IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 9001/2020

In the matter between:

MARK WAYNE CHRISTOPHER	Applicant
and	
JOLINDI NICOLENE VERSTER	First Respondent
PIETER JOHANNES VERSTER	Second Respondent
PUPPY TOWN	Third Respondent
THE CITY OF CAPE TOWN	Fourth Respondent

Date of hearing: 8 March 2021
Date of Judgment: 4 June 2021 (delivered by email to the parties' legal representatives and by release to SAFLII. The Judgment shall be deemed to have been handed down at 13h11)

JUDGMENT

Henney, J:

[1] The applicant and the first and second respondents are neighbours. The purpose of this application is to prohibit these two respondents from operating a

business known as Puppy Town (the third respondent, hereinafter referred to as Puppy Town), that is described as a daycare centre offering supervision and care for a number of dogs during certain hours in the week. I will, for the sake of convenience, refer to them as the respondents. The City of Cape Town, cited as the fourth respondent (hereinafter referred to as the City), does not oppose the application. The applicant alleges that this business being operated by the respondents, is a distraction to the peace and serenity that he is entitled to as a neighbour, and is unlawful on several grounds, to which I will refer later in this judgment.

[2] The applicant seeks the following relief in his notice of motion:

1) prohibiting the respondents from operating a puppy or dog daycare, or any similar animal care or custody business, on their property at 11 Shilling Road, Vierlanden, Durbanville;

2) directing them to forthwith cease the operation of a puppy or dog daycare, or any similar animal care or custody business, from the property.

The applicant's case

[3] The applicant works from home as a pastor, and requires a peaceful environment to write, research, study and counsel his congregants. His property abuts the property occupied by the respondents. The second respondent owns the property. The first respondent operates Puppy Town from the property, and on Puppy Town's website, it is described as a daycare centre which, inter alia, offers constant supervision, structured playtime, potty training, basic training, socialisation with different dogs and constant feedback to the owners about their dogs. Every morning Puppy Town's clients drop their dogs off at the property and collect them again in the evening. There are up to 17 dogs present on the property at any given time during business hours.

[4] The property is a residential property, and the dogs are accommodated in the garden. Puppy Town's advertised operating hours are from 7h00 to 18h00 from

Monday to Friday. It also runs puppy training sessions on Saturday mornings. Clients drop off the dogs at the property from 6h30 during the week. The applicant alleges that the fact that the business operates from 6h30 until 18h00 is one of the grounds upon which its operations are unlawful. This is because the property zoning permits businesses that are allowed to run from home to operate only from 08h00 to 17h30 from Mondays to Fridays.

[5] The applicant alleges that every time a client drops his or her dog off at the property, or picks them up, the other dogs on the property start barking. This is disturbing and disruptive to the peaceful enjoyment of his property and to his daily activities. The dogs barking on the property also trigger a cacophony of barking from all the dogs in the neighbourhood, which aggravates matters considerably.

[6] He alleges that throughout the day the dogs on the property sporadically begin barking, again triggering a symphony of barking throughout the neighbourhood. On some days he says he endures up to 8 hours of barking. He is not the only neighbour who is disturbed by Puppy Town, and as proof of this he filed the confirmatory affidavit of David Austin, who resides at 13 Shilling Street, who has similar complaints to his. He also refers to the confirmatory affidavit of Rehan Celliers, who rented his property while he was abroad for some period of time.

[7] Before the applicant moved into the area on 7 December 2015, he and his family viewed the property over a weekend and at that time it was quiet, since Puppy Town operates only during the week and on Saturday mornings. He specifically asked the previous owner if there were any dogs barking in the neighbourhood and adjoining properties. He was concerned about this issue due to his need for a quiet working environment.

[8] He had several discussions with the respondents about the constant noise emanating from the property, and to enquire about what could be done to stop the dogs' incessant barking. He also informed them on several occasions that he found it to be a nuisance and unacceptable. As from February 2016, after having made several attempts to get the respondents to limit the noise coming from the property, he reported them to the City.

[9] After several complaints to the City, which included allegations that the business being operated by the first respondent is unlawful, did not have the desired result, he had no other alternative than to seek redress in this court in the form of interdictory relief. These complaints started in February 2016 and continued up until July 2019, and were in the form of emails, telephone calls, Facebook messages, direct interactions with City officials and letters sent by his attorney to the City.

[10] These complaints resulted in the City issuing a compliance notice, dated 9 March 2020, to the respondents in terms of section 126 of the City's Development Management Scheme which is a scheme to the City's Municipal Planning By-Law ("DMS"). It also resulted in the City instituting an unsuccessful attempt to prosecute the respondents, which resulted in the withdrawal of the case on 29 January 2020, which, on the version of the applicant, was as a result of the witnesses not having been subpoenaed. The respondents contend rather that the case was withdrawn due to insufficient evidence. According to the record as set out in the applicant's founding affidavit, during this period more than 40 requests were made by either the applicant or his attorney to investigate and take action against the respondents for their alleged failure to adhere to the provisions of the DMS. The complaints, it seems, were predominantly aimed at the noise which emanated from the respondents' property.

The arguments

[11] The applicant submits that the operation of Puppy Town (including the unacceptable level of barking from the dogs on the property) is unlawful on the following grounds:

a) the property is zoned as Single Residential Zoning 1 ("DMS"). The DMS is a schedule to the City's Municipal Planning By-Law ("the planning by-law"). According to the applicant, the zoning of the property does not permit the operation of Puppy Town from the property and the business therefore contravenes the DMS. Further, even if the DMS permitted the business to operate from the property, its operating hours contravenes the DMS.

b) the dogs' loud and incessant barking also contravenes regulation 3 (c) of the Western Cape Noise Control Regulations 2013 ("the Noise Control Regulations"), which prohibits any person from allowing an animal to make a noise insofar as it causes or is likely to cause a 'noise nuisance', which is defined in the Noise Control Regulations as 'any sound which impairs or may impair the convenience or peace of a reasonable person'.

c) the dogs' barking on the property further constitutes a common law nuisance, which is a serious impediment to the ordinary and reasonable enjoyment of the applicant's property.

d) Puppy Town contravenes the City's Animal By-law 2011 ("the Animal By-law"), for the following reasons:

1) the respondents keep more than six dogs over the age of six months on the property without a permit, in contravention of section 2 (2) of the Animal By-law; and/ or

2) the respondents keep dogs which bark, yelp, howl or whine for more than six accumulated minutes in an hour, or more than three accumulated minutes in half an hour, in contravention of section 6 (e) of the Animal By-law.

[12] I will now deal in more detail with the specific grounds upon which the applicant avers that the respondents' conduct is unlawful. The applicant firstly submits that the respondents contravened the DMS, as their property is zoned for Single Residential Zone 1 ("SR1")[1] under the DMS. The additional use rights contemplated in section 21 (b) include a 'home occupation', which stipulates that the conditions listed in subparagraphs (i) – (vi) must be complied with. These include (in

[1] 'Section 21 Use of the property
. . .
(a) Primary uses are dwelling house, private road and additional use rights as specified in paragraph (b).
(b) Additional use rights which may be exercised by the occupant of a property are home occupation, bed and breakfast establishment and home child care, subject to the following conditions:
. . .
(iv) The conditions stipulated in sections 23, 24, or 25 (whichever is applicable) shall be adhered to; . . .'

terms of subparagraph (iv)) the conditions as mentioned in section 23 of the DMS.

