

**SOUTH GAUTENG HIGH COURT, JOHANNESBURG****CASE NO:** 16296/2011**DATE:** 2011-08-31

In the matter between

10 CITY OF JOHANNESBURG

Applicant

and

BERGER, CEDRIC

First Respondent

BERGER, SHAUN

Second Respondent

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**J U D G M E N T**

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S PILG; J:20 **INTRODUCTION**

1. This case commenced as an unopposed application. Although the respondents (who will be referred to as the Bergers, unless the context requires otherwise) subsequently filed a set of affidavits dealing with the factual background to their occupation of the property the matter remained unopposed. An *ex tempore* judgment was delivered and I indicated that the reasons would be amplified if

necessary. I consider it appropriate to do.

2. The City of Johannesburg applies for an order requiring the Bergers to “*forthwith cease*” utilising their property, situated along Corlett Drive, in contravention of its zoning bye-laws. It seeks to buttress the main order with a number of complimenting restraining and compelling orders.

10 3. The City relies on the bye-laws promulgated in terms of the Johannesburg Town Planning Scheme under Administrator’s Notice 1157 of 1979 as read with the Town-Planning and Township Ordinance no 15 of 1986 (“*the Ordinance*”). . It contends that the property is being used as a veterinary clinic, rescue, rehabilitation and re-homing centre for cats and dogs, operating under the name “*Kitty and Puppy Haven*” in violation of its Residential 1 zoning status.

20 4. When the matter was first called I expressed concern about the consequences the order would have on the animals sheltered at the haven. In particular I wished to ascertain whether alternative shelter could be found or whether animals, generally puppies and kittens, would be euthanized if the order sought was implemented without alternative arrangements for their relocation. I therefore postponed the application and requested the City to secure the attendance of the Bergers at the resumed hearing so that the court could be informed of any alternative arrangements that might be made to provide for the

animals if the order sought by the City was granted and whether any of the animals would be put down. I also requested the City to advise whether the SPCA could provide assistance.

10 5. On the adjourned date *Mr Weltz* appeared on behalf of the respondents. Although his instructions were not to oppose the application it was submitted that certain facts should be brought to the court's attention. They were contained in an affidavit which I then received. The affidavit was deposed to by Samantha Berger. She is  
10 respectively the wife and daughter-in-law of the respondents and is the director and founder of Kitty and Puppy Haven. Her affidavit was supported by the respondents.

6. A supplementary affidavit was then filed by the City. It comprised a response and included a supporting affidavit from the SPCA, a petition from and letters signed by residents as well as a letter from the store owner of a local Pick 'n Pay.

#### 20 **BERGER'S AFFIDAVIT REGARDING THE HAVEN'S OPERATIONS**

7. The affidavit submitted by the Bergers revealed that over 200 young cats and dogs were being sheltered at the Haven. Very few adult dogs were on the premises: They were limited to bitches still weaning puppies that may have been abused or injured.

8. The Bergers had set up the Kitty Haven during 2000 from premises

in Parkwood for the purpose of rescuing, rehabilitating and finding homes for kittens and cats. The initiative was extended in 2003 to include puppies and dogs. Hence its present name.

9. Kitty and Puppy Haven is a registered non-profit organisation as well as an approved public benefit organisation for tax purposes. It is part of the My Planet Scheme. During 2004 the Haven moved from Parkwood to a residential stand in Bramley and began to receive far more animals in need of care than the Bergers had previously anticipated. In 2007 one of the applicant's departments advised that the Haven was obliged to close down because it was situated within in a residential area.

10. The Haven then relocated to a family property situated in Corlett Drive. The Corlett Drive property was a suitable size and situated within an ideal location; it bordered a park, was adjacent to a main road and was in an area that also housed a shopping centre and other small businesses. This is where the Haven is now situated. The property was also considered because of its potential for re-zoning rights which the Bergers then set about to obtain. The Corlett Drive property has proved to be ideally located for its intended purpose and the area it is meant to serve.

11. The affidavit explains where the animals are drawn from and that most residents who are catered for by the Haven cannot afford transport but come on foot with their animals. The proximity of the

Haven to Alexandra was consequently essential to its operations and for providing meaningful assistance to distressed animals.

