IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION : DURBAN

CASE NO: D10675/2019

In the matter between:

KWADUKUZA MUNICIPALITY	**APPLICANT**
and	
BUILD-RITE PROPERTIES (PTY) LTD	**FIRST RESPONDENT**
MARLIN NAIDOO	**SECOND RESPONDENT**
MOHSIN GANI	**THIRD RESPONDENT**

ORDER

---

1. **(a)** **The application against the second and third respondents is dismissed.**

(b) **The applicant shall pay such additional costs as may have been incurred by the inclusion of the second and third respondents as parties to the litigation.**

2. **The order of 27 January 2020 is discharged.**

3. (a) The application for the interdict set out in paragraph 2 (c) of the order prayed in the notice of motion is dismissed.

(b) The counter application is granted in the following terms.

"It is declared that the Core Mixed Use (MUC 3) zoning currently applied to Erf 220, CBD Stanger situate at 63 Balcomb Street, KwaDukuza permits the operation of a wholesale hardware shop or hardware shop within a shop building situate on the said Erf 220."

(c) The costs of the counter application shall be paid by the applicant.

4. As to the costs of the main application not already dealt with in paragraph 1 of this order,

(a) those incurred up to and including 27 January 2020 shall be paid by the first respondent; and

(b) those incurred after 27 January 2020 shall be paid by the applicant.

JUDGMENT
Delivered on: Thursday, 12 August 2021

OLSEN J

[1] This application was launched by the KwaDukuza Municipality on 13 December 2019, accompanied by a certificate of urgency recording a contention that a hearing of the application on 18 December 2019 was justified. The papers cited the first respondent, Build-Rite Properties (Pty) Limited, as the owner of Erf 220, CBD Stanger ("Erf 220"). The second respondent, Marlin Naidoo, was cited as a person "who conducts business from or is employed at Erf 220". The third respondent, Mohsin Gani, was similarly cited.

[2] The application is all about the construction of a building by the first respondent on Erf 220. It should have been perfectly clear to the applicant that the party responsible for the construction was the owner of Erf 220, the first respondent. The second respondent is employed as the project manager for the works in question. The third respondent is a director of the first respondent. Although the relief sought by the applicant in its notice of motion was expressed to be against each of the respondents, no case has been made out for the proposition that it was justified, or might be justified, to seek such relief against the second and third respondents. Erf 220 belongs to the first respondent. The construction works were undertaken at the instance of the first respondent. Any deviation from lawful conduct in connection with the construction was the responsibility of the first respondent.

[3] Counsel for the applicant advanced its argument on the footing that there are no material disputes of fact evident on the papers. Counsel for the respondents correctly challenged that notion. The respondents' papers challenge and contradict a number of the facts stated in the founding papers. I have concluded that some of these disputed facts have a material bearing on one aspect of this case, and in those instances I must accept the respondents' version where the challenge is *bona fide* and real.

[4] In summary the notice of motion sought the following relief.

(a) Firstly an order directing the respondents to vacate Erf 220, and interdicting the respondents from causing or allowing occupation thereof before a certificate of occupancy is issued.

(b) An order interdicting and restraining the respondents from carrying out any further building work on the property other than the construction of a retaining wall
    (i) under the direct supervision of a "certified and licenced civil engineer", and in accordance with the design of such an engineer for the retaining wall; or
    (ii) strictly in accordance with approved building plans for the retaining wall.

(c) An order restraining the use of Erf 220 as a hardware store, a builder's supply yard, or in any other way in conflict with the zoning of the property under the KwaDukuza Land Use Management Scheme. (The founding papers specify no such alternative use.)

[5] The relief sought in this case is of two types. The interdicts concerning occupancy and construction works seek to restrain the respondents (and of course in particular the first respondent) from proceeding with either occupation or construction without certain conditions being met. The relief sought is conditional and does not seek to interfere with the respondents rights on a permanent basis. The second type is in the nature of a permanent interdict against particular uses of Erf 220. It is not sought conditionally. The relief is final in nature and whether it should be granted or refused turns upon the proper construction of the provisions of the KwaDukuza Land Use Management Scheme (the "Scheme").

The Facts

[6] In giving an account of the facts I will as far as possible confine myself to the essentials.