[13] The relevant conditions in terms of section 23, as it applies in the instant matter, are the following: in terms of subparagraph (a): 'No home occupation shall include . . . activities that are likely to generate a public nuisance, . . .'

The applicant alleges that subparagraph (e) is also applicable: 'No activities shall be carried out which constitute or are likely to constitute a source of public nuisance, generate waste material which may be harmful to the area . . .'

Further also subparagraph (g), which states: 'The total area used for all home occupation activity on a land unit, including storage, shall not consist of more than 25% of the total floor space of the dwelling units on the land unit or 50m², whichever is the lesser area'.

[14] The applicant submits that the respondents have contravened all of these conditions. He submits, firstly, that Puppy Town is an activity that is likely to generate a public nuisance as contemplated in section 23 (a), or is likely to constitute a source of public nuisance, or to generate waste material which may be harmful to the area and which requires special waste removal processes. His submission is that this business is therefore prohibited under section 21 (b) (iv), read with section 23 (a) and (e) of the DMS. Secondly, the area of the property used for the 'home occupation' exceeds the lesser of either 25% of the floor space of the dwelling units on the property, or 50m²; the business is therefore prohibited under section 21 (b) (iv), read with section 23 (g) of the DMS. Thirdly, the applicant alleges that the operation of the business in any event contravenes the DMS, because under section 23 (j), the hours of operation shall not extend beyond 08h00 to17h30 on Mondays to Fridays, and from 08h00 to 13h00 on Saturdays. Puppy Town advertises its hours of business as 07h00 to 18h00 on Mondays to Fridays, and the business in fact commences operations from 06h30 on weekdays when the clients begin dropping off their dogs.

[15] Regarding the allegation that the respondents did not comply with the maximum permitted area in which they may operate the business, the applicant

contends that the respondents accept that under the DMS the maximum permitted area of the business must be the lesser of either 25% of the total floor space of the dwelling units on the property, or 50m². He contends that Puppy Town does not operate in an area that is limited to 50m². He says this for the following reasons:

Firstly, the respondents' temporary departure application to the City, which was signed by both first and second respondent, clearly shows that the operation of the business was in an area that exceeds 50m². In this regard they state in their application, under the heading 'Contravention extent', that: 'the existing garage on the property (36m² in extent) and the hardened gravel area of approximately 110m² in extent are being used for the puppy day care centre.' Therefore, on their own temporary departure application to the City, they admitted that the business operates in an area of 146m², and sought a departure for this very reason. They have not explained the contradiction between the temporary departure application and the allegation in the answering affidavit that the business operates within an area of 50m².

Secondly, in this regard, the applicant attached to his replying affidavit several photographs from Puppy Town's Facebook page, that shows that the dogs are roaming free on the gravel area that runs along the side of the property next to the vibracrete wall. It is furthermore clear from the diagram attached to Van Gend's (an expert the respondents consulted) affidavit that the gravel area is approximately 110m², which corresponds to the hardened gravel area of 110m² referred to in the temporary departure application. The gravel driveway that appears on the photographs is next to the 1.8m pre-fabricated wall, as shown in Van Gend's diagram, which is also visible on the attached photographs. The applicant submits that the photographs are recent, some dating from August and September 2020. A photograph from July 2020 depicts an event evidently sponsored by Hills (a pet food manufacturer), with dog training apparatus set up in the gravel driveway. Self-evidently such a training event could never have taken place in an area measuring 16m². The applicant submits therefore that Puppy Town consistently and predominantly operates on the gravel driveway area, which measures 110m², and consequently exceeds the parameters of the DMS.

Thirdly, the applicant alleges that photographs from Puppy Town's Facebook page show that the dogs in any event are not confined to the driveway area. The Facebook page has many photographs showing the dogs playing throughout the garden. According to a diagram attached to Van Gend's affidavit, there is a pool on the other side of the garden, opposite the garage and the driveway. The photographs show that some of dogs can be seen near the pool and on the other side of the 1.2m wire fence, shown on the diagram separating the driveway from the rest of the garden. The videos on Puppy Town's Facebook page also show the dogs running around the garden, and one can also hear the dogs barking and yelping.

Fourthly, the applicant contends that it is in any event entirely implausible that the respondents would run a puppy daycare, consisting of approximately 15 puppies, together with their two own dogs, for an entire day, in an outside area of only 16m². According to the applicant, under these conditions it would be inhumane to accommodate those animals, and it would not allow sufficient space within which to train them.

The applicant therefore submits that the first respondent's business unquestionably breaches the permitted maximum area limitations applicable to 'home occupations' prescribed by the DMS.

[16] Regarding the respondents' contravention of the operating hours as prescribed by the DMS, the applicant alleges that Puppy Town's advertised operating hours are 07h00 to 18h00 from Monday to Friday, whereas it should have been from 08h00 to 17h30 (and from 08h00 to 13h00 on Saturdays). He submits that the first respondent's assertion, that she has changed the operating hours of the business from 08h00 to 17h30, is unsustainable, because the operating hours on the website have not been changed. The applicant further alleges that the puppies are still being dropped off between 07h00 and 08h00. He furthermore alleges that he has recently witnessed dogs be dropped off shortly after 07h00. From this he submits that it is clear the respondents run their business from 07h00, and need to open early enough so that clients can drop off dogs before going to work. From this it is clearly evident that Puppy Town contravenes the operating hour restrictions set out in the DMS.

[17] Regarding the allegation that the business is likely cause a public nuisance, as contemplated in Section 23 (a) of the DMS, the applicant submits that the respondents have not addressed this ground of contravention of the DMS at all. They have merely sought to contend that the business does not cause a nuisance, because the puppies are kept quiet by giving the them toys to play with and dog chews to eat. The applicant denies the dogs are being kept quiet, or that it would be possible to do so by merely giving them toys and things to eat.

[18] Even if the respondents were by some miracle able to keep 17 dogs quiet, the applicant submits this is not an answer to the contravention of the DMS. According to him, the DMS prohibits businesses that constitute a public nuisance, or that are likely to constitute public nuisance, or generate waste material. He submits that whether or not the respondents manage to keep the puppies on their premises quiet, is not the issue, but whether a puppy daycare in general is likely to constitute a nuisance. He submits that a puppy daycare, by its nature, is likely to do so.

[19] According to the applicant there can be no question that Puppy Town operates as an animal care centre, and thus contravenes the DMS on this further basis also. It advertises itself as a puppy 'daycare centre', and its attorney's letter of 29 November 2018 states that the first respondent was in talks with the City to facilitate her caring for animals. He therefore submits that apart from failing to comply with the conditions applicable to home occupations as set out in the DMS, Puppy Town contravenes the DMS on the further basis that it's an animal care centre which impermissibly operates on this residentially-zoned property. On each of the independent grounds as stated, Puppy Town contravenes the DMS and its operations are unlawful. He submits that on that basis alone, he is entitled to the relief he seeks.