12. Despite the increase in crime along that part of Corlett Drive The Haven has continued to provide shelter for stray or abandoned puppies and kittens brought in by residents and which are in need of care. The animals under its care are then fully vaccinated, treated against rabies and sterilized. The Haven adopts a “no kill” policy in respect of animals brought to the shelter. Since April 2011 it has also  
10 conducted a community veterinary clinic, under a qualified veterinarian. The clinic provides care on a free or affordable basis to animal owners who are unable to pay private veterinary fees. In this regard it provides free rabies injections and other vaccinations, attends to sick animals and distributes free pet food to those unable to afford it.

13. Over three thousand animals have been treated, adopted or sterilized annually at The Haven. The Haven addresses a vital public need for the neighbouring Alexandra community. Although it also  
20 manages an adoption programme, which results in a thousand animals annually being successfully placed for adoption, The Haven focuses on providing quality care for rescued animals and for pets belonging to indigent people. At the time the application was brought over 200 cats and dogs were being cared for on the premises.

14. The clinic itself has been approved by the State Veterinarian, the

Department of Agriculture and the South African Veterinary Council. Moreover the Haven receives the support of the community it serves. To this end a recent letter from the Alexander branch of the youth wing of a national political party was produced. The letter confirms and endorses the valuable contribution made by The Haven to the residents of Alexandra. The Bergers also claim that the shelter received support from a national supermarket chain. This claim will be considered later.

- 10           15. It is therefore evident that the central focus of the Haven is to provide an invaluable and much needed service mainly for residents of Alexandra by rescuing, treating and finding homes for injured or abused animals, and also by treating animals free of charge as a service to needy members of the community.

#### **BERGER'S AFFIDAVIT REGARDING REZONING APPLICATION**

16. The Bergers had applied for and claim that despite the passage of many years were still awaiting the outcome of a rezoning application.

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17. Their affidavit reveals that prior to moving the Haven to its present location they had engaged a firm of town planners, Steven Jaspan and Associates ("*Jaspan*"), which formally applied on their behalf in July 2008 for the removal of restrictions on the property and its rezoning. All necessary processes were attended to and the

application lay open for inspection while contiguous property owners were also duly notified.

18. On 15 October 2008 the Executive Director: Development Planning and Urban Management addressed correspondence to Jaspan advising that no objections had been received. Subsequently on 22 October 2008 the Bergers were advised that their rezoning application would be forwarded to a council planner for evaluation and preparation. A year later, during October 2009, they were advised that the application had been eventually assigned to a council planner.
19. During July 2010 the Bergers were approached by Mr Mario Di Cicco of Di Cicco and Buitendach CC to finalise the application for the simultaneous removal of restrictions and rezoning of the property, it being acknowledged, according to the Bergers, that there had been an unwarranted delay in the process. Nonetheless, in terms of the mandate the Bergers were advised that they would be responsible for the associated costs.
20. Another year passed and in July this year the Haven was advised by Di Cicco that a report had been sent for "*final transmission*". At the time of the hearing before me the Bergers were advised that Di Cicco was in Italy until the 17<sup>th</sup> August and it was not possible to obtain further information regarding the process.

## THE CITY'S RESPONSE

21. The City addressed three issues; the progress of the Bergers' rezoning application, the attitude of the neighbours and the assurances that the SPCA could provide regarding the well being of the 200 animals if the Haven was immediately required to close down.

10 22. The application was not opposed. Accordingly the court cannot apply the ordinary *Plascon Evans Paint Ltd v van Riebeeck Paints Pty Ltd* 1984 (3) SA 623 (A) test ( at 634 E to 635 C) which would otherwise have benefitted the respondents. I am prepared to accept the City's version, save in the one respect to which I will refer later.

23. The City confirms that all the Departments that have responded do not object to the rezoning. However the report of the Environmental Health Department is outstanding. It is contended that the delay in finalising the application is attributed to the consultants appointed by the Bergers failing, since June 2009, to submit a site plan with consent signatures from the surrounding neighbours as had been called for by the City. When Di Cicco replaced Jaspan as the new firm of town planning consultants a request was made on behalf of the Bergers to keep the rezoning application on hold. It was only in response to the City's letter of demand that Di Cicco in May 2011 sought to revise the rezoning application. The City contends that at no stage did the Bergers indicate that they wished to operate from the

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property a charitable rescue, rehabilitation and re-housing facility for animals. It was argued that the application had been motivated to provide only for a veterinary clinic and associated rehabilitation centre.

