's request for permission to use the buildings in question in terms of s 14(1A), alternatively reviewing and setting aside the Municipality's refusal of such permission.

[3] The property in question is the Remainder of Portion 5 of the farm Rietfontein, about 4 kms south of Piketberg. As at 1986 there existed on the property a large Victorian house known as Dunn's Castle and three chalets (converted stables). The owner ran the property as a commercial guest facility. Zelpy acquired the property in 2003. It has continued to run the business under the name Dunn's Castle Guest House. The property is just under 35 ha in extent. Most of the property is covered with indigenous vegetation. The property has apparently never been farmed.

[4] In early 2004 Zelpy began construction of a double-storey conference centre and four free-standing double-storey residential structures, each structure containing four self-catering apartments. Zelpy did not obtain approval of building plans as required by the Act, though it claims to have received oral permission from a municipal engineer whose name Zelpy's deponent is unable to recall and to have been brought under the impression that plans did not need to be approved.[1] The unlawful building activity was discovered by the Municipality's building inspector in

[1] It was not alleged by Zelpy that it ever obtained permission in terms of s 7(6) of the Act to commence building before formal plan approval. An application for permission in terms of s 7(6) must be made in writing. The permission would have to be granted by a duly authorised official and would, one would expect, invariably be in writing.

March 2004. At this stage the work was only at the foundation stage. The inspector also ascertained that the unapproved building plans would not be able to be approved unless the property was rezoned. Pursuant to the Land Use Planning Ordinance 15 of 1985 ('LUPO') the property was at that time zoned Agricultural Zone 1. The Municipality would not be able to approve the building plans unless the property were rezoned Resort Zone 1.

[5] Zelpy ignored a notice to cease work. In May 2004 the Municipality sought an interdict in the Piketberg Magistrate's Court ('the PMC'), which Zelpy opposed. On 14 May 2004 the PMC made an order by agreement that Zelpy could continue building provided that by 10 June 2004 it supplied evidence to the Municipality that it had lodged a rezoning application and provided further that if the rezoning was not granted the Municipality could apply for demolition of the unlawful structures. In other words, Zelpy was permitted to continue building at its own risk.

[6] Zelpy failed to lodge a rezoning application by the specified date. In July 2004 the Municipality renewed its application for demolition. By this stage the construction of the unlawful buildings was, according to Zelpy, complete. Zelpy opposed the demolition application, alleging that it had instructed a firm of land surveyors to prepare a rezoning application. On 26 July 2004 the PMC ordered that the building work could continue (though it was apparently already complete) but that the Municipality could apply for demolition if the rezoning application failed.

[7] In September 2004 Zelpy lodged its rezoning application in which it sought to rezone the areas covered by the new buildings as Resort Zone 1, the rest of the farm to remain Agricultural Zone 1. This application, though lodged with the Municipality, was ultimately required to be adjudicated by the Department of Environmental Affairs and Development Planning in the Western Cape Provincial Government ('the DEA'). The DEA advised Zelpy that it would need also to make application for approval in terms of s 24G of the National Environmental Management Act 107 of 1998. These processes occupied several years. On 3 October 2007 the DEA informed Zelpy that an environmental impact assessment would have to be undertaken. This assessment was submitted in mid-2008. On 28 August 2009 the DEA refused the rezoning application. Upon request the DEA

furnished its reasons on 7 December 2009. It appears from these reasons that the DEA's approach was not to permit a rezoning of this kind unless the agricultural property in question possessed a unique recreational resource which set it apart from surrounding agricultural properties. Zelpy's property, in the DEA's view, did not qualify. The new structures also exceeded the height and density guidelines for Resort Zone 1. Accordingly, only the structures which existed as at 1986 would be permitted to function as a resort.

[8] Zelpy lodged an appeal to the relevant provincial Minister. On 8 February 2011 the Minister dismissed the appeal. Zelpy did not thereafter take any steps to have the rezoning decision brought under judicial review.

[9] In refusing the rezoning application on 28 August 2009, the DEA had requested the Municipality to determine an appropriate zoning for the areas occupied by the buildings which had existed as at 1986.[2] On 7 November 2009 the Municipality determined the zoning of the said areas to be Resort Zone 1, the rest of the property remaining Agricultural Zone 1.

[10] In the meanwhile, in June 2007 Zelpy commenced further unlawful building work in the form of another double-storey structure containing four apartments. (I note that the proposed use of this additional building as part of the guest house was not covered by the rezoning application which was still pending at that time.) Again, Zelpy claims that its builder was told by a municipal official that Zelpy could build at its own risk. On 13 June 2007 the Municipality's building inspector gave an oral instruction for the unlawful work to cease. This was followed up by a letter from the Municipality's attorneys. Zelpy continued construction despite these demands though again it relies on discussions with other municipal officials. There was considerable correspondence between the attorneys. On 30 August 2007 the Municipality's attorneys informed Zelpy's attorneys that the new building work was unlawful and should cease. On 13 September 2007 Zelpy's attorneys advised the Municipality's attorneys that the new structure was complete and that Zelpy merely wanted permission to put in windows and doors. The Municipality refused such

[2] Presumably this request was made with the provisions of s 14(1) of LUPO in mind.

permission. On 9 October 2007 the Municipality's attorneys rejected a suggestion for a site inspection, saying that an inspection was unnecessary and that Zelpy simply ignored all instructions.

[11] For reasons which do not appear from the papers, the Municipality then seems to have allowed the matter to be held in abeyance for many months, perhaps in the expectation that the PMC would not order demolition while there was a pending rezoning application. The Municipality only took up the cudgels again in late 2011, some months after the rejection of Zelpy's appeal against the dismissal of its rezoning application. In response to the Municipality's intimation that it would seek a demolition order, Zelpy in November 2011 requested further discussions, an invitation which the Municipality rejected as pointless. On 6 February 2012 Zelpy's attorneys informed the Municipality's attorneys that Zelpy intended to lodge a new rezoning application in which it would seek to extend the Resort Zone 1 zoning (as determined by the Municipality on 17 November 2009) so as to include the area covered by the new structures. On 2 March 2012 the Municipality's attorneys replied that the Municipality nevertheless intended to proceed with court action. On 20 March 2012 Zelpy lodged its new rezoning application.

[12] The Municipality launched the current interdict application on 20 April 2012. Because a new rezoning application had been lodged, the Municipality decided not to seek an immediate demolition order (which is what it originally had in mind) but an interdict to prevent the use or occupation of the new structures, with a right to apply on the same papers for demolition if the new rezoning application failed. (The new rezoning application has to date not been decided.)