[7] In May 2019 the applicant approved building plans for what it describes as a "warehouse type building" on Erf 220. The applicant's papers do not disclose what features of the building or the plans cause it to describe the building as of a "warehouse type". It seems likely that the label flows from the fact that the plans depict a steel frame mode of construction. However the respondents point out that the resolution of the first respondent which was required to be submitted with the plans referred to an intention for the property to be used as a hardware store, a fact which was confirmed by a sign board erected by the first respondent on the boundary of the property indicating its intended use as a hardware store, which sign would have been visible to municipal officials throughout the building period.

[8] In September 2019 a building inspector employed by the applicant, Mr Nkwakhwa was passing Erf 220 and noticed that earthworks were underway. He saw that they had reduced the ground level of Erf 220 to "considerably below" the level of adjacent properties. But he did not regard it at that stage as unusually dangerous.

[9] On 15 October 2019 Mr Nkwakhwa conducted an inspection and claims to have established that the earthworks on Erf 220 had undermined the property and a building on the adjacent Erf 221. He claimed to have seen a collapsed wall, but the respondents deny that any wall had collapsed.

[10] The applicant's Manager : Building Control, Mr Vilakazi, inspected the site on 15 October 2019. The approved plans make no provision for retaining walls, but that physical inspection made it clear that such would be necessary. Mr Vilakazi prepared a report for submission to the applicant's Economic Development Planning Portfolio Committee which would apparently be considered on 30 October. The concerns he noted regarding the site were of two types, one concerning work place safety and the other the unretained excavated embankment which had been created towards the rear of Erf 220. Mr Vilakazi met with Mr T Singh of JVT Consulting Engineers (Pty) Limited later on 15 October 2019 when the former requested the latter to produce a remedial action report and the proposed design of the retaining wall. It was noticed that on 21 October 2019 construction work had resumed on the site but that at that stage the required designs had not been received. The respondents' account of the meeting of 15 October 2019 is somewhat different. It is to the effect that the applicant's officials placed the blame for the conditions then prevailing in a rainy season on the owners of the neighbouring properties who had consistently failed properly to control storm water run-off from their properties. According to the respondents the wall which the applicant's officials regarded as having collapsed had in fact been taken down in a controlled manner on the instruction of the first respondent's engineer, because of the excessive flow of storm water from the higher properties onto Erf 220. As I understand the explanation, the engineer's view would have been that the wall would have collapsed, perhaps in a dangerous fashion, if it was not removed, as it could not withstand the pressure from the water emanating from the higher neighbouring properties.

According to the respondents it was agreed at the meeting of 15 October 2019 that the first respondent could construct a wall to retain its rear boundary.

[11] According to the principal founding affidavit (attested to by the applicant's Director: Development Enforcement, Mr F R Naidoo), the applicant's approach to the matter following the inspection of 15 October 2019 was as follows.

"The unstable excavation required urgent or emergency intervention. In part because the second respondent represented that an engineer has been appointed, the applicant did not issue a "stop work" notice, nor did it insist on building plans for a retaining wall being approved before further work, but rather issued a notice of violation which was meant to compel the respondents to remedy the situation."

[12] Jumping ahead a little in time, the founding affidavit (attested to on 13 December 2019) states in part explicitly, and in part by implication, that the claim by the respondents that the required retaining structures were to be dealt with by an engineer were too vague to be relied upon, and that no engineer's drawings had been received. That assertion has been shown to be false beyond doubt. The engineer's drawings for the retaining structures were sent to Mr Vilakazi on 22 October 2019. They did not feature in his report to the council's committee, despite the fact that when he asked for them he did so because he was preparing the report. Mr Vilakazi signed a confirmatory affidavit which was delivered with the founding papers. Copies of the engineer's drawings were put up with the replying affidavit. It is not suggested that there is anything wrong with the design. Neither is there any explanation why the designs were not dealt with in the founding affidavit. The drawings were sent electronically, and Mr Vilakazi acknowledged receipt of them.

[13] According to the founding papers further visits to Erf 220 were undertaken by representatives of the applicant on 13 November 2019, 6 December 2019 and 10 December 2019. The allegation is made that at these times the retaining structures had not yet been built. The site is said to have been in a condition "essentially as it was previously". This characterisation of the state of affairs upon Erf 220 in late November 2019 and early December 2019 elicited what amounts to a bare denial by the respondents.