[20] The dogs' loud and incessant barking also contravenes regulation 3 (c) of the Noise Control Regulations.

[21] The applicant submits that the barking dogs on the property also constitute a common law nuisance, which is a serious impediment to the ordinary and reasonable enjoyment of his property. In this regard, he relies on the case of *De*

Charmoy v Day Star Hatchery(Pty) Ltd[2], which I will refer to later in this judgment. The applicant submits that, objectively considered, the operation of a puppy daycare centre in a quiet residential area, constitutes a serious impediment to his ordinary and reasonable enjoyment of his property, particularly given the following circumstances:

1) the volume of barking generated by the large number of dogs on the property and the fact that those dogs trigger other dogs in the neighbourhood too;

2) the fact that the noise is particularly loud and disturbing in the mornings and evenings when families typically spend time together;

3) the location of the property in a quiet residential area.

[22] This, according to the applicant, has an impact on his enjoyment of his property, in the following respects:

1) he has never been able to enjoy his back garden due to the constant paroxysms of barking emanating from Puppy Town. He cannot even enjoy a morning cup of coffee in his back garden before starting his day, due to it being so unpleasant, as puppies are being dropped off and are barking continuously during that period. Also, if he wants to use his back garden on a weekday evening, he has to wait until around 18h15 or 18h30 before the noise quietens down sufficiently. As a result of this, applicant reserves the back garden area and patio for Saturday evenings or Sunday lunch;

2) this restriction in his ability to use his back garden is a severe limitation on the enjoyment of his property. According to him, the back garden should be a place where he and his family are able to enjoy some quiet and privacy. His back garden is also the main garden area of his property where the pool is located. This section of his property unfortunately abuts respondents' property;

[2] 1967 (4) 188 (D) at 192, cited with approval in Laskey and Another v Showzone CC and Others 2007 (2) SA 48, para 22.

3) as a result of the fact that he and his family are unable to use his back garden during the week, they often sit on the front porch in the morning to have coffee, but even then there are days when the barking is such a nuisance that they can clearly hear it from the front porch. According to him, this barking embraces the property 'like a surround sound system'. He further states that on days when the barking is particularly bad, there is absolutely no sanctuary from the noise anywhere on the property;

4) according to him, he cannot easily sell his property and move anywhere else, because principally the presence of Puppy Town has had a serious negative effect on the value of his property. He also cannot, in good conscience, conceal its existence from a prospective purchaser of the property as it was concealed from him before he bought it. As a result of this, he would therefore make a significant loss from the sale of the property.

[23] He further submits that the respondents' contention that the business does not generate a nuisance, is based on their allegation that they are able to calm the puppies on the property by giving them toys to play with and dog chews to eat, and also by training them. The applicant submits that the contention that 17 dogs can be kept quiet in this manner is plainly risible. Furthermore, that the first respondent's contention that she employs 'one caretaker to assist in the management and cleaning of the premises', which would mean that only two people, herself and the caretaker, are able to keep 17 dogs quiet by giving them toys and chews, is far-fetched and untenable. According to him, in any event, the videos on the respondents' Facebook page shows the puppies running around the garden and parking area without any effort to keep them quiet.

[24] He furthermore contends that the neighbours' statements upon which the respondents rely to contend that the business is not a nuisance, constitutes inadmissible hearsay evidence. He therefore submits that Puppy Town contravenes the Noise Control Regulations and constitutes a common law nuisance, and that the respondents have advanced no sustainable basis for showing that it does not.

[25] He submits that he has also clearly shown that the loud and incessant barking

emanating from Puppy Town is a contravention of the Animal By-law, because of the following facts:

1) the respondents keep more than six dogs over the age of six months in the property without a permit, in contravention of section 2 (2) of the Animal By-law; and/or

2) the respondents keep dogs which bark, yelp, howl or whine for more than 6 accumulated minutes in an hour, or more than 3 accumulated minutes in half an hour, in contravention of section 6 (e) of the Animal By-law.

[26] As far as dogs over the age of six months are concerned, the applicant referred in his founding affidavit to photographs on Puppy Town's Facebook page of birthday parties held for the dogs on the property. In one instance, there was a 1st birthday party and in another a 7th birthday party. On this basis the applicant contends that Puppy Town does not cater exclusively for puppies under the age of six months.

[27] The respondents in their answering affidavit do not deny that they have accommodated animals older than six months, and in response to this allegation they simply state that 'it happened on specific occasions that parties were held as per the owners requests and that party activities have as stopped since March 2020'. They consequently do not deny that they have accommodated dogs older than six months, and therefore breached the Animal By-law on that basis. Further, the allegation that they have ceased holding animal birthday parties does not constitute an undertaking that they would not accommodate dogs that are older than six months in future.

[28] The applicant contends that even if Puppy Town accommodated only dogs younger than six months, that in any event circumvents the purpose of the Animal By-law. Also that even if Puppy Town did not contravene section 2 (2) of the Animal By-law, it unquestionably contravenes section 6 (e) thereof, as it accommodates dogs which bark, yelp, howl or whine for more than six accumulated minutes in an hour, or more than three accumulated minutes in half an hour; in the hours that the

puppies are dropped off and picked up, the barking continues uninterrupted for more than two hours each day.

[29] The applicant therefore contends that he has satisfied the requirements of an interdict by, firstly, showing that the operation of Puppy Town is unlawful on the four independent grounds he set out in his heads of argument. Furthermore, he has a right to the ordinary and reasonable enjoyment of his property, which is being infringed by Puppy Town. He also has a right to require that the activities carried out on the property are lawful insofar as those activities impact on his enjoyment of his property. In this regard, he submits that he has shown that he has a clear right.

[30] He furthermore submits that an injury was actually committed, or that there is a reasonable apprehension thereof. In this regard he says that he has had to endure the sound of the dogs barking on the property since he purchased his home at the end of 2015. This impacts on his right to exercise his profession as a pastor who works from home. While he accepts that the usual sound of a few neighbourhood dogs is to be expected in a residential area, the sound of 17 dogs on a neighbouring property is intolerable and cannot be expected to be endured by any reasonable person. He is not the only resident in the area that has a problem with the dogs, his surrounding neighbours also do. It cannot be expected of him to endure the barking that emanates from Puppy Town.

[31] The respondents furthermore do not dispute that the area in which they live is a few minutes from the suburban edge of Durbanville, and that it would be difficult for them to find nearby premises suitable for the needs of themselves and their clients. They have chosen not to do so and have instead established the business unlawfully in a residential area. They have also not denied that their reasons for doing so are financial, by operating their business from their home, and that they are unable to afford the rent for other premises from where they can operate. They expect the whole neighbourhood to endure the cacophony of dogs barking on the property so that they may enjoy the relatively minimal financial advantage of saving the rental of alternative premises.