[13] The events giving rise to Zelpy's counter-application took place after the launch of the interdict application. On 1 June 2012 Zelpy applied to the Municipality in terms of s 14(1A) of the Act for permission to occupy the new structures prior to the issue of an occupancy certificate, such permission to endure pending a decision on the new rezoning application. On 12 June 2012 the Municipality advised Zelpy that its application could not be granted because s 14(1)(a) stated that an occupancy certificate could only be issued in respect of buildings constructed in accordance with approved plans. The Municipality proceeded to quote what it

regarded as the relevant sections applicable to Zelpy's application, namely s 14(1)(a) and s 7(1)(a). The Municipality concluded by stating that because no approved building plans existed for the new structures Zelpy's request could not be granted. The Municipality added that plans could not lawfully be approved since they would be in conflict with the zoning of the property.

[14] This letter was understood by Zelpy's attorneys as meaning that because s 14(1)(a) referred to a building erected in accordance with approval granted under the Act, s 14(1A) was similarly limited. Zelpy's attorneys in a letter dated 12 June 2012 argued that this interpretation of s 14(1A) was wrong and that because of the Municipality's incorrect view of the scope of s 14(1A) the Municipality had failed to consider Zelpy's request on its merits. The Municipality was asked to reconsider the matter. In a letter dated 31 July 2012 the Municipality's attorneys notified Zelpy's attorneys that the Municipality adhered to its view and that it had taken due note of the provisions of s 14(1A) in making its decision. (In the counter-application Zelpy says that this letter did not come to its notice until it was seen as an annexure to the Municipality's answering affidavit. It seems that the letter may have gone astray within the office of Zelpy's attorneys.)

The issues

[15] In regard to the interdict application, Zelpy accepts that its use of the new structures without an occupancy certificate or permission granted in terms of s 14 is unlawful. (The correctness of this assumption will need to be examined in due course.) The main issues raised by Zelpy and pressed in argument are the following: [a] that the Municipality has not shown that the criminal sanctions for which the Act provides are not an adequate remedy; [b] alternatively, that any interdict granted by the court should be suspended pending a decision on Zelpy's s 14(1A) request (which Zelpy contends in the counter-application has not yet been validly determined) and pending the outcome of the new rezoning application.

[16] In the counter-application the main question is whether s 14(1A) permits a local authority to grant permission for a building to be used where the building has been erected without the local authority's approval. If so, the Municipality's decision

was vitiated by a material error of law and it failed to apply its mind to the merits of the s 14(1A) request. Otherwise, the Municipality's rejection of the s 14(1A) application was correct. There are subsidiary questions as to [a] whether the Municipality's letter of 12 June 2012 is to be characterised as an adverse decision or rather as indicative of a failure by the Municipality to take a decision; and [b] whether the counter-application was launched outside the 180 days stipulated in s 7(1) of the Promotion of Administrative Justice Act 3 of 2000 and if so whether the failure should be condoned.

Relevant provisions of the Act

[17] In terms of s 4(1) of the Act no person shall, without the prior approval in writing of the local authority, erect any building in respect of which plans and specifications are to be drawn and submitted in terms of the Act. Section 4(4) provides that a person who erects a building in contravention of s 4(1) is guilty of an offence and liable on conviction to a fine not exceeding R100 for each day on which he was engaged in so erecting the building.

[18] The new structures in the present case were buildings in respect of which plans and specifications were required to be drawn and submitted in terms of the Act. The erection of the new structures was clearly unlawful. The papers do not contain precise information as to the duration of the unlawful building work. The first unlawful structures appear to have been erected over a period of about five months and the second unlawful structure over a further period of about four months. This would suggest that upon a criminal conviction Zelpy would be liable to a fine not exceeding about R27 000.

[19] Sections 14(1), (1A) and (4) read as follows:

'(1) A local authority shall within 14 days after the owner of a building of which the erection has been completed, or any person having an interest therein, has requested it in writing to issue a certificate of occupancy in respect of such building –

(a) issue such certificate of occupancy if it is of the opinion that such building has been erected in accordance with the provisions of this Act and the conditions on which approval was granted in terms of section 7, and if certificates issued in terms of the provisions of subsection (2) and, where applicable, subsection (2A), in respect of such building have been submitted to it,

(b) in writing notify such owner or person that it refuses to issue such certificate of occupancy it it is not so satisfied or if a certificate has not been so issued and submitted to it.

(1A) The local authority may, at the request of the owner of the building or any other person having an interest therein, grant permission in writing to use the building before the issue of the certificate of occupancy referred to in subsection (1), for such period and on such conditions as may be specified in such permission, which period and conditions may be extended or altered, as the case may be, by such local authority.

(2) …

(2A) …

(3) …

(4) (a) The owner of any building or, any person having an interest therein, erected or being erected with the approval of a local authority, who occupies or uses such building or permits the occupation or use of such building –

(i) unless a certificate of occupancy has been issued in terms of subsection (1)(a) in respect of such building;

(ii) except in so far as it is essential for the erection of such building;

(iii) during any period not being the period in respect of which such local authority has granted permission in writing for the occupation or use of such building or in contravention of any condition on which such permission has been granted; or,

(iv) otherwise than in such circumstances and on such condition as my be prescribed by national building regulation,

shall be guilty of an offence.

(b) …

(5) … ‘

[20] Since no penalty is stipulated in s 14(4), the general penalty clause in s 24 applies, which means that a person guilty of the offence created by s 14(4) is liable on conviction to a fine not exceeding R4 000 or to imprisonment for a period not exceeding 12 months.

Discussion

[21] In the interdict the only point pressed by Zelpy's counsel on the merits was that the criminal sanction in s 14(4) read with s 24 was a satisfactory alternative remedy. This is the third of the three requirements for a final interdict: a clear right, an injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy (*Setlogelo v Setlogelo* 1914 AD 221 at 227). Both sides appear to have assumed that the first two requirements were met. This was based on the view that in terms of s 14(4)(a) it was unlawful for Zelpy to occupy or use the new structures in the absence of an occupancy certificate issued in terms of s 14(1)(a) or permission granted in terms of s 14(1A) and that the Municipality, as the local authority principally responsible for applying the provisions of the Act in the relevant area, was injured by conduct which contravened s 14(4)(a). The Municipality put the matter thus in its founding affidavit:

'[Artikel 14(4)(a)] verwys na 'n gebou wat opgerig is of word met die goedkeuring van die plaaslike bestuur. Dit is egter duidelik dat die artikel wel ook van toepassing is op die gebruik of bewoning van enige gebou ten opsigte waarvan daar nie 'n okkupasiesertifikaat uitgereik is nie, ook wanneer die gebou sonder die goedkeuring van die plaaslike bestuur opgerig is. Dit is so omdat die doel van die artikel is om te verhoed dat onveilige geboue gebruik of bewoon word. Die veiligheid van die bewoning of gebruik van 'n gebou kan slegs bevestig word deur die uitreiking van 'n okkupasiesertifikaat.'