There are however photographs of the situation which obtained on the property at the time, and it is fair to say that what they reveal is that little if anything had been done to execute the works which had been depicted in the design drawings by the engineer. A notice of violation delivered by the applicant to the first respondent drew attention to the dangerous site conditions. There was a further one on 6 December 2019 drawing attention to occupation without a certificate (I will revert to this), and the absence of approved plans and of adequate protection for the public. On the same day (6 December 2019) the applicant gave notice of an intended prosecution for "operating a hardware (Build-Rite Hardware)" on a site at which such use was prohibited.

[14] According to the respondents the first time that the issue of plans for the retaining structures was raised was on 6 December 2019 when the second respondent advised the applicant that plans could be submitted on 7 December 2019. According to the respondents this proposal was in effect rejected because the applicant had already closed "for plan submissions" until 13 January 2020.

[15] According to the respondents the principal issue at and around 6 December 2019 was the applicant's contention that the use of Erf 220 for a hardware store was not in accordance with the scheme. The second respondent pointed out that similarly zoned properties in the town accommodated hardware stores, but it does not seem that at that stage the particular provisions of the scheme relied upon by the applicant were considered or debated.

[16] The founding papers assert that on 6 December 2019, with the building itself on Erf 220 still incomplete, and no occupation certificate having been issued, the building was being "stocked with building materials and supplies, and to this extent the respondents have taken partial occupation by using the building. It was apparent that they were intent on taking full occupancy." In the answering affidavit it was contended that the first respondent was not in occupation of the property and certainly not trading there. I do not understand the latter contention to be disputed. Neither party has provided any

particularity regarding the extent to which any items which might be regarded as the stock of a hardware store had been placed in the building on Erf 220 as at 6 December 2019.

[17] The founding papers reveal that on 11 December 2019 the second respondent visited Mr F R Naidoo and orally undertook that the first respondent would not take further steps with regard to occupying the building without a certificate of occupancy; and that the hardware store would not be opened. Mr Naidoo asked for this undertaking to be given in writing, but it was not. Later on the same day Mr Naidoo saw an advertisement in the local newspaper for the "grand opening" of the hardware store on 16 December 2019. The respondents explain in answer that the advertisement was placed about a month prior to it appearing, it having been anticipated at that time that the business would open on 16 December 2019, and that the third respondent simply forgot to cancel the advertisement.

[18] The next day (12 December 2019) at 13h03 a letter from the applicant's attorney's (erroneously dated 20 November 2019) was delivered by hand to the second respondent. It drew attention to the proposed opening on 16 December 2019 of an illicit hardware store, and the construction of a retaining wall without building plans. The letter continued.

"In the circumstances we are instructed to give you notice, as we hereby do, not to allow occupation of the building or to commence the operation of a hardware store on the property. Unless you give us a written undertaking to that effect by 4pm today (12 December 2019), our instructions are to proceed to launch an urgent application in the High Court on Tuesday, 17 December 2019 for an order interdicting you from doing so."

The first respondent replied by letter of 13 December 2019 delivered at 08h32.

"Having sought advice, we will not be opening the store on 16 December 2019 as advertised. There is accordingly no need for any unnecessary urgent court application to be launched."

[19] Notwithstanding that, this application was launched on a founding affidavit dated 13 December 2019, and was set down for 18 December 2019. Concerning the undertaking which preceded the signature of the founding affidavit, the deponent to that document said

that the "undertaking does not mean that occupancy won't be taken or that the store won't be opened after 16 December 2019 and does nothing to resolve the problems of the dangerous excavation."

[20] On 18 December 2019 the matter was adjourned to the unopposed roll of 27 January 2020 with directions as to the delivery of further affidavits. The respondents made certain undertakings, the ones which remain material being the following.

(a) An affidavit from the engineer, Mr K Govender would be delivered disclosing his qualifications and confirming that he would supervise the construction of the retaining structures. That was to be done by Monday, 23 December 2019.

(b) Except for completing the building works and for the continued storage of building materials on site, there would be no further occupation of Erf 220 without a certificate authorising occupation.

(c) There would be no building work conducted on Erf 220 besides the construction of the retaining wall either under the direct supervision of a certificated and licenced civil engineer in accordance with the drawing which had been issued and supplied to the applicant, or in accordance with approved plans for those structures.