[32] The applicant submits that he has shown that he has no alternative remedy.

He has lodged complaints with the City for nearly 4 years, which yielded no effective results and they have afforded him no relief. He tried everything in his power short of approaching this court, and has brought this application out of desperation and as a last resort. He had no option but to apply for an interdict.

The Respondents' case

[33] The respondents, in answer to these allegations, submit that the application should be dismissed with costs. They contend that they are conducting a legitimate business from the property, and that their home is zoned as a single business residence and has additional use rights in terms of Section 21 (b) that categorises it as home occupation under Section 23 of the DMS. They further submit that the noise levels from Puppy Town are not unreasonable and that the respondents are within their rights as defined in the relevant by-laws. They submit that there is no evidence that Puppy Town's noise levels exceed the rating level for the specific area.

[34] They further argue that it is unreasonable for the applicant to demand a quiet working environment from them if they have a legitimate business next door to the applicant. There was, in any event, no evidence submitted by the applicant that Puppy Town's noise levels exceed the limits of expected toleration in the given circumstances. They submit they have instructed a town planner (Van Gend) to advise them on how to proceed with an application for a temporary departure from the zoning regulations.

[35] They were accordingly advised that in terms of the planning by-law and, more specifically, the DMS, the first respondent can, as of right, conduct her home occupation without permission from the City of Cape Town. Based on Van Gend's diagram and affidavit, part of the property can be used for home occupation. According to them, Van Gend relied on the following factors:

1) the property concerned is known as a single residential and in terms of Section 23 of the DMS a home occupation is conditionally allowed;

2) the first respondent only used the double garage on the property for her property occupation, which constitutes 36m², and as such it is less than 50m² as illustrated on the diagram “SVG 1”;

3) the respondents further state that Van Gend informed the first respondent that an application for a temporary departure, and the seeking of an administrative penalty, is not warranted, as the first respondent’s business constituted a home occupation. The first respondent submitted in her answering affidavit that Puppy Town operated as a home occupation; the operational hours had been changed to 8h00 to 17h30; and that the puppies are accommodated in the double garage.

[36] The applicant’s contention that Puppy Town is not a home occupation in terms of the DMS, as well as the basis and facts upon which he relies, is not correct. They submit that Puppy Town indeed qualifies as a home occupation as defined in the DMS, for the following reasons:

1) According to them Puppy Town is conducted as an enterprise from an outbuilding on the property in terms of the definition of home occupation.

2) An outbuilding is defined as: ‘. . . a structure*, whether attached or separate from the main building, which is normally ancillary and subservient to the main building on a land unit, and includes a building which is designed to be used for the garaging of motor vehicles. . .’.* They contend that the double garage that Puppy Town occupies, qualifies as an outbuilding in terms of this definition.

3) In terms Section 21 (a) of the DMS they submit that even though the property is zoned for singular residence, additional use rights are allocated to the residential zoning. This additional right is categorized as a home occupation within a single residential zone.

4) They further submit that if Puppy Town is a source of public nuisance the City must investigate the complaint under section 125 of the planning by-law, and

if the City is of the opinion that they are in contravention of the by-law, it must issue a directive under section 128 in the form of a notice. In such a notice provision is made for the submission of representations and reasons by the owner; even though criminal steps were taken by the City the case was later withdrawn.

5) According to them, the total area of floor space in which Puppy Town operates is within the prescribed floor space for home occupation, as per the expert report.

6) They contend that the definition of additional use rights under Section 11 of the DMS is as follows: 'An activity or use described as an additional use right in a particular zoning is permitted in that zoning without the approval of the City, provided that any condition or further provisions specified for such activity or use are adhered to.'

   There was thus no need to apply to the City for the use of the property as a home occupation.

[37] Regarding their alleged contravention of the Noise Control Regulations, which inter alia defines a noise nuisance, prohibits a noise nuisance, sets out the procedure for the control of noise and sets out the manner in which a noise nuisance complaint must be investigated, the City's law enforcement confirmed that Puppy Town causes no legal disturbance. The respondent submits further that in terms of regulation 12 of the Noise Control Regulations, the local authority may exempt any person or venue from any of the provisions of the Noise Control Regulations either on their own initiative or on application by any person. Based on this provision, even if the local authority is of the opinion that the barking of the puppies is the cause of the noise nuisance, the respondents can still apply to be exempted from the relevant regulation. The local authority may even impose conditions in granting any permission to be exempted from the provisions of these regulations, in terms of regulation 11 (1) (a).

[38] Regarding the applicant's contention that the respondents have created a

nuisance under common law, the respondents refer to various cases that, inter alia, deal with the question whether or not a nuisance is actionable, the relevant factors a court has to consider, when the noise causing a disturbance can be accepted as reasonable and when an applicant in cases like these is entitled to interdictory relief.[3]

[39] They further submit that, as can be seen from the statements given by neighbours at 9 Shilling,13 Shilling, and 7 Shilling Street, these neighbours state that the puppy daycare is of no concern to them and they have no objections thereto; that they do not have an issue or problem with the first respondent running the puppy daycare from her house; that one neighbour in particular (Mr. Robert Upton) has for the last 17 years been doing work from home; that his workspace is situated at the back of his house which faces the border wall of the Puppy Town residence; that this neighbour has indicated that he spends most of his time on conference calls with customers and that although the puppies from Puppy Town occasionally bark and cry during the course of any working day, it is usually negligible for periods of time and that he can, with absolute certainty, confirm that it does not in any way interfere with his work.

[40] The respondents also submit that the City's law enforcement, who on occasion came to their property unannounced, confirmed that there was no legal disturbance from Puppy Town. Furthermore, that Puppy Town never received any warnings, either written or verbally from the City's law enforcement department. According to the first respondent, there are many pet owners in the suburb and some dogs bark on the slightest whim. She keeps her puppies under control and they do not bark for any reason. Various things trigger the barking of dogs. The City's law enforcement spent one morning at Puppy Town and they could not pinpoint or show that it was Puppy Town that was responsible for the barking. The respondents submit that it is not unreasonable to accept that the puppies will bark when dropped off or collected.

[41] The applicant, being a pastor, expects the noise level in the residential area to

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[3] PGB Boerdery Beleggings (Edms) Bpk and Another v Somerville 62 (Edms) Bpk and Another 2008 (2) SA 428 (SCA) para 9; De Charmoy v Day Star Hatchery supra fn 2; Moskeeplein (Edms) Bpk an 'n Ander v Die Vereniging van Advokate (TPA) en Andere 1983 (3) SA 896 (T) 900G-H and 901A; Laskey and Another v Showzone CC and Others supra fn2, para 32.

be of such a low volume that he can write, research and counsel, and he wants a quiet working environment. This expectation is unreasonable, because a lot of people in the area have dogs and there is no evidence to support his conclusion that Puppy Town is responsible for the barking of a large number of dogs in the area. Even the City's law enforcement department concluded that the barking from the puppies were not at a nuisance level and various neighbours confirm that on occasion barking can be heard, but it is not disturbing.