[22] Since the parties' assumption rested on a particular interpretation of s 14(4)(a), the court is not bound by that assumption. It is the duty of the court to determine the fate of the interdict application in accordance with the law as determined by the court. This is particularly important in this case, where the fate of the counter-application rests on a closely related point of interpretation. Section 14 must be interpreted and applied consistently to the interdict application and the counter-application.

[23] The premise of the interdict application is that Zelpy's occupation of the new structures is unlawful in terms of s 14(4)(a). The only express prohibition in s 14(4)(a) is against the occupation or use of a building which has been or is being erected with the approval of a local authority. Zelpy's new structures are not such

buildings. Zelpy's erection of the new structures without municipal approval was unlawful in terms of s 4(1) but that section does not state, at least not expressly, that it is unlawful to use a building which has been unlawfully erected.

[24] I agree with the common assumption of the parties that Zelpy's use of the new structures is currently unlawful in terms of the Act. This must necessarily rest on implication but contrary to what the parties assumed I think the implication's location is s 4(1) rather than s 14(4). The distinction is important, because the location of the implication affects other aspects of the interpretation of s 14.

[25] The broad scheme of the Act in my view is this. Firstly, a person may not erect a building without approval from the local authority in the form of approved plans (ss 4-7). If he erects a building without such approval he is guilty of an offence (s 4(4)). In addition, the local authority may apply to interdict the unlawful work and may seek an order for the demolition of the unlawful structures (s 21). Second, a person who lawfully erects a building with the local authority's approval may not use or occupy the building without the local authority's permission in the form of an occupancy certificate (s 14(1A)) or temporary permission pending an occupancy certificate (s 14(1A)). If he occupies or uses the building without such permission he is (unless one or other of the circumstances in sub-paras (ii) and (iv) is present) guilty of an offence (s 14(4)(a)).

[26] One of the Act's main purposes, in providing for the laying down of standards for plans and specifications and in requiring plans to be approved by the local authority, is to ensure that buildings will be safe and suitable for their intended use. The erecting of a building is not an end in itself; a building is erected so that it may, upon completion, be occupied and put to use. The reason the Act forbids the erecting of buildings without approved plans and provides for their demolition if they are unlawfully erected is to prevent the existence of buildings which, because of the absence of approved plans, may be unsafe and unsuitable for use (even though no enquiry into safety and suitability is required in order for the act of erecting to be unlawful or in order to obtain an interdict or a demolition order). Even when a building has been erected in accordance with approved plans, s 14 does not permit it to be use or occupied without the local authority's further approval. This is a further

mechanism to ensure that the building is safe and suitable for occupation, as is apparent *inter alia* from the requirement for the certificates specified in ss 14(2) and 14(2A).

[27] There is, however, no express prohibition in the Act against the use and occupation of a building erected without approved plans. Whether there is a prohibition must thus depend on whether a prohibition can be implied. In *Rennie NO v Gordon & Another NNO* 1988 (1) SA 1 (A) Corbett JA, with reference to a plethora of earlier cases, said that our courts have consistently adopted the view that words cannot be read into a statute by implication 'unless the implication is a necessary one in the sense that without it effect cannot given to the statute as it stands' (22E-H). This view has been repeated in subsequent decisions of the Supreme Court of Appeal (see, for example, *American Natural Soda Ash Corporation & Another v Competition Commission of South Africa* [2005] 3 All SA 1 (SCA) para 27).

[28] However, in *Palvie v Motale Bus Service (Pty) Ltd* 1993 (4) SA 742 (A) the court said, with reference to *Rennie NO*, that the linguistic modification of the statutory provision under consideration in *Palvie* so as to extend it to cases not expressly mentioned was 'not necessary to realise the ostensible legislative intention or to make the Act workable' (749C). This reference to achieving the ostensible legislative intention was repeated by the Constitutional Court in *Bernstein & Others v Bester & Others NNO* 1996 (2) SA 751 (CC) at para 105. In *National Director of Public Prosecutions & Another v Mohamed NO & Others* 2003 (4) SA 1 (CC) at para 48, and in *Masetlha v President of the Republic of South Africa & Another* 2008 (1) SA 566 (CC) at para 192, it was said that an implication must be necessary in the sense that without it effect cannot be given to the statute as it stands and that in addition the implication must be 'necessary in order to realise the ostensible legislative intention or to make the [statute] workable'.

[29] I respectfully suggest that the formulations in the Constitutional Court cases just cited should not be read as imposing cumulative requirements, with the result that a term cannot be implied into a statute unless [a] the implication is necessary in the sense that without it effect cannot be given to the statute as it stands, and [b] the implication is necessary to realise the ostensible legislative intention, and [c] the

implication is necessary to make the Act workable. To say that effect cannot be given to a statute as it stands unless something is implied into it seems to me to be indistinguishable from saying that the Act is not workable without the implication. These two formulations (which mean substantially the same thing) are in turn the basis upon which one can deduce that the implication is necessary to achieve the ostensible legislative intention.

[30] Is the inability to give effect to a statute without implying the term (or, which is the same thing, that the Act would be unworkable without the implied term) the sole basis for deducing the ostensible legislative intention and thus for implying a term into a statute? In certain of the cases cited by Corbett JA in *Rennie NO* the test for implied statutory terms was said to be the same as in contracts.[3] The fact that a proposed contractual term is necessary to give effect to the contract and to make it workable is one basis on which a tacit term will be inferred but it is not the only basis. A court may discern the party's intention from the other terms of the contract, viewed in the light of surrounding circumstances. A favourite test for ascertaining whether the parties had such an intention is to use the device of a pertinent question asked by an officious bystander. If the bystander had asked the appropriate question, would the parties immediately have responded, 'Yes, of course, that is too obvious to mention'? A tacit term may be inferred into a contract on this basis even though the contract would be workable without it (see Christie *The Law of Contract in South Africa* 6th Ed at 177-179). The question whether something is to be implied into a statute is an aspect of interpretation, and the ultimate goal of statutory interpretation is to arrive at the intention of the lawmaker. I thus do not think that unworkability is the sole basis on which the lawmaker's intention can be satisfactorily deduced.