[21] Matters took a turn for the worse with the delivery of the applicant's replying affidavit dated 20 January 2020. Mr F R Naidoo, speaking for the applicant, asserted that the required affidavit from the engineer had not been delivered. He asserted that the respondents' case was "entirely undermined by their failure to comply with the undertaking recorded to court to provide the affidavit from the engineers." That central premise was false. In turns out that the affidavit required had been delivered on 23 December 2019 by email. It had gone to the central email of the applicant's attorneys and unfortunately had not reached the attorney dealing with the case.

[22] A new case was sought to be made, or certainly new material was sought to be placed before the court, in that replying affidavit. It was asserted that as a matter of fact the work was not being done in accordance with the engineer's drawings which were now acknowledged to have been received in October 2019. It was asserted that the deviations from the construction drawings signified a danger to the public. Accordingly the applicant claimed a right to interim relief on 27 January 2020 when the case was to feature on the unopposed motion roll. On 27 January 2020 the third respondent attested to a short affidavit opposing the grant of any urgent relief. Besides confirming the applicant's error in believing that the first respondent had not complied with the undertaking to deliver the engineer's affidavit by 23 December 2019, the affidavit objected to the short notice given of the intention to seek such relief, asserting that the matter was not urgent. The respondents also relied on another affidavit by the engineer, Mr K Govender, who attested to the fact that he was overseeing the activities on Erf 220, that the construction of the retaining wall was being supervised by him, and that what was there did not pose any danger to members of the public or construction personnel on site. He gave an undertaking irrevocably and unconditionally to comply with the first respondent's undertaking by continuing to supervise the construction of the retaining wall, and to copy written instructions and drawings issued by him to the applicant.

[23] In the event interim relief essentially in accordance with the undertaking originally recorded was granted on 27 January 2020. I do not know in what circumstances the order was made.

SUBSEQUENT EVENTS

[24] Later on the first respondent delivered an affidavit to support a counterclaim that it should be entitled to run a "wholesale hardware shop" on Erf 220. The affidavit set out the argument for the proposition, and again made reference to the fact that similar businesses are conducted under the same zoning controls elsewhere in the town. Accordingly the issue of the proper construction of the scheme is the subject of both a request for a permanent interdict by the applicant, and a favourable declaratory order by the first respondent. I will turn to that issue as the final one.

[25] The applicant otherwise asks that the interim relief granted on 27 January 2020 be made final. The respondents argue that no such relief should be granted to the applicant, essentially on the basis that the papers reveal that the application should never have been launched, and that there was no need for the interim relief granted on 27 January.

[26] I assume that the delay in what followed is largely attributable to the breakdown in administrative and court performance as a result of the pandemic which swept through our country after 27 January 2020. The first respondent complains that when it asserted that its works were complete, the applicant failed to conduct the requisite inspection in order to determine whether an occupation certificate could be granted. The first respondent launched a separate application to compel compliance with those obligations of the applicant. I am told that there was subsequently such an inspection and that the applicant declined to certify the building ready for occupation. The issue as to why that was done, and whether it was lawfully done, is not before me. The result, however, is that the apparently complete building (and completed retaining structures) are in place, but the building remains unoccupied.

THE CONDITIONAL INTERDICTS REFERRED TO IN PARAGRAPH 4 (a) and (b) ABOVE

[27] These interdicts are in essence the subject of the interim orders made on 27 January 2020. Although counsel for the applicant, Mr *Goddard SC*, asked that final orders should be made along the lines of the interim ones of January 2020, I did not understand him to contradict the proposition that as matters stand, there is little or no reason to suppose that the interdictory relief would now have any purpose. Matters concerning Erf 220 are presently being dealt with as the law requires, and there is no evidence of the first respondent having extended or threatened to extend the level of so-called “occupation” of the building which the applicant sought to interdict in the original founding papers in December 2019.

[28] In my view the position is that the factual analysis I have been compelled to set out in this judgment is relevant only to the questions of costs which the parties have asked me to decide. I approach that issue upon the footing that there is certainly no need now for any final relief along the lines of the interim relief granted in January 2020.

[29] Some of my views which have a bearing on costs have already been dealt with or expressed in the course of furnishing an account of what has transpired in this matter. I think particularly of the applicant's initial attempt to present a case for the proposition that whilst it was satisfied that it was in order for the retaining structures to be built in accordance with a design and under the supervision of an engineer, the first respondent was proceeding otherwise than with such supervision without submitting engineering designs to the applicant. Mr *Aboobaker SC*, who appeared for the respondents, has argued that what this evidences is an unnecessary rush to court.