[42] They contend that whilst the barking that results from the puppies being dropped off and collected is most disturbing for the applicant, that that only happens for a short period of time during the day. In any event, the noise measurements that were taken during this time show that the barking is not a disturbing noise (or nuisance), and it does not exceed the rating level by 7dBA. Because Puppy Town is a business it will generate noise, and the noise generated can be expected in the circumstances and is therefore reasonable. They submit that a 'disturbing noise' in terms of the Noise Control Regulations defines noise nuisance as 'any sound which impairs or may impair the convenience or peace of a reasonable person', and that the City's law enforcement has confirmed that there is no legal disturbance from Puppy Town.

[43] In the context of a business that generates noise, they contend that such noise must be a disturbing noise. A 'disturbing noise' is a noise, excluding an unamplified human noise, which: (a) exceeds the rating level by 7dBA; (b) exceeds the residual noise level where that level is higher than the rating level; (c) exceeds the residual noise level by 3dBA, where that level is lower than the rating level; or, in the case of low-frequency noise, exceeds the level specified in annex B of SANS 10103.

[44] Furthermore, in terms of regulation 2 of the noise control regulations, a person may not: (a) cause a disturbing noise; or (b) allow a disturbing noise to be caused by any person, animal, machine, device, apparatus, vehicle, vessel or model aircraft, or any combination of the aforegoing. When a person lodges a complaint to the local authority regarding a disturbing noise, it must be investigated and measures must be taken to determine the level of noise. There is no evidence that any measurements

were taken by local authority officials of the noise levels at Puppy Town. The respondents submit that the applicant has not provided any evidence that he sustained or apprehended actual harm.

[45] Regarding the complaint that they contravened the Animal By-law, and in particular section 2 (2) which places restrictions on the number of dogs on any premises, they submit that notwithstanding Puppy Town having been visited on more than one occasion by law enforcement officers, each and every time it was confirmed that no legal disturbance was caused by Puppy Town. They therefore contend that, based on the facts and the submissions they made, they have not been in contravention of any of the Animal By-laws. They furthermore argue that the applicant has not made out a case that he is entitled to interdictory relief.

[46] The applicant has not shown, firstly, that he has a clear right. Also there is no evidence that he endured actual harm, or that there is an apprehension of harm. The only harm the applicant relies on is when the barking of the puppies gives rise to actionable private nuisance. They furthermore contend that they acted within the provisions of the law, in terms of the DMS and the Animal By-laws.

[47] They further submit, as to the second requirement for interdictory relief, that on 9 March 2020 a compliance notice in terms of section 126 of the planning by-law was issued to the First Respondent by an employee of the City. As per the notice, the first applicant was instructed to comply with the terms of the notice within 30 days, failing which further steps could be taken by the City. As of the date of these proceedings, no action has been taken by the City to enforce the notice. The applicant should have applied for a mandamus against the City to enforce the notice issued on 09 March 2020. The Applicant has therefore not established, on a balance of probabilities, that he has is no alternative remedy.

Analysis

[48] I agree with the respondents' submissions that Puppy Town's operations fall within the definition of additional use rights as a 'home occupation'. I will now deal specifically with the allegations that the applicant relies on where he states that the

respondents failed to comply with the conditions set out in Sections 23 (a), (e), (g) and (j) of the DMS. Whilst the complaints that the applicant lodged against the respondents seems to be wide-ranging, the principal complaint, in terms of variously the DMS, the Noise Control Regulations, the Animal By-laws and the common law, is based on the noise which emanates from the respondents' property while they're conducting their business. I will deal firstly with the various complaints as set out in the DMS, the Noise Control Regulations, and the Animal By-laws, and lastly with the common law grounds upon which the applicant submits the respondents' conduct is unlawful.

The contraventions of the DMS

[49] The applicant alleges that in terms of Section 23 (a) the respondents are conducting a home occupation activity that is 'likely to generate a public nuisance'. Further, that in terms of Section 23 (e) the respondents are engaging in an activity which constitutes, or is likely to constitute, 'a source of public nuisance', or generate waste material which may be harmful to the area'. On a conspectus of the applicant's case, it is clear that he bases the allegation of a contravention by the respondents of Sections 23 (a) and (e) on the level of noise emanating from the respondents' property. The question to consider is what is required to be shown where it is alleged that a business is likely to generate a public nuisance. One has clearly to understand and examine what is meant by public nuisance.

[50] In terms of Section 1 of the DMS, 'public nuisance' is defined as: '. . . any act, omission or condition which in the City's opinion is offensive, injurious or dangerous to health, materially interferes with the ordinary comfort, convenience, peace or quiet of the public, or which adversely affects the safety of the public, having regard to: (a) the reasonableness of the activities in question in the area concerned, and the impacts which result from these activities; and (b) the ambient noise level of the area concerned'.

[51] In my view, the applicant has not made out a case that the business of the respondents constitutes a public nuisance, or is likely to constitute a public nuisance, based on the level of noise emanating from the respondents' property. For this to

have happened, the respondents' conduct had to involve an 'act, omission or condition which in the City's opinion is offensive, injurious or dangerous to health, materially interferes with the ordinary comfort, convenience, peace or quiet of the public, or which adversely affects the safety of the public'.

[52] There is no evidence that the City formed an opinion that the respondents' conduct falls within the aforegoing definition, although it did issue a compliance notice on 9 March 2020, and instituted a prosecution against the respondents. In fact, it did not proceed to act upon the compliance notice, and it seems that it withdrew the charges against the respondents. As will be pointed out later, the City's response to the applicant's complaints was totally inadequate and not in keeping with its constitutional obligation to serve the public. The mere fact, however, that the noise emanating from the respondents' property is offensive, or materially interferes with ordinary comfort, convenience, peace or quiet of the applicant, and at least one of his neighbours (David Austin), and had been experienced by a person (Rehan Celliers) to whom he rented his premises for almost 18 months, would not, in my view, constitute the likelihood of a public nuisance.

[53] In our law, public nuisance is defined by Joubert (Ed) *The Law of South Africa* Vol 19 (2nd Edition Replacement) para 214 as:

'In the result the term "public nuisance" in South African law has the simplified meaning of an ordinary nuisance so extensive in its effect or range of operation as to discomfort the public at large.'

In this regard, the learned authors refer to the decision of *Queenstown Municipality v Wiehahn* 1943 EDL 134, at 140, and go on to state the following: 'There is no usually cited definition of "public nuisance" in South African law. The following definition which appears in the Municipal Ord 20 of 1974 (Cape) s 1 would seem to provide a satisfactory statement of the South African concept of a public nuisance: "Any act, omission or condition which is offensive, which is injurious or dangerous to health, which materially interferes with the ordinary comfort, convenience, peace or quiet of the public or which adversely affects the safety of the public."'

This definition accords with the definition of public nuisance in the DMS.

[54] In para 216 it is further stated: 'There is authority for the proposition that where a nuisance is so extensive or widespread as to affect the public at large or threatens the public health, civil proceedings may be instituted for the suppression of the nuisance. Such proceedings are usually instituted by a local authority, although a private individual may in appropriate circumstances go to law.' (Internal footnotes omitted.).