[31] I cannot say that the Act would be unworkable as it stands unless one implied into it a prohibition against the use and occupation of a building erected in violation of s 4(1). However, a consideration of the terms of the Act as a whole leaves me in no doubt that in order to achieve the ostensible legislative intention it is necessary to imply such a prohibition. It is inconceivable that the lawmaker could have intended that while lawfully erected buildings could be used and occupied only after obtaining

[3] See, eg, *Taj Properties (Pty) Ltd v Bobat* 1952 (1) SA 723 (N) at 729E.

the certificate or permission contemplated in s 14, an unlawfully erected building could lawfully be used and occupied unless and until it was demolished. Such a view would defeat the obvious intention of the lawmaker. The lawmaker intended that buildings should not come into existence without approved plans and that buildings erected in accordance with approved plans should not be use or occupied without further permission. If one were to commandeer the officious bystander whose more usual function is to put questions to contracting parties and got him to ask the lawmaker, as the latter prepared to approve the Act, whether a person would be entitled to use and occupy a building erected without approved plans, the lawmaker's immediate response would have been, 'Of course not, he cannot even lawfully erect such a building.' By forbidding in s 4(1) the act of bringing into existence a building intended (upon completion) for use and occupation, the lawmaker can be taken to have also forbidden the intended use and occupation if for any reason the unlawful erecting was allowed to reach the stage of a completed building. Even though the local authority may apply for a demolition order, this might take some time.

[32] It will be noted that I have located the implication in s 4(1) rather than in s 14(4)(a). This accords with my view as to the scheme of the Act. Section 14 in my opinion applies only to buildings erected with the local authority's approval under the Act. In order for a building to be used or occupied it must first be erected with approval granted under the Act, and then permission to use or occupy the building must be obtained. Section 14 deals with the latter stage, on the premise that the former has been complied with. In other words, in terms of s 14 the only buildings in respect of which the local authority may give permission to use and occupy are those erected with municipal approval. (The fact that the implication is located in s 4(1) naturally does not mean that s 14 is irrelevant in the process of reasoning leading to the implication – on the contrary, the implication arises from a consideration of s 4(1) in the context and scheme of the Act as a whole.)

[33] There are several textual considerations which cumulatively support the view that the implication is located in s 4(1) rather than s 14(4)(a). Firstly, In terms of s 14(1), which applies in the case of a completed building, an occupancy certificate can only be granted in respect of a building erected in accordance with the Act.

Such approval would entail *inter alia* the approval of building plans and specifications in terms of s 7(1)(a). Section 14(1A) does not expressly refer to a building erected (or being erected) in accordance with approval granted under the Act but in my view the permission contemplated in s 14(1A) is confined to such buildings. Firstly, 14(1) refers to the 'owner of a building'. Section 14(1A) then refers to 'the owner of the building' in respect of the period before the issue of an occupancy certificate in terms of s 14(1). In context, the definite article 'the' indicates that what is being dealt with in s 14(1A) is a building of the kind referred to in s 14(1), namely a building erected (or being erected) in accordance with the provisions of the Act. This is also indicated by the fact that permission under s 14(1A) is intended as a temporary measure prior to the issuing of an occupancy certificate in terms of s 14(1). Although all the circumstances entitling the owner to an occupancy certificate might not yet have been satisfied at the time permission under s 14(1A) is sought, the building must be of a kind in respect of which an occupancy certificate could in due course be granted, namely a building erected or being erected in accordance with approval granted under the Act.

[34] Second, the introductory part of s 14(4)(a) refers expressly to a building 'erected or being erected with the approval of a local authority'. The occupation or use of such a building is unlawful unless one or other of the four circumstances listed in sub-paragraphs (i) to (iv) is present. One of those circumstances is that an occupancy certificate has been issued in terms of s 14(1)(a) while another is that permission has been granted by the local authority (*viz* in terms of s 14(1A)). This indicates that s 14(1)(a) and s 14(1A) are intended to apply to buildings of the same kind, namely those referred to in the introductory words of s 14(4)(a) (that is, a building 'erected or being erected with the approval of a local authority'). The permission referred to in sub-paragraph (iii) is clearly the permission envisaged in s 14(1A). The phrase 'such building' in sub-paragraph(iii) refers back to the phrase 'any building erected or being erected with the approval of a local authority' in the opening portion of paragraph (a) of s 14(4). If the lawmaker had intended s 14(1A) to apply also to a building erected or being erected without the local authority's approval, s 14(4)(a) could not sensibly have been restricted to buildings erected or being erected with the local authority's approval.

[35] Third, the legislative history of s 14 supports this interpretation. The provision now to be found in s 14(1A) was previously contained (though in slightly different language) in paragraph (b) of s 14(4). The said paragraph (b) read as follows:

'Permission in writing referred to in paragraph (a)(iii) may, at the request of the owner of any building or of any person having an interest therein, be granted by a local authority on account of considerations of fairness for such period and on such conditions as may be specified in such permission, which period and conditions may be extended or altered by such local authority, as the case may be.'

Section 14(4)(b) in this form regulated the granting of the permission contemplated in s 14(4)(a)(iii). As already noted, the permission contemplated in s 14(4)(a)(iii) was (and still is) a permission which may be granted for the occupation or use of 'such building', namely a building of the kind contemplated in the introductory portion of s 14(4)(a), ie 'any building … erected or being erected with the approval of a local authority'. It follows that in terms of s 14 as it originally read, there were textual considerations indicating conclusively that the permission contemplated in s 14(4)(b) could be granted only in respect of a building erected or being erected with the approval of a local authority. In terms of s 7 of Act 62 of 1989 paragraph (b) of s 14(4) was deleted and sub-section (1A) was inserted. Although there were minor changes in the formulation in other respects, there is no indication that the purpose of the amendment was to extend the type of buildings in respect of which permission to use or occupy could be granted. The main reason for the amendment, I suspect, was that it was thought more logical, as with the issuing of permanent occupancy certificates, to deal at the beginning of the section with the granting of temporary permission to use or occupy buildings pending the issuing of occupancy certificates, and then to deal with unlawful use and occupation in s 14(4)(a). In other words, ss 14(1) and 14(1A) lay the groundwork for the prohibition in s 14(4)(a).