[30] On the other hand, the photographs of the site put up in the papers illustrate that there was indeed a dangerous situation which, it is common cause, required remedial work in the way of retaining structures. I am unimpressed with the first respondent's more or less bare denial of the fact that little if anything had been done to implement the engineering designs by mid-December. Such dangerous circumstances justifiably induce a sense of anxiety in municipal officials who are responsible for seeing to it that there is compliance with the laws which require that construction work be carried out safely.

[31] Whilst the applicant's missteps (failing to disclose the submission of engineering drawings and asserting the non-delivery of an engineer's affidavit by 23 December 2019) were material, so too is the fact that it is clear on these papers that the first respondent did not take the unsafe conditions on its site as seriously as it ought to have done. I find that the first respondent's contention in its papers, that in fact the unsafe conditions must be laid at the door of the owners of the adjacent properties, is contradicted by the first respondent's acceptance of its own responsibility to build retaining structures. The photographs in the papers illustrate that the excavations undertaken on Erf 220 had the

effect of undermining whatever lateral support was previously in place on Erf 220 for the benefit of adjacent properties.

[32] I do not think that the fact that matters have subsequently been brought into conformity with the law relating to such works (eg the subsequent approval of plans for the retaining works which have actually been constructed) establishes that the first respondent was "in the right", and I did not understand Mr *Aboobaker SC* to argue otherwise.

[33] I conclude that it is possible, but not necessarily so, that if this litigation had not been instituted the first respondent would have brought its works into conformity with the law in much the same way as matters turned out during the course of litigation. However it strikes me that the applicant litigated in performance of its public duty, even if one can see that more determined efforts on the part of the applicant to engage with the first respondent might have avoided the need for litigation.

[34] Both parties were at fault in connection with their conduct "on the ground" and this litigation. I conclude that there should be a more nuanced costs order than is customary, a subject I will deal with at the end of this judgment.

THE ZONING ISSUE

[35] The parties prepared a joint statement of issues in dispute and to be dealt with at the hearing. They define the zoning issue as follows.

'Whether a "builder's hardware shop" alternatively a "tile and décor" store as proposed by the respondents is permitted or prohibited by the provisions of the KwaDukuza Land Management Scheme and whether the interdict sought by the applicant or the relief sought by the respondent should accordingly be granted, and associated costs.'

Both parties prepared more detailed heads of argument on the zoning issue for the purpose of the hearing. Whilst their argument over the material already discussed above took a little time as it involved an analysis of the facts and how the litigation unfolded, the

zoning issue was ultimately the most important one as, if the applicant was correct in its contentions, the building on Erf 220 could never be employed for its intended purpose.

[36] Erf 220 is zoned “Mixed Core Use 3 (MUC3)”. The scheme lists

(a) freely permitted uses for Zone MUC3 under the headings “Environment and Recreation”, “Commercial”, and “Industrial”;

(b) uses in the zone which may be sanctioned by municipal consent.

The building and land uses not appearing in either part of the table of uses are prohibited.

[37] A “shop” is listed under the “Commercial” heading in the table of freely permitted uses. A warehouse and a wholesale shop are the two entries in the table of freely permitted uses under the heading “Industrial”.

[38] The first respondent intends the building on Erf 220 to be used as a hardware shop. A hardware shop is a shop. A shop is a permitted use. It does not appear to me to matter, when considering the dispute, whether one regards the hardware shop as a “builder’s hardware shop” or a “wholesale hardware shop” (a term also used by the first respondent to identify the intended use). Describing the proposed enterprise as a “wholesale” enterprise simply puts it under the industrial heading in the list of permitted uses, whereas it would fall under the commercial heading “shop” in the list of permitted uses if described as a hardware shop for builders.

[39] The applicant seeks to avoid this analysis of matters by referring to the use “builders supply yard” which features in the scheme. That use is defined. It means “premises which is used for the storage or sale of building material and equipment”. The first respondent claims no right to use any of the vacant land around its building on Erf 220 for the storage or sale of building material and equipment. The applicant argues that the word “premises” includes buildings, and accordingly that a hardware shop falls within the definition of a builder’s yard because such a shop inevitably stocks and sells material and goods and equipment which can and are used in the building industry. Accordingly, argues the

applicant, although a hardware shop may be a shop, it is of a specific type which falls within the prohibited use “builder’s supply yard”. The applicant seems quite insensitive to the question as to whether this is a sensible construction or an insensible misconstruction of the relevant provisions of the scheme.