None of the conduct complained of by the applicant, in my view, falls within the definition of public nuisance, since there is no evidence that the noise emanating from the respondents' property, as a result of the business they conduct, is so extensive or widespread as to affect the public at large, or to threaten the public health. As said earlier, it seems to be a nuisance that affects the applicant and, at the very least, one of his neighbours. I base this conclusion solely on what the applicant alleges in his founding affidavit, as confirmed and corroborated by Austin and Celliers in their affidavits.

[55] I agree with the applicant's contention that the evidence of the first respondent, to the effect that some of the neighbours do not find the business, and more especially the noise generated by the incessant barking of the dogs, disturbing or a nuisance, is inadmissible hearsay. I did not rely on that evidence for the conclusion I came to.

[56] At the very least, based on the above definition, the conduct must be shown to be such that it is likely to cause a nuisance that is widespread and extensive, meaning that it must have the potential to affect the public at large, in order for it to be likely to cause a public nuisance. In my view, therefore, the applicant has failed to show that there was a contravention by the respondents of sections 23 (a) and (e) that is likely to generate a public nuisance, based on the level of noise emanating from the respondents' property in conducting their business as a home occupation. The applicant has also failed to show that the respondents carried out any activity which is likely to generate waste material requiring special waste removal processes.

[57] Regarding the allegation that the respondents contravened section 23 (g) of the DMS, I am satisfied on the evidence presented by the applicant, as supplemented by the affidavit of the respondents' expert Van Gend, that the respondents indeed contravened section 23 (g), by exceeding the lesser of 25% of the total floor space of the dwelling units on the land unit, or 50m². This is based on the diagram attached to Van Gend's affidavit, which shows the area in which the business operates to be approximately 146m², consisting of the driveway area of 110m² and the garage area of 36m².

[58] I am also satisfied that the respondents contravened Section 23 (j) of the DMS, in that it did not operate the business during the hours of 8h00 and 17h30 on Mondays to Fridays, and from 08h00 to 13h00 on Saturdays. It was not disputed by the respondents that Puppy Town advertised its operating hours to be from 07h00 to 18h00 on Mondays to Fridays. I furthermore agree with the applicant's submission that the first respondent's assertion that she has changed the business' operating hours, is unsustainable, because it seems that the operating hours listed on the website have not been changed, even after the applicant lodged a complaint. The applicant also stated in his evidence that puppies were still being dropped off between 7h00 and 8h00, and he has witnessed dogs being dropped off shortly after 7h00.

Noise Control Regulations

[59] The applicant's allegation that the respondents contravened regulation 3 (c) of the Noise Control Regulations, is based on the fact that the respondents, by allowing the dogs to bark incessantly on their property, caused a noise nuisance as defined in the regulations. The applicant further bases this allegation on the fact that there can be no question that the barking on the property is permitted and facilitated by the respondents, as a natural consequence of the business they have chosen to operate. Also that this barking is a sound which impairs the convenience or peace of a reasonable person.

[60] The applicant states that a reasonable person cannot be expected to endure the sounds of 17 dogs barking on one property in a residential area. The respondents, in answer to this, merely deny the allegation. This, in my view, constitutes a bare denial, and of an allegation that cannot be disputed, because it is a natural and inherent consequence of the business that the respondents operate, that a noise will be created because of the number of dogs present on the property. The argument raised by the respondents in their heads of argument, that the applicant has failed to show that the noise is a "disturbing noise" as defined, is totally irrelevant as to what constitutes a noise nuisance such as that which the applicant complains about, as set out in the regulations. The probabilities clearly favour a conclusion that, given the intensity and continuous noise generated by dogs barking, and the number of dogs on the property, it evidently impairs the convenience or peace of a reasonable person.

Contravention of Animal By-law

[61] I agree with applicant that the respondents contravene the Animal By-law, firstly, in that the respondents keep more than six dogs over the age of six months on the property without a permit, in contravention of section 2 (2); and secondly, in that the respondents keep dogs which bark, yelp, howl or whine for more than six accumulated minutes in an hour, or more than three accumulated minutes and half an hour, in contravention of section 6 (e). The respondents have not denied this allegation in their answering affidavit[4].

[62] The first respondent furthermore does not deny the allegation that on Puppy Town's website it is shown that the business does not exclusively cater for puppies under the age of six months, and that there is an album of photographs on Puppy Town's Facebook page devoted to the 1st and 7th birthdays of certain dogs. Furthermore, the first respondent's denial that the dogs bark, yelp, howl or whine more than six accumulated minutes in an hour is, given the nature of the business and the number of dogs kept on the premises per day, unsustainable. This is sufficient evidence to show that the respondents contravened the provisions the Animal By-law.

[4] Paragraphs 152-155, page 41 -41.

[63] In my view, it is not a sufficient excuse or justification for the respondents to merely state that because the City did not act against them, their conduct was not unlawful. The failure of an organ of state to act against unlawful conduct does not make such conduct lawful. Their evidence in this regard is in any event not admissible, as it amounts to hearsay. This cannot be a reason not to conclude that the conduct of the respondents was not unlawful, where there is objective and certain undisputed evidence as pointed out above, that there were indeed breaches of the law.

[64] Furthermore, given the number of times the applicant complained and received no assistance from the City, it is clear there was a dereliction of duty on the part of the City's officials, who failed to come to the applicant's assistance. They were clearly uncooperative and grossly inept in carrying out their duties. There was plainly a reluctance to assist the applicant. Having said that, as will be shown later on, the mere fact that the respondents have contravened certain by-laws, does not entitle the applicant to interdictory relief. He must clearly show that he suffered harm as a result of the respondents' contraventions. I will deal with this aspect later in this judgment.

Common Law Nuisance

[65] A further ground upon which the applicant alleges that the business which respondents are unlawful because it constitutes a common law nuisance. It would be appropriate to have regard to the principles relating to the so-called law of Neighbours, which includes the use of a neighbour of his or her property where such use has an impact of the rights of other neighbour. Van der Walt & Pienaar: *Law of Neighbours* (1st Ed)[5] thus states:

'In South African neighbour law, neighbours are expected to tolerate a reasonable level of interference resulting from the use of neighbouring land, but when the use of land affects neighbours in ways that exceed that level it becomes unlawful and thus actionable nuisance. The applicant's right to interdict the offending behaviour results from the nuisance being unlawful, and unlawfulness is predicated upon the judgment that the effects of the nuisance

[5] Chapter 6.2.1 at page 262-263.

exceed (in its nature, scope or level) what could reasonably be expected of the neighbour to accept or tolerate. As will appear from the analysis and discussion below, the reasonableness standard plays a large part in reaching this conclusion.