[36] Fourth, in order to find that s 14(1A) authorises the grant of temporary permission to use and occupy a building even though it has been or is being erected without approved plans it would be essential to imply, after the word 'with' in the phrase 'with the approval of a local authority' in the introductory part of s 14(4)(a), the further words 'or without'. This implication would be essential to bring the prohibition in s 14(4)(a) in line with the proposed expansive interpretation of s 14(1A). Without some such implication in s 14(4)(a) there would be the manifest

absurdity that while s 14(1A) would (on the expansive interpretation) contemplate a process for obtaining permission to use an unlawfully erected building, s 14(4)(a) would not prohibit the owner of the unlawfully erected building from using it without getting the said permission. However I find it impossible to imply the proposed additional words in s 14(4)(a). One is not, in s 14(4)(a), dealing with a case where the lawmaker has used a wide term in circumstances where it appears that some implied restriction must have been intended. Here the lawmaker in s 14(4)(a) begins with an unrestricted expression 'any building' and then expressly qualifies these words by means of the phrase 'erected or being erected with the approval of a local authority'. If one were to imply into the latter phrase, after 'with', the words 'or without', one will effectively have rendered superfluous both the express qualification ('with the approval of a local authority') and the implied qualification ('without the approval of a local authority'), since then the lawmaker may just as well have referred to 'any building' without qualification (a building can only be erected with or without the approval of the local authority – these two qualifications cover the whole field). Put differently, the only reason for implying the additional words 'or without' in s 14(4)(a) is to neutralise and render irrelevant the express qualification which the lawmaker has inserted. However, it is a cardinal principle in the process of implication that the implied term should not conflict with the express language of the instrument (see, eg, *Absa bank Ltd v SACCAWU National Provident Fund* [2012] 1 All SA 121 (SCA) para 34). This point can be expressed with reference to an equally well accepted canon of construction. Since the effect of the proposed implication is to neutralise the limiting effect of the express qualification ('with the approval of the local authority'), one could just as well contend (without arguing for any implication) that the words 'erected or being erected with the approval of a local authority' should simply be ignored (the effect would be the same). Such a contention would, of course, offend against the rule that effect should if at all possible be given to every word in a statute (see, eg, *CIR v Golden Dumps (Pty) Ltd* 1993 (4) SA 1100 (A) at 116F-117B; *Fish Hoek Primary School v GW* 2010 (2) SA 141 (SCA) paras 9-10). Such an extreme disregard of the lawmaker's words is not in my view required to make sense of the Act. The reason that s 14(4)(a) does not contain the missing words and that the provision refers only to buildings erected in accordance with municipal approval is that the scope of s 14 as a whole, including s 14(1A), is confined to buildings erected or being erected in accordance with the approval of the

local authority. The lawmaker did not deal in s 14 with buildings for which no approval existed because the lawmaker took it for granted that since such buildings could not lawfully be erected they obviously could not be occupied or used.

[37] Section 21 does not state that a court is compelled to order the demolition of an unlawfully erected building. If the law were applied vigilantly and properly (which seems not have occurred in this case) unlawful building work would be interdicted before it got very far. However, if the erecting of a building were competed despite the absence of approval, it is conceivable that a court might in the exercise of its discretion refuse to order demolition if the building were soundly constructed and if there were other circumstances operating in favour of the owner. If, as I consider, s 14 applies only to lawfully erected buildings and that it is necessarily implied in s 4(1) that an unlawfully erected building cannot be used, there might be a stalemate in which the local authority has refused to approve plans but the court in its discretion has refused demolition. Even if s 14(1A), contrary to my view, could apply to a building erected without plans, it would not be a permanent solution to this particular problem, since permission under s 14(1A) is a temporary measure until an occupancy certificate can be issued in terms of s 14(1)(a). An occupancy certificate in terms of s 14(1)(a) can never be issued in respect of a building erected without the local authority's approval. I am inclined to think that this type of stalemate is unlikely ever to arise in the real world. If the local authority has good reason to refuse plan approval (and if its objections are irremediable), I cannot see that it would be proper for a court to refuse a demolition order. Conversely, if there were good grounds to refuse a demolition order, it seems unlikely that the local authority could properly refuse forever to approve building plans – such a refusal would be susceptible to review. However, if there were a real and persistent stalemate, the answer might well be that the owner could never use the building despite its non-demolition. It would not be for the court to fill the *casus omissus* left by the lawmaker (*Summit Industrial Corporation v Claimants against the Fund Comprising the Proceeds of the Sale of the MV Jade Transporter* 1987 (2) SA 583 (A) at 596J-597D; *Caroluskraal Farms (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk* 1994 (3) SA 407 (A) at 422B-G). The possible existence of this *casus omissus* of rare occurrence would not be a reason to imply into s 14(4)(a) words which are inconsistent with the express wording of that provision or to refuse to imply into

s 4(1) the implied prohibition which is necessary to achieve the obvious legislative intent.

[38] There is a further reason for implying the prohibition in s 4(1) rather than s 14(4)(a). In the case of s 4, there is a prohibition in s 4(1) and an offence created in s 4(4). In the case of s 14, the prohibition and offence are not separately legislated – the sole source of unlawfulness is the offence created by s 14(4)(a). By implying into s 14(4)(a) words which would extend its operation to buildings erected without municipal approval one would be establishing a wider criminal offence than the one expressly created by the lawmaker. The scope of penal provisions must be conveyed with reasonable clarity (*Ellis Park Stadium v Minister of Justice* 1989 (3) SA 898 (T) at 910E-F; *Bertie van Zyl (Pty) Ltd v Minister of Safety and Security* 2010 (2) SA 181 (CC) paras 47 and 101-103). Penal provisions are to be interpreted restrictively in the case of obscurity or ambiguity (*R v Milne & Another (7)* 1951 (1) SA 791 (A) at 823 B-F; *S v Sparks NO & Others* 1980 (3) SA 952 (T) at 957E-H; *S v Motswi* 1982 (1) SA 172 (T) at 177C-F). This is a further obstacle to implying words into s 14(4)(a), and it is only by some such implication that s 14(1A)'s scope could sensibly be read as including buildings erected without municipal approval. The same difficulty does not exist in s 4. Although the prohibition in s 4(1) necessarily implies, in the context of the Act as a whole, a prohibition against use, it is not necessary, and in the light of the cases just cited probably not permissible, to make the same implication in s 4(4), which expressly criminalises the erecting (not the use) of a building in contravention of s 4(1)) and authorises a penalty expressed with reference to the number of days on which the person was engaged in erecting (not using) the building.