24. The City's supplementary affidavit also demonstrates that since September 2010 neighbours have objected to the excessive barking and unpleasant odours emanating from the property. The local Pick 'n Pay franchisor also confirms that he does not support the Haven and complains about the unbearable stench at times and the prevalence of flies which he attributes to the Haven's presence. Although the Pick 'n Pay letter is not accompanied by an affidavit, neither was the Bergers' assertion that such support existed. Affidavits were however presented on behalf of the City by two objecting neighbours. Their affidavits are supported by the inspections conducted by the City's official which precipitated the notices and the application before me.

25. It is therefore evident that although the Bergers used the property as a sanctuary for young animals, an application for rezoning had been made at a very early stage and there was no reason at that stage to believe that it would not be granted. However by September 2010, if not already by mid-2009, it would have been apparent that the rezoning would be objected to by a number of neighbours. Nonetheless it is evident that the City should to be in a position to finally determine the application shortly after Di Cicco's return.

26. Finally it is necessary to consider the affidavit of the SPCA official. It

is couched in somewhat hesitant terms and adopts a tempered tone. Nonetheless it is evident that if an order is granted with immediate effect then an unknown number of animals will be euthanized. This was confirmed when the SPCA senior official present in court could not give an assurance that animals would be euthanized nor could she estimate how many might have to be put down. If regard is had to the number of animals sheltered at the Haven it is hardly surprising that the SPCA cannot give such an assurance.

## 10      **THE CITY'S EXERCISE OF ITS POWERS**

27. The City relies upon section 42 (1)(c) of the Town-Planning and Township Ordinance no 15 of 1986. The Ordinance affords the local authority a discretion to direct that the landowner discontinue using the property in contravention of a town-planning scheme and to take down any offending structure. The provisions of section 42 apply to land situated within an authorised local authority's area of jurisdiction. This is by reason of section 55 of the Ordinance. However once the local authority issues a directive, as occurred in the present case, and  
20 it is not complied with then the landowner is guilty of an offence under sub-section (5). See also the penal sanction under section 58(2) in respect of a contravention of the provisions of an approved scheme.

28. Moreover under section 58(1) a local authority is obliged to observe and enforce the provisions of an approved scheme. It is under this

legislative provision that the City exercises its power to approach a civil court for recourse against an offending landowner.

29. It must therefore be accepted that the City has exercised its powers under the enabling legislation and the Bergr's have not sought to challenge that decision on the basis of a legitimate expectation that they would be allowed to maintain the animal sanctuary until a decision was made.

10 30. Moreover a court cannot second guess a decision taken by an administrative body to exercise its powers in a particular way even if it may not necessarily have made the same decision, provided that the decision taken is rational, procedurally regular and within its competence. Provided a decision is competently taken under section 42(1) to issue a directive then it carries the added weight of a specific criminal sanction under section 42(5) of the Ordinance.

### **COMPETING INTERESTS**

20 31. The Bergr's' rezoning application has lain with the City for some three years without finality. The Bergr's were aware that they had to apply for rezoning and would not be entitled to use the facility as an animal shelter or veterinary facility before the necessary authorisation was obtained. They had also sought a delay in finalising the application. Nonetheless, the City is obliged to make a decision on the

rezoning. The City did not come out and say unequivocally that the rezoning will not be approved. Furthermore no objection was raised prior to mid-2009 despite due notice to the public. At that time the Bergers would have believed that their rezoning application would be successful.

10 32. In my view the situation that has developed is of the City's own making. It is obliged to act within the provisions of Section 33 of the Constitution and provide just administrative action. This includes the duty to make decisions within a reasonable time having regard to the nature of the matter before it and to provide certainty. These requirements appears to find their counterpart in sections 56(8) to (10) of the Ordinance, which obliges the local authority to notify an applicant without delay of its decision either to approve or postpone its decision after investigating an application in the prescribed manner.