[40] Counsel for the applicant has argued with reference to *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 SCA at paragraph [18] that any contrary interpretation of the scheme must be one which fails to attribute meaning to the words of the scheme, fails to identify the mischief the scheme is aimed to prevent and which involves impermissibly ignoring the duty to interpret all the words in the scheme relevant to the enquiry. In my view there is no merit in these arguments.

[41] The word “premises” can, depending on context, mean land or buildings or both land and buildings. The applicant argues that the word “premises” in the present context must mean land and buildings, primarily, as I understand the argument, because use zones and the like apply to both the use of land and of buildings on the land. I think that as a generalisation this argument is correct.

[42] However if it is obvious that the word “premises” is being used with respect to what might be called “open land” – land not built upon in the ordinary sense of that word (ie enclosed by walls and covered by a roof) - can one say that the use of the word “premises” brings about that for the purpose of the provision in question, a building must be regarded as “open land”? I think not.

[43] The definition upon which the applicant relies is a definition of a “yard”. I know of no use of the word “yard”, certainly in the ordinary language I have come across, which conveys that a building (properly so-called) can be regarded as a “yard”.

[44] The Oxford South African Concise Dictionary gives the primary meaning of the word “yard” as

'a piece of uncultivated ground adjoining a building, typically one enclosed by walls → an area of land used for a particular purpose or business: *a builder's yard*.'

When one speaks of one's "back yard", the term denotes a piece of undeveloped land to the rear of a dwelling – that is to say on the opposite side of the house to the road frontage. It is ordinarily delineated by the property boundaries and, in South Africa in any event, also by a fence or wall. It is a common term. It always denotes land uncovered by roofing, although not necessarily enclosed by walls as suggested in the dictionary definition.

[45] Counsel for the applicant argues that these observations regarding the ordinary use of the word "yard" cannot affect the meaning of the word "premises" where it appears in the definition of a "builder's yard". As I understand the argument it is that the word "premises" appears as part of the defining element. It determines what "yard" means. The use of the word "yard" does not determine what the word "premises" means. I appreciate the logic of that argument, but it cannot be carried so far as to bring about that the thing which is the subject of the definition ceases to be what we all know it is. To give an example: if a drafter is silly enough in the rules of a sectional title scheme to define the word "cat" as a four-legged domesticated animal, and then records that cats are not allowed within the boundaries of the scheme, is it logical to then conclude that dogs are also not allowed because they are four-legged domesticated animals, despite the fact that they are not cats?

[46] In my view the answer lies in appreciating the purpose of the defining words in the definition relied upon by the applicant. The purpose of the definition is not to define what a yard is. It is to establish what the term "builder's supply yard" means, as opposed to any other yard. The definition is aimed at the use of the yard "for the storage or sale of building material and equipment". The use of the word "premises" in the definition is merely incidental, and it makes no sense to regard the word as bringing about that a "builder's supply yard" may not be a yard at all.

[47] A hardware shop is all about the business of selling of goods. Some of them will undoubtedly be building material and equipment. Bearing in mind the wide range of goods which are to be found in any ordinary hardware shop, much of which could be regarded as items or material used in or in the course of building work (from, for instance, nails and hammers through to a pocket of cement), and given the self-evident popularity of, and the need of ordinary people (non-builders) to access, the materials and tools and the like sold in a hardware shop, it is wrong to give the excluded use (builder's supply yard) so broad a meaning as to exclude the operation of a hardware shop inside a building on a property governed by a zoning such as that attributed to Erf 220.

[48] Builder's supply yards, being open land and normally quite large pieces of land, can accommodate the storage and sale of industrial scale quantities of such items as sand, stones, bricks and so on, and therefore attract a significant flow of industrial type traffic in the way of heavy vehicles both delivering materials to the yard and picking material up from the yard for delivery to building sites. That sort of traffic generation and activity would be a considerable obstacle to the enjoyment of the public amenities which are supposed to be available in an area zoned MUC3. The level of storage and trade - generated interference with public amenities by a facility such as a hardware shop contained within a building cannot be compared to that generated by a builder's yard.

[49] I accordingly conclude that the applicant's contention with regard to whether the proposed use of Erf 220 is permissible under the scheme is wrong, and that the counter application must succeed.