[39] I thus consider that s 14(1A) does not apply to buildings erected or being erected without the local authority's approval. On my interpretation, s 14(1A) would entitle a local authority to grant permission for a building to be used where the building has been or is being erected in accordance with municipal approval but there is some temporary impediment to the issuing of an occupancy certificate. Examples would be where the erection of the building has not yet been completed but some discrete part of it is ready for use; or where the whole building is very close to completion and may safely be used (or partially used); or where the building

has been completed but there is some delay in obtaining the certificates required by ss 14(2) and 14(2A). I reject Zelpy's submission that the purpose of s 14(1A) is to cover the case where a building has been erected without approval. There is nothing in the wording of the section or in its history to support that view. If this had been the intention, I would have expected the lawmaker to say so in clear terms.

[40] My conclusions thus far lead to the following conclusions: [a] Firstly, Zelpy's new structures were erected without municipal approval and in violation of s 4(1). It follows that Zelpy was not entitled to obtain permission for their use in terms of s 14(1A) and the Municipality rightly refused permission. The counter-application must thus be dismissed. [b] Second, Zelpy's use of the new structures violates the implied prohibition in s 4(1) against the use of structures erected without approval under the Act. The remaining questions are whether the Municipality is entitled to an interdict to prevent Zelpy's ongoing violation of the implied prohibition.

[41] Although the Municipality in its founding papers located the implied prohibition in s 14(4)(a) rather than in s 4(1), this was a legal misapprehension which does not affect the nature of its case. The Municipality, while treating the implication as a component of s 14(4)(a), has also consistently contended that ss 14(1)(a) and 14(1A) do not apply to buildings erected without approval under the Act. It has also always been the Municipality's case that the new structures were erected in violation of s 4(1) of the Act. The essence of the Municipality's case was thus that a building erected without approval cannot be used or occupied, because no mechanism exists to confer permission for such use. That legal conclusion is one which I consider flows from a proper interpretation of the Act, even though my interpretative route differs from the one advanced by te Municipality in the founding papers. I put to counsel my difficulty in locating the implied term in s 14(4)(a) and invited supplementary submissions on the point, which I have taken into account in my reasoning. This is thus not a situation where the Municipality could properly be non-suited for having failed to make out its case in the founding papers.

[42] The fact that the implication is located in s 4(1) rather than s 14(4)(a) may be thought to bring into play the orders granted by the PMC, since those orders were made in response to applications by the Municipality based on Zelpy's violation of s 4(1). However, the applications and orders only concerned the erecting of the

buildings. The question whether the new structures, upon completion, could lawfully be occupied was not addressed in the magistrate's court proceedings and the PMC made no orders in that regard. The orders in essence did not prevent Zelpy from erecting the buildings at its own risk (though I think the Municipality erred in agreeing to the order of 14 May 2004 and the PMC erred in making the order of 26 July 2004). Furthermore, the orders stated that the Municipality could seek demolition of the new structures if the rezoning application failed. The first rezoning application (which is the one contemplated in the PMC orders) did fail. It cannot be contended that the temporary indulgence which the PMC (incorrectly in my view) granted to Zelpy survived the final rejection of the first rezoning application. I may add that the PMC orders in any event would not have applied to the new structure which Zelpy built in 2007.

[43] Zelpy did not in argument contend that if its use and occupation of the new structures were unlawful in terms of the Act, the first and second requirements for a final interdict were not satisfied. There are many cases which confirm that in cases of this kind, where a local authority is the primary body charged with applying the provisions of a law relating to building or use of land, the local authority's rights are infringed by a contravention of the law and such infringement constitutes an injury sustaining an application for an interdict.

[44] On the merits, this leaves the third requirement for an interdict, namely 'the absence of similar protection by any other ordinary remedy' (*Setlogelo supra* at 227). Zelpy's argument was that the criminal offences created by the Act were a sufficient remedy. As appears from the decision in *Food and Allied Workers' Union v Scandia Delicatessen CC* 2001 (3) SA 613 (SCA), particularly at paras 34-41, a criminal prosecution may in appropriate circumstances be found to constitute a satisfactory alternative remedy.[4] Given the Municipality's approach in the founding papers to s 14(4)(a), the alternative criminal remedy would have been a prosecution in terms of s 14(4)(a) read with s 24 of the Act (relating to the unlawful use of the

[4] Zelpy's counsel also cited *Bannatyne v Bannatyne* 2003 (2) SA 359 (SCA) as a further example but in my view that case was not based on an application of the third *Setlogelo* requirement for an interdict but on the view that the high court would exercise only sparingly a supposed jurisdiction (assumed to exist for purposes of the case) to commit a person for contempt of an order of a maintenance court. The decision, I may add, was reversed by the Constitutional Court – 2003 (2) SA 363 (CC).

new structures) – this would be in addition to a possible prosecution in terms of s 4(4) for the unlawful erecting of the structures. The adequacy of the criminal remedies was not satisfactorily dealt with by the Municipality in the founding papers but the matter was canvassed in the answering and replying papers.

[45] Given my interpretation of the Act, s 14(4)(a) is not the source of the unlawful conduct of which the Municipality complains. Section 14(4)(a) only applies to the use of a building erected with the approval of the local authority. It follows that the criminal remedy in s 14(4)(a) read with s 24 was not available to the Municipality. The source of the unlawfulness is the prohibition to be implied in s 4(1). I have already expressed my doubt as to whether a contravention of the implied prohibition is also an implied offence in terms of s 4(4), given the restrictions on expanding criminal contraventions beyond their clear language. If it is not an offence, there are no criminal remedies available to the Municipality at all in respect of Zelpy's unlawful use of the new structures. The fact that the Municipality might be able to lay a charge in terms of s 4(4) in respect of the unlawful erecting of the new structures is not an alternative remedy in respect of the unlawful use of the completed structures. It would not even have been an adequate remedy in respect of the unlawful erecting of the new structures. As I indicated earlier, the only penalty is a fine not exceeding R100 per day of unlawful building work. That would not come to more than about R27 000. Zelpy built the structures for commercial exploitation. Its managing director and controller Mr Edmondson stated in the answering affidavit that the extension of the accommodation facilities in 2004 was the only way to make the commercial operation viable. He states that Zelpy spends more than R110 000 per year on repairs and maintenance.[5] Its annual turnover, according to annexed financial statements, currently exceeds R1 million. Although the financial statements reflect an accounting loss, it is wholly implausible that Zelpy would have been deterred from erecting the unlawful structures by exposure to the modest fine for which s 4(4) makes provision.