Continuing, ongoing and repetitive infringements of the use and enjoyment of neighbouring land have become known as nuisance in the narrow sense. This form of nuisance, also known as annoyances, primarily hinders or disturbs the neighbour in the use and enjoyment of her property and may cause personal discomfort or even injury, although it can also result in patrimonial loss. The principle is that any use of land that causes ongoing immissions of water, unpleasant smells, smoke, vibrations or noise on neighbouring land or that in any other way infringes the normal use and enjoyment of neighbouring land, in an ongoing and unreasonable manner, constitutes a nuisance in the narrow sense, which is unlawful and could therefore be interdicted. Nuisance in this sense infringes the affected landowner's use and enjoyment of her property, although it has also been said (confusingly) that the nuisance impinges on the personal comfort and wellbeing of its user. . . .

It is usually said that the owner or user of the affected neighbouring land can obtain any or all of the following remedies in nuisance cases: an interdict to prevent or terminate the offending behaviour; a delictual remedy to claim compensation for accompanying damages; and a claim for compensation, based on the actio inuriarum or the action for pain and suffering, for infringements of the plaintiff's personality rights such as her personal integrity or health. For nuisances that amount to annoyances as defined earlier, the interdict is by far the most important remedy, since the object in these cases is primarily to either prevent a nuisance from occurring or to terminate an ongoing nuisance. The nature and goal of the remedy, the requirements for success and the considerations taken into account by the courts to decide whether the remedy is available differ according to the facts of each case, the context within which the nuisance occurred and the remedy sought or provided.' (Internal footnotes omitted.)

[66] It seems that, generally speaking, an annoyance that causes personal suffering (such as ongoing loud noise) and that will interfere with the affected owner's use and enjoyment his or her land, constitutes a nuisance. In a case like this, aimed at preventing or stopping a nuisance, the relief that is available to an affected person is in the form of an interdict, in terms of which the applicant has to show a clear right, an injury actually suffered or reasonably apprehended, and the

absence of any other remedy[6]. Fault is not a requirement but nuisance should be unlawful. All that is required is proof of an infringement. In a case like this, the following factors are relevant:[7]

a) the infringement will be unlawful when (and because) it results from abnormal use of the neighbouring property;

b) unlawfulness thus follows from the fact that the nuisance imposes an unreasonable infringement of the applicant's rights, established in accordance with the reasonable standard;

c) when applying for an interdict to prevent or terminate a nuisance emanating from a neighbouring property, the applicant has to show that the use of the neighbouring land, or the state of affairs that causes (or threatens to cause) the nuisance, is excessive and unlawful, and also that the nuisance occurs repeatedly or continuously. A single occurrence of such a nuisance would be insufficient to obtain an interdict;

d) to obtain an interdict to prevent or terminate a nuisance, the applicant must show that an infringement emanating from the neighbouring land, in the form of smoke, noise and unpleasant smells, is excessive and therefore unlawful;

e) to conclude that the nuisance is excessive, the courts apply a reasonableness standard, which entails a balancing of the mutual and reciprocal rights and obligations of neighbours. Owners and users of land are expected to accept a reasonable volume of smoke, noise and other immissions from neighbouring land, and can only complain when those immissions transgress the limit of reasonableness, for instance when they result from abnormal use of the property; exceed the limits of reasonable forbearance expected of neighbours, or when they cause serious physical damage or seriously and urgently endanger the physical integrity, health and well-being of the neighbour;

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[6] Laskey supra fn 2.
[7] Pages 264-273, Van Der Walt & Pienaar.

f) the assessment of whether a particular interference is unreasonable is purely a contextual question, in which the court considers such factors as the suitability of the respondent's use of the property; the extent and the duration of the interference; the time or times when the interference are caused; the nature of the property and the locality where the harm was caused or where it occurred; the sensitivity of the applicant of the particular emission or in general; and the possibility, and practical and economic feasibility, of actually preventing, terminating or mitigating the harm.

Actual or apprehended harm

[67] It has clearly been shown that the respondents have contravened the provisions of Section 23 (g) and (j) of the DMS, regulation 3 (c) of the Noise Control Regulations, and section 2 (2) and 6 (e) of the Animal By-laws. In my view, all three pieces of legislation were enacted for the general benefit of the public. In such a case, as pointed out by the court in *Laskey* (supra), para 13, where the court relied on the decision of *Patz v Greene & Co*[8] and *Roodepoort- Maraisburg Town Council v Eastern Properties (Prop) Ltd*[9] '. . . when it appears that a statute was enacted in the interests of a particular person or any class of persons, a party who shows that he or she is one of such persons or such class of persons and seeks judicial intervention by way of the grant of interdictory relief premised on the Act is not required to show harm as a result of the contravention of the statute, such harm being presumed. But that when a statutory duty was imposed, not in the interest of a particular person or a particular class, but in the public interest generally, the applicant must show that he or she has sustained, or apprehends, actual harm in order to obtain interdictory relief on the grounds of a breach of the statute.'

[68] In my view, given the nature of the DMS, the Noise Control Regulations, as well as the Animal By-laws, it was clearly enacted for the benefit of the general public and not for the benefit of any particular person or class of persons like the applicant. In order for the applicant to secure an interdict, he has to show that a breach or a contravention of any of the mentioned legislation, regulations or by-laws, has occasioned or is likely to occasion harm.

[8] 1907 TS 427
[9] 1933 AD 87 at 95-96.

[69] The respondents may, on application, be exempted by the City from any provision of the mentioned laws, and as pointed out by Binns-Ward AJ (as he then was) at para 18 in *Laskey*, the fact that the respondents have been shown to be in an apparent contravention of the statutory provision does not *per se* entitle an applicant to interdictory relief. In order for an applicant obtain such relief it is necessary for him/her to show that the breach or contravention has occasioned him or her harm, or is likely to do so. In this regard, the learned judge was of the view that the requirement of harm would be established if the conduct of the respondents which the applicant complained of gave rise to a private nuisance actionable at the applicant's instance. In that particular case, the applicants founded their claim in the alternative on the common law remedy and its consideration in that context may be determinative of the application. Similarly, in this case the applicant has also founded his claim in the alternative on the common law remedy of a so-called noise nuisance.

[70] I am satisfied that the applicant has made out a case that his use and enjoyment of his property has been infringed by the respondents in the conduct of their business, and that the infringement is continuous and repetitive. He has clearly shown that he cannot enjoy a peaceful environment where he can live and work unhindered. In this regard it is clear that the noise is generated by the incessant barking of a large number of dogs. According to the evidence, there are about 17 dogs (which includes the first and second Respondents' own two dogs) on any given day. The noise is particularly loud and disturbing in the morning and evening. This occurs in a scenario where the property is located in a quiet residential area. The applicant states that due to the continuous barking, he and his family cannot enjoy a morning cup of coffee in the back garden and finds the circumstances very unpleasant. Furthermore, if they want to use the back garden on a weekday evening, they have to wait until around 18h15 or 18h30 before the noise quietens down sufficiently.

[71] The applicant further states that every time a client of the business drops his or her dog off at the property or picks it up, the other dogs on the property start

barking. This triggers a cacophony of barking from all the dogs in the neighbourhood, which aggravates matters considerably. Furthermore, that throughout the day the dogs on the property sporadically begin barking, which again triggers barking of the dogs throughout the neighbourhood. The applicant has put up a case which is corroborated by one of the neighbour, David Austin, and the applicant's former tenant, Rehan Celliers.