[50] In *KwaDukuza Municipality v Stangvest Investments (Pty) Limited and Others*, case number 1006/2019 in this Division, Kruger J reached the same conclusion as I have on the zoning issue raised in this case. The applicant argued that I should not regard myself as bound to follow that decision as it was clearly wrong and not supported by the reasons given for it by the learned Judge. I have, on the contrary, decided that the conclusion reached in *Stangvest Investments* was correct.

COSTS

[51] In dealing with the issue of costs I will not repeat the considerations I have already identified as relevant to the enquiry. The general rule that costs follow the result is sometimes a blunt instrument. In this case the employment of that general rule is difficult with regard to the relief summarised in paragraphs 4 (a) and (b) of this judgment. No final order has been made in favour of the applicant. It is arguably so that this outcome is the product of the passage of time, and the events on the ground during that passage of time, between when the interim order was made in January 2020 and the presentation of the case to court for a final decision.

[52] The basic principle which underlines all orders for costs, even when the order simply follows the result or outcome of the case, is that the court has a discretion which must be exercised judicially upon a consideration of all the facts. As between the parties "in essence it is a matter of fairness to both sides". (See *Ward v Sulzer* 1973 (3) SA 701 (A) at 706.)

[53] In my view it is fair to say that the order granted on 27 January 2020 evidences substantial success on the part of the applicant up to that date in its pursuit of the relief set out in paragraphs 4 (a) and (b) of this judgment. Although some costs were incurred in respect of those two issues after January 2020, the central issue since then has been the zoning issue on which the applicant has not achieved success. Just as costs were incurred before and after January 2020 on the issues set out in paragraphs 4 (a) and (b) of this judgment, so too were costs incurred before and after January 2020 in connection with the zoning issue.

[54] I take the view that in considering what is fair in circumstances like the present a court should be aware and take account of the complications which may arise in the taxation of costs. Mr *Aboobaker SC* has asked that the first respondent should be allowed all costs incurred in respect of the zoning issue. That would entail extracting drafting and perusal costs from the founding and answering papers and an argument over how much of the costs which post-dated January 2020, especially those incurred in connection with

the preparation for and presentation of argument before me, is attributable to the zoning issue. In my view fairness to the parties, and between the parties, dictates that such debates should be avoided as far as possible. It is better simply to fix a date up to which the costs in the main application will be paid by the first respondent; after which date the costs in the main application must be borne by the applicant.

[55] The same problems do not seem to me to arise in connection with the counter application, as it post-dated January 2020.

[56] I accordingly formulate the order for costs as fairly as I can manage applying the above principles.

I make the following order.

1. (a) The application against the second and third respondents is dismissed.

(b) The applicant shall pay such additional costs as may have been incurred by the inclusion of the second and third respondents as parties to the litigation.

2. The order of 27 January 2020 is discharged.

3. (a) The application for the interdict set out in paragraph 2 (c) of the order prayed in the notice of motion is dismissed.

(b) The counter application is granted in the following terms.

"It is declared that the Core Mixed Use (MUC 3) zoning currently applied to Erf 220, CBD Stanger situate at 63 Balcomb Street, KwaDukuza permits the operation of a wholesale hardware shop

or hardware shop within a shop building situate on the said Erf 220."

(c) The costs of the counter application shall be paid by the applicant.

4. As to the costs of the main application not already dealt with in paragraph 1 of this order,

(a) those incurred up to and including 27 January 2020 shall be paid by the first respondent; and

(b) those incurred after 27 January 2020 shall be paid by the applicant.

OLSEN J

APPEARANCES

Date of Hearing:	26 and 27 May 2021
Date of Judgment :	Thursday, 12 August 2021
Plaintiff's Counsel:	Mr G D Goddard SC
Instructed by:	Shepstone & Wylie Attorneys Applicant's Attorneys 24 Richefond Circle Ridgeside Office Park Umhlanga Rocks Durban (Ref: V Nkosi/kwad7135.852) (Tel: 031 – 575 7000) (Email: douglas@wylie.co.za smkhize@wylie.co.za)
Defendants' Counsel:	Mr TN Aboobaker SC with Mr B Houston
Instructed by:	Amod's Attorneys Respondents' Attorneys Suite 900, Nedbank House Durban (Ref: AA/ps/G111/20001) (Tel: 031 – 307 7862) (Email: admin2@amodsattorneys.co.za)