[46] The provisions of s 21 are, furthermore, an indication that the lawmaker intended the local authority to have the power to seek civil remedies. Indeed, I think it would usually be the duty of a local authority to interdict unlawful building work.

[5] Para 31 record p 239.

The lawmaker could never have intended that the local authority would have to be satisfied with exacting a criminal fine not exceeding R100 per day of unlawful work. Although s 21 does not deal with unlawful use, its provisions nevertheless point to a legislative recognition that the local authority should have easy access to civil remedies. (Section 21 is designed to facilitate access to the magistrate's courts by removing objections to jurisdiction; it does not oust the jurisdiction of the high court.)

[47] Even if s 14(4)(a) read with s 24 applied in this case, I would not regard it as a suitable alternative remedy. Although *Scandia Delicatessen* is authority for the view that a criminal prosecution may in an appropriate case be a suitable alternative remedy, there are, at the level of general principle, reasons why it will often not be an adequate alternative. *Setlogelo*, it should be emphasised, refers to the absence of similar protection by any other ordinary remedy. One would not usually regard a criminal remedy as one which is available to the harmed individual. It is a pubic remedy at the discretion of the prosecuting authorities. Only if the directorate of public prosecutions declines to prosecute can the individual launch a private prosecution, and I would hesitate to call a private prosecution an 'ordinary remedy' (they are very rare in this country). A criminal conviction also does not, in a case like this, provide 'similar protection': the protection afforded by an interdict is the cessation of the unlawful activity; a criminal prosecution does not achieve anything similar – it punishes past conduct (see *Ebrahim v Twala & Others* 1951 (2) SA 490 (W) at 493A-B). Then there is the fact that in a criminal prosecution *mens rea* must be established and that all the elements of the offence must be proved beyond reasonable doubt. In some cases this might not be a real impediment (see *Scandia Delicatessen* paras 39-40) but in other cases it may be a reason to avoid criminal proceedings. In the present case, for example, Zelpy's counsel submitted in para 63 of the heads of argument in the interdict that Zelpy was unlikely to be found guilty of a contravention of s 14(4)(a) 'due to a lack of intention on its part to contravene the NBA and the zoning scheme'. When I asked Zelpy's counsel in argument whether Zelpy conceded that it was guilty of a criminal offence she declined (perhaps understandably) to make the concession. It is also often the case that the criminal sanction will, in the circumstances of the case, be an inadequate deterrent. In this case, for example, Zelpy is a company and thus the only criminal sanction it would face in terms of s 24 of the Act is a fine of R4 000 – imprisonment would not be an

option (see s 332(2)(c) of the Criminal Procedure Act 51 of 1977). Although Zelpy's directors or servants could perhaps face imprisonment if charged alongside the company, the prosecution of such persons would not be an alternative remedy as against Zelpy.

[48] There is a raft of cases in which local authorities have been granted interdicts in regard to planning matters (it would be tedious to give the citations). It is, I think, regarded as the usual way in which a local authority goes about preventing contraventions of zoning schemes and other restrictions relating to the use of land. In some of these cases the courts considered and rejected a contention that the statutory offences were to the exclusion of civil remedies. The separate question as to whether the criminal remedies were adequate alternatives so as to make it inappropriate to grant an interdict has not, as far as my research goes, been pertinently considered though it does not seem to have occurred to the many experienced judges and counsel who featured in the cases that this was a proper objection in such cases. In *City Council of Johannesburg v Berger* 1939 WLD 87 Solomon J, in granting an interdict to prevent unlawful building work, said that the local authority was entitled to protect its right of control from being violated by way of an interdict, and he quoted with approval the following words from an English case (at 90): 'If there were no remedy except the statutory remedy, a public authority might by circumstances be rendered singularly impotent although it had made bye-laws'; and Solomon J added that the truth of this remark was illustrated by the respondent's disregard in that case of the municipality's protests. In *Randleigh Buildings (Pty) Ltd v Friedman* 1963 (3) SA 456 (D) – a zoning violation – Warner AJ said the following (457H-458A):

'I can find no ground for inferring in this case that te Legislature intended that the only sanction was to be the criminal one. If it were it would mean that the Courts would be powerless to ensure that the scheme was carried into effect because individuals could continue breaking it and accepting their punishment. This would not have the effect of furthering the purposes of the scheme as set out in the Ordinance. Unless the Courts are in a position to ensure that the scheme is carried out and not merely to punish each breach the intention of the Legislature will be defeated.'[6]

[6] See also *Tzaneen Local Transitional Council v Louw & Others* 1996 (2) SA 860 (T) at 863I-864D.

[49] The *Scandia Delicatessen* case is in truth a relatively rare example where a criminal remedy has been found to be a suitable alternative. The circumstances in that case were very different to the present one. The applicant was not a local authority seeking to enforce a planning law in the public interest. A trade union was complaining about an employer's failure to comply with an industrial court order for the reinstatement of workers. Effectively the court found that a civil remedy in the nature of a contempt order was not necessary in the light of the fact that it was a statutory offence for the employer to fail to comply with the industrial court order.

[50] Recently, in *Independent Outdoor Media (Pty) Ltd & Others v City of Cape Town* [2013] ZASCA 46, a case where a local authority wished to interdict the unlawful displaying of advertising signs, the Supreme Court of Appeal upheld the trial court's rejection of the defence that the criminal remedy was a satisfactory alternative. Admittedly there was evidence that criminal prosecutions had been found to be unavailing in the past but it is nevertheless worth quoting paras 35 and 36 of the court's judgment:

'[35] The City contended that history has shown that the laying of criminal charges had proved to be ineffectual in the past. Delays arising in the prosecution process, inter alia due to representations made on behalf of the persons charged, had resulted in unlawful signs remaining on display and continuing to generate income for the accused for lengthy periods. In the light of this and 'the relatively low maximum sentences that are handed down by the criminal courts and the fact that the criminal courts lack the power to grant orders of the kind sought in this case, namely that the offending signs be removed' the court a quo observed that 'criminal proceedings do not constitute an adequate alternative remedy in a case such as the present'.

[36] I agree. In my view there is no reason why an interdict should not be granted to stop unlawful signs being displayed in breach of the Bylaw, and while a criminal prosecution may well follow upon an offender making itself guilty of unlawful conduct, it would be a sad day if the criminal courts were to be clogged by a vast number of cases of such a nature. The court a quo was quite correct to have granted the interdict that it did.'