20 33. In the present case the Bergers did not close their eyes to the bye-laws or adopt a wait and see attitude. Necessity drove them to relocate the animals and they selected an area which had rezoning prospects. This included a period when there appeared to be no objection despite publication and notification of the application.

34. I accept that none of this on its own permits a court to ignore legislation that requires effective and prompt implementation of remedies for bye-law infringements. However what comes into reckoning is whether the bye-law is to be enforced humanely where

life is threatened.

35. The need for decision making and determinations within a reasonable period of time is evident from the provision of Section 6(2) (g) of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”) which allows judicial review for a failure to take a decision. The City has failed to comply with its obligations in this regard and the court is faced with the effect of that failure upon the Haven and the animals in its care, which effectively will require the selection of animals to be  
10 euthanatized if the order is to be implemented “*forthwith*” as sought.

36. I must therefore weigh the obligation to enforce a bye-law against the City’s failure to comply with its constitutional obligations, as given expression in PAJA. If the City had complied with its obligations then there would already have been a rezoning (albeit one subject to conditions) or a notification that the rezoning application was refused.

37. In my view every attempt has been made to explore an adequate alternative solution created by the City's failure to comply with its  
20 administrative duties to secure just administrative action. There is no adequate alternative centre and the animals cannot be relocated under the auspices of the SPCA without the risk of some being destroyed.

38. The question comes down to whether we should sacrifice life, because of a failure to consider an application made to the City within

a reasonable time, particularly when such a decision is due imminently.

39. The values we aspire to implicitly involve avoiding the ending of animal life unnecessarily. Even though the paradoxes of slaughtering for food must be accepted as a reality, it is a far cry from the present situation of killing very young animals.

10 40. The Bergers confirm that they would only be able to re-house the adult dogs by 12 December 2011. Although the City accepts that some time period is required to attempt to find alternative shelter for the animals, without consensus being reached it seeks the immediate implementation of the order sought. The preservation of life outweighs the entitlement to immediately implement a bye-law, particularly bearing in mind that a rezoning decision is imminent, It is self evident that there exists a less invasive and less restrictive, yet adequate remedy which can also take into account the imponderable; ie., whether the City will rezone the property: If the City approves the rezoning there would be a needless destruction of life. If it does not  
20 then the animals can be removed within a reasonable period of time.

41. In my view an appropriate order is to do what is possible now pending the final determination of the rezoning, namely to remove those animals that can be removed while ensuring that none will be euthanized .The Haven can continue to provide treatment for animals in a manner that can take into account the complaints regarding

barking, which is said to emanate from adult dogs, and also the concern about odour and general hygiene.

## PROTECTION OF ANIMALS

42. The competing interests may also be considered by considering the consequences of implementing the bye-law that may result in a number of young animals, which have already suffered and are undergoing rehabilitation, being destroyed against the body of law which gives expression to our humanity.

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43. Domestic animals are objects of the law, mere chattels, which are not accorded any right or specific protection under our Constitution. See the minority judgment of Cameron JA (at the time) in *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA) at paras [38] and [39]

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44. However the enquiry is not whether animals have rights, since they do not under our common law, but what our responsibility is towards animals; and in this case, those which we treat as pets under our control and which receive protection under statute.

45. Such an enquiry may ultimately resolve itself by reference to the content of our humanity and whether it is to be regarded both as the foundational stone which lies at the heart of our Constitutional rights

and also as the expression of a value system, of which the inter-relationships between humans is a manifestation but which transcends it.

46. This understanding of humanity within our constitutional framework may have been touched upon in *S v Makwanyane and Another* 1995 (3) SA 391 by Didcott J at para [177] when referring to the following extract from Gubbay CJ's judgment in *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General, Zimbabwe, and Others* 1993 (4) SA 239 (ZSC) at 247 I - 248 B). That case considered the prohibition of inhuman or degrading punishment under the Zimbabwe Constitution in the following manner:

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*"It is a provision that embodies broad and idealistic notions of dignity, humanity and decency. It guarantees that punishment....of the individual be exercised within the ambit of civilised standards. Any punishment....incompatible with