[72] Austin states in his affidavit, inter alia, that he and his family find Puppy Town to be a serious nuisance which adversely affects their lives on a daily basis in many ways; that the noise nuisance is perhaps the single greatest annoyance; that Puppy Town also increases traffic volumes in a quiet residential area and clients park on the verge of his house and cause a disturbance; that the dogs in the neighbourhood join in the 'canine chorus' every time a puppy is dropped off or picked up; that the noise emanating from Puppy Town adversely affects his ability to work from home, in particular his ability to conduct Skype calls; that he cannot enjoy a coffee in his back garden on a Saturday morning without having to listen to Puppy Town; that Puppy Town has adversely impacted upon the value of his property; that he is concerned with questions of hygiene and the welfare of the dogs; that the operation of Puppy Town is extremely inconsiderate of the legitimate interests and desires of neighbours in the area; and that the business seriously prejudices their ability to enjoy their properties.

[73] Celliers in his affidavit similarly confirms that the noise from Puppy Town was very disruptive. He used to live at 5 Obol Road, as a tenant at the applicant's property; during that time, he says it was particularly bad in the mornings and after the dogs were dropped off and picked up; and that they bark several hours at a time with little interruption. In answer to these allegations made by these two witnesses, the first respondent has responded with bald denials, and attached to her affidavit letters of support from other neighbours, instead of affidavits. As I said earlier, I view this as inadmissible hearsay evidence. No application was made by the respondents for this evidence to be admitted in terms of the provisions of section 3 of the Law of Evidence Amendment Act 45 of 1988.

[74] I furthermore agree with the applicant that the first respondent's contention

that she is able to control 17 dogs barking, by any means, is not plausible. It is a natural and inherent consequence of the business which the respondents conduct, where they have permitted a number of dogs to be on their premises which is situated next to that of the applicant, that such a business creates a noise nuisance because of the natural inclination of dogs to bark. Especially when you have about 17 dogs housed together in the relatively confined space in which the respondents conduct their business. On their own version this space is $36m^2$.

[75] Whilst it is true that anyone is permitted to use their property for any purpose they choose and, in this particular case, the respondents are entitled to conduct their business from their home, the law requires them to do so without unreasonably infringing on the use and the enjoyment by the neighbours of their own properties. In *De Charmoy* supra, at page 191F-G, the court said, with reference to the case of *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A)[10]:

'The principal in our law is this: although an owner may normally do as he pleases on his own land, his neighbour has a right to the enjoyment of his own land. If one of the neighbouring owners uses his land in such a way that material interference with the other's rights of enjoyment results, the latter is entitled to the relief.

> "Die reg moet 'n reëling voorsien vir botsende eiendoms- en genotsbelange van bure, en hy doen dit deur eiendomsregte te beperk en aan die eienaars teenoor mekaar verpligtings op te lê.". . .

The Chief Justice went on to refer to commentators on the Roman and Roman-Dutch law and, after pointing out, *inter alia*, that an owner was not required to endure "bomatige" disturbance caused by smoke emanating from his neighbour's property, he observed

> "Dit lê voor die hand dat dieselfde beginsel ten aansien van ander stoornisse soos gerase en reuke aanwending sou kon vind."'

In *Laskey*, para 19, it was said: 'What constitutes reasonable usage in any given

[10] See also Moskeeplein, supra fn 3.

case is dependent on various factors, including the general character of the area in question - persons living and working in an urban area would, for example, reasonably be expected, in general, to be more forbearing about a higher level of noise intrusion into their lives than neighbours living in a rural housing estate.'

[76] This is not a case where you have one or two dogs of a neighbour that would occasionally bark at a stray cat, a stranger knocking at the door, an intruder or something unusual in their surroundings, which would normally occur in a quiet neighbourhood. It is not normal or reasonable use of the respondents' property. It is abnormal use, which in my view exceeds the limits of reasonable forbearance to be expected from a neighbour like the applicant, who lives in a quiet neighbourhood away from the hustle and bustle of city life. The nuisance caused by the barking is incessant, repetitive and continuous during the day. It is not a single or sporadic occurrence, which a neighbour is expected to forebear. While such noise may be bearable in a busy City, where there is a lot of activity, such as large volumes of traffic, the constant movement of people and crowds and noise created by businesses, it would definitely disturb the peace and serenity of a quiet neighbourhood where such noises are not expected, and to which the applicant is entitled.

[77] I agree with the applicant that the noise not only impacts on his right to exercise his profession as a pastor who works from home, but more importantly it also impacts on his right to the peaceful use and enjoyment of his property, by himself and his family in general. It is furthermore not disputed that the area in question is a few minutes from the suburban edge of Durbanville, and that it would not be difficult for the respondents to find premises nearby, for them to conduct their business from. They have chosen not to do so and have instead established the business unlawfully in a residential area. The applicant in my view, has clearly shown that as a result of noise created by the respondent's business, he has suffered harm.

<u>No alternative remedy</u>

[78] I also agree that given his continuous complaints to the City covering a period

of 4 years, since February 2016 until March 2020, about the nuisance caused by the respondent, where it was clearly evident that the respondents had breached the DMS, the Noise Control Regulations as well as the Animal By-laws, that he has clearly shown that he has no alternative remedy, other than applying for interdictory relief.

In my view, the applicant has satisfied the requirements for interdictory relief. In cases like these an order is sought to either prevent the respondent from proceeding with the actions that subject the applicant to the nuisance, or to compel the respondent in particular circumstances to avert an imminent threat of nuisance. Also to compel a respondent to terminate ongoing action or the ongoing state of affairs that causes the nuisance.

[79] This court is mindful of the effect and consequences which the order the applicant seeks will have on the respondents' business. Whilst this court found that the respondents in the conduct of their business contravened or breached the provisions of the DMS, the Noise Control Regulations and Animal By-laws, the grounds for the interdict were not found to be on that basis, but on the basis of respondents creating a common law nuisance.

[80] In my view, given the circumstances of this case, it would not be appropriate for the court to exercise its discretion to suspend its order, so as to grant the respondents an opportunity to abate the nuisance it caused by their business. Such an order would defeat the whole purpose of the relief, because they would then continue with their business on their property which is situated next to that of the applicant. Whilst they would not be required to close down their business, they will be required to discontinue from operating their business whilst it is situated next to the applicant's property, in order for them to discontinue with the nuisance. They will clearly have to relocate their business to another location to prevent the nuisance from continuing in order to comply with the interdict. In the result therefore, I make the following order:

1) The First to Third Respondents are prohibited from operating a puppy or dog daycare, or any similar animal care or custody business from Erf 5818, 11 Shilling Road, Vierlanden, Durbanville ("the property");

2) They are directed forthwith to cease the operation of a puppy or dog daycare, or any similar animal care or custody business, from the property;

3) The First to Third respondents are ordered to pay the Applicant's costs, jointly and severally, the one paying the other to be absolved

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R.C.A. Henney

Judge of the High Court