[51] In the circumstances, and despite the absence of evidence as to the history and effect of prosecutions under the Act, I am satisfied, viewing the matter in a common-sense way, that such criminal charges as the Municipality may have been

entitled to lay with the prosecuting authorities in this case would not have constituted a satisfactory alternative to an interdict as contemplated in *Setlogelo.*

[52] In the Municipality's supplementary submissions the Municipality advanced an alternative argument to the effect that Zelpy's use of the new structures was in any event contrary to LUPO. Section 39(2) of LUPO reads as follows:

'(2) No person shall –

(a) contravene or fail to apply with –

(i) the provisions incorporated in a zoning scheme in terms of this Ordinance, or

(ii) conditions imposed in terms of this Ordinance or in terms of the Townships Ordinance, 1934,

except in accordance with the intention of a plan for a building as approved and to the extent that such a plan has been implemented, or

(b) utilise any land for a purpose or in a manner other than that intended by a plan for a building as approved and to the extent that such plan has been implemented.'

In terms of s 46(1)(a) of LUPO a person who contravenes or fails to comply with s 39(2) is guilty of an offence and on conviction liable to a fine not exceeding R10 000 or to imprisonment for a period not exceeding five years or both. Section 46(2) provides that a person convicted of an offence under LUPO and who after such conviction continues with the offending conduct shall be guilty of a continuing offence and on conviction liable to a fine not exceeding R100 in respect of each day on which he so continues or continued therewith. *Prima facie* Zelpy's conduct in using the new structures for commercial guest house purposes contravenes both s 39(2)(a)(i) (the current zoning being agricultural) and s 39(2)(b) (there being no approved plan). On the other hand, a contravention of LUPO was not the basis on which the Municipality sought relief in its founding papers in the interdict application. Given the conclusions I have reached thus far, I find it unnecessary to decide whether – if s 39(2) of LUPO had been the sole basis for establishing the unlawfulness of Zelpy's use of the new structures – the Municipality would have been entitled on its papers as they stand to rely on that section to sustain the interdict.

Suspension of interdict

[53] Since the Municipality has established the prerequisites for an interdict, the remaining question is whether I can and should suspend the interdict. Given my view that s 14(1A) of the Act is inapplicable to the new structures and that Zelpy's request for permission under that section was rightly refused by the Municipality, a suspension pending a (further) decision under that section falls away. Zelpy argues, however, that I should in any event suspend the interdict pending a decision on the new rezoning application. I am prepared to accept that a court has the jurisdiction to suspend an interdict even though the interdicted conduct is a continuing criminal offence (as is the case here by virtue of s 39(2) of LUPO).[7] Nevertheless a discretion in these circumstances will be sparingly exercised, for obvious reasons.

[54] I can see no basis for suspending the interdict in this case. Zelpy has had the benefit of its unlawful conduct for long enough and has had fair warning that it may need to cease its use of the new structures until its situation is regularised (if it ever is). I decline to enter into a consideration of whether the new rezoning application is or is not likely to succeed. I have no way of telling, though the papers before me do not explain why the second application should succeed when the first one failed. The fact that in consequence of the closure several people may lose their employment with Zelpy (at least temporarily) and that the Piketberg area will be deprived of what Zelpy regards as a valuable tourist facility to the benefit of the local economy is certainly unfortunate but that type of prejudice will very often be present when people use their property contrary to planning laws. These considerations do not justify an order which effectively condones a flouting of the law. Zelpy erected the new structures unlawfully. The only reason it is now in a position to complain of prejudice if it is required to cease its unlawful use is that it completed the building of the new structures at its own risk and in the knowledge that it did not have the approval required by the Act and LUPO. Zelpy should not be permitted to use its prior unlawful conduct as the foundation for justifying a suspension of the interdict. It would undermine sound and effective local government if the message went out that people who unlawfully commence operations without required approvals will be

[7] I dealt briefly with this question (with reference to prior authority in this division) in *Booth & Others v Minister of Local Government, Environmental Affairs and Development Planning & Another* [2013] ZAWCHC 47 para 65.

permitted to continue with those operations just because they already exist. Nobody would then have an incentive to follow the rules.

[55] The Municipality could in this case have applied for demolition of all the new structures pursuant to the rejection of the first rezoning application. An interdict against the use of the new structures is a less drastic remedy and one about which Zelpy can have no legitimate complaint in the circumstances. This said, I certainly hope that the second rezoning application can be determined more promptly than the first. The lengthy delays which bedevilled the first application are not consistent with our constitutional values of administrative fairness and efficiency and do not appear to have been the fault of Zelpy.

Conclusion

[56] The interdict sought by the Municipality in paragraph 1 of its notice of motion prohibits the use of the new structures unless an occupancy certificate in terms of s 14(1) has been issued. Although my analysis is that neither an occupancy certificate nor permission under s 14(1A) can currently be granted in respect of the buildings given that no approval for their erection exists, it is not inappropriate to retain a reference to s 14 since if the new rezoning application is granted and if the building plans for the new structures are thereafter approved, Zelpy will at that stage be entitled to seek a right to use and occupy the new structures in terms of s 14. Such permission remains, in the final analysis, a prerequisite for Zelpy to use the new structures. However, I do not think the reference to s 14 should be confined to s 14(1); it is conceivable that if the plans were in due course approved, Zelpy might be entitled (prior to the issue of an occupancy certificate) to seek temporary permission in terms of s 14(1A) if there is any delay in getting an occupancy certificate in terms of s 14(1).

[57] The Municipality seeks in paragraph 2 of the notice of motion an order entitling it to apply on the same papers for demolition if the new rezoning application is refused. I do not see any utility in such an order. So much water is likely by then to have passed under the bridge that the Municipality may as well bring a further application under a new case number.

[58] I make the following order:

(a) The respondent is prohibited from in any way using or occupying, or allowing to be used or occupied, the structures it unlawfully erected in 2004 and 2007 without approval in terms of the National Building Regulations and Building Standards Act 103 of 1977 on Remainder of Portion 5 of the farm Rietfontein No 184 located in the Berg River Municipality, Piketberg Division, Western Cape, held under Deed of Transfer T2823/2004, unless and until the respondent has been issued with an occupancy certificate in terms of s 14(1)(a) of the Act or has obtained the permission contemplated in s 14(1A) of the Act.

(b) The respondent shall pay the applicant's costs in the main case, including the costs of two counsel.

(c) The respondent's counter-application is dismissed with costs, including the costs of two counsel.

ROGERS J

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