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

Case no: **D10273/2022**

In the matter between:

ETHEKWINI MUNICIPALITY	**APPLICANT**
and	
PERSADH JITESH	**FIRST RESPONDENT**
THE EXECUTOR: ESTATE LATE KHAN YACOOB	**SECOND RESPONDENT**
KWAZULU-NATAL HUMAN SETTLEMENT DEPARTMENT	**THIRD RESPONDENT**
LALLMUM KALICHARAN	**FOURTH RESPONDENT**

Coram: Mossop J
Heard: 2 May 2024
Delivered: 2 May 2024

ORDER

The following order is granted:

1. The first respondent is interdicted from conducting and operating a trucking business from any of the following properties whilst they are not zoned by the applicant for industrial purposes in terms of the relevant byelaw, namely:

(a) [...] S[...] Road, Umkumbaan, with the formal description of Portion 4[...] of Erf 7[...] Cato Manor, eThekwini;

(b) [...] S[...] Road, Umkumbaan, with the formal description of Portion 4[...] of Erf 7[...] Cato Manor, eThekwini;

(c) 1[...] U[...] Road, with the formal description of Remaining Portion of Erf 7[...] Cato Manor, eThekwini; and

(d) [...] R[...] Road, Umkumbaan, with the formal description of Portion 4[...] of Erf 7[...] Cato Manor, eThekwini;

2. The first respondent is to pay the applicant's costs of suit.

JUDGMENT

MOSSOP J:

[1] This is an ex tempore judgment.

[2] The applicant is the Ethekwini Municipality, a municipality established in terms of the Local Government: Municipal Structures Act 117 of 1998, one of whose duties it is to enforce the byelaws that apply within its area of jurisdiction. In its notice of motion, it identifies four immovable properties within that area of jurisdiction, namely those situated at:

(a) [...] S[...] Road, Umkumbaan, owned by the first respondent;

(b) [...] S[...] Road, Umkumbaan, owned by the second respondent;

(c) 1[...] U[...] Road, Umkumbaan, owned by the third respondent; and

(d) [...] R[...] Road, Umkumbaan owned by the fourth respondent,

(collectively referred to as 'the properties')

and makes the case that the first respondent is unlawfully conducting a trucking business from the properties. As far as I can make out, the properties despite their addresses, are all contiguous to each other. All of the properties, so the applicant alleges, are zoned either as 'special residential 400m^2' (properties (a), (b) and (d) above) or as 'general commercial' (property (c) above). This is not disputed by the first respondent, who is the only respondent that has opposed the application.

[3] It is also not disputed that the first respondent is conducting a trucking business from his property and the properties owned by the other respondents. The applicant claims that such conduct by the first respondent is unlawful because he is utilising the properties for a purpose other than that in respect of which they are zoned. The applicant alleges that for a trucking business to be operated, the property from which it is conducted must be zoned for 'industrial' activities. Zoning of property for 'special residential 400m^2' use or for 'general commercial' use, as in the case of the properties, specifically excludes the use of the property for industrial purposes and running a trucking business is regarded as an industrial activity. None of this appears to be disputed by the first respondent.

[4] By virtue of the allegation that the first respondent is acting in a manner contrary to the byelaw, the applicant has served contravention notices on the first respondent, and on the third and fourth respondents on at least two different dates.

In total, eight contravention notices have been issued in all.[1] The applicant has fined the first respondent in respect of his use of the properties in a total amount of R20 000.[2] None of this has stopped the first respondent from continuing to conduct his business in breach of the byelaws.

[5] The first respondent appears not to dispute that he was liable to be fined because he stated the following in a statement that he made to the Durban Metro Police when he was served with the aforementioned fines:
'I, PERSADH JITESH, the owner of the above-named property, do hereby acknowledge being served with the Municipal Notice 114 of 2017, that I PERSADH JITESH, am guilty of contravening Section 76 of the Bye-Law.'

[6] In his rather threadbare answering affidavit in this application, the first respondent tacitly acknowledges his wrongdoing and indicates that he has instructed an architect to attend to applications on his behalf to have the properties marked as (a), (b) and (d) in paragraph [2] of this judgment rezoned so as to permit him to park his trucks thereon. He consequently sought an adjournment of this application for six months to allow this process to run its course. The architect that he has engaged to drive this process confirmed in a supporting affidavit that he had commenced working on the rezoning applications. Both of those affidavits are dated 3 June 2023.

[7] It is now 2 May 2024. Given the glacial speed at which this division's opposed motion roll moves, more than six months have elapsed since the respondent's answering affidavits were delivered. The first respondent has had the six-month period that he asked for, and then some. There is no admissible evidence from him of how far the rezoning applications have proceeded nor is there any evidence that the properties have actually been rezoned.

[1] On 19 March 2020 notices were served on the first respondent in respect of properties (a), (b) and (c) referred to in paragraph 2 above and on the fourth respondent in respect of property (d). A notice was served upon the third respondent on 27 September 2021 in respect of property (c). Further notices were served upon the first respondent in respect of properties (a) and (b) on 30 November 2021, as well as on the fourth respondent in respect of property (d).
[2] On 1 March 2021 the first respondent was fined R5 000 in respect of his unlawful use of each of the four properties.

[8] Attached to the first respondent's heads of argument is a copy of his rezoning application. It is dated 7 April 2024. I can otherwise take no heed of it for it has not been supported by an affidavit. It is, furthermore, entirely unacceptable, as the first respondent's legal representatives no doubt appreciate, for heads of argument to be used as a mechanism for introducing further evidence.

[9] In his heads of argument, the first respondent merely repeats that he is in the process of seeking the rezoning of the properties. That appears to be his defence. He submits that the application should be dismissed with costs. In truth the defence raised is not a defence at all. It is, rather, an admission that the properties are not currently zoned for the purpose that the first respondent is using them. If that were not the case, no rezoning would be required.

[10] What is disturbing about the first respondent's attitude is that he has been aware since at least March 2020 that he was contravening the by-laws and did nothing about it. When this application was brought he stated in June 2023 that he was seeking the rezoning of three of the four properties, yet that rezoning application is only dated April 2024. He appears to do things at a pace that only suits himself. That will have to change. The law applies to all.

[11] The applicant has made out an overwhelming case for the relief that it seeks and it is entitled to that order for so long as the properties are not zoned for industrial activities. Clearly, if the properties, or any one of them, are rezoned for industrial purposes any interdict preventing the respondent from operating his business from that property or properties would not be justified, on the applicant's own version. The applicant must have its order, subject to the just mentioned qualification. I make it plain that if one of the properties is rezoned, it may be used for the purposes that such rezoning permits. It is not the intention of this order that all the properties must first be rezoned before any one of them may be used for such permitted purposes.

[12] The applicant has, as a consequence, been entirely successful in its application. There is therefore no reason to depart from the tried and tested principle that costs follow the result.

[13] I accordingly grant the following order:

1. The first respondent is interdicted from conducting and operating a trucking business from any of the following properties whilst they are not zoned by the applicant for industrial purposes in terms of the relevant byelaw, namely:

(a) [...] S[...] Road, Umkumbaan, with the formal description of Portion 4[...] of Erf 7[...] Cato Manor, eThekwini;

(b) [...] S[...] Road, Umkumbaan, with the formal description of Portion 4[...] of Erf 7[...] Cato Manor, eThekwini;

(c) 1[...] U[...] Road, with the formal description of Remaining Portion of Erf 7[...] Cato Manor, eThekwini; and

(d) [...] R[...] Road, Umkumbaan, with the formal description of Portion 4[...] of Erf 7[...] Cato Manor, eThekwini;

2. The first respondent is to pay the applicant's costs of suit.

MOSSOP J

APPEARANCES

Counsel for the applicant	:	Mr E M Nkosi
Instructed by:	:	Linda Mazibuko and Associates 231-233 Stamford Hill Road Morningside Durban
Counsel for the first respondent	:	Ms I Maharajh

Instructed by	:	Manoj Haripersad Attorneys Inc. Care of: Abdul Shaikjee Attorneys Office No. 6, 6th Floor The Spinnaker 188 Mahatma Ghandi Road Point Waterfront Durban
Counsel for the second respondent	:	No appearance
Instructed by	:	Not applicable
Counsel for the third respondent	:	No appearance
Instructed by	:	Not applicable
Counsel for the fourth respondent	:	No appearance
Instructed by	:	Not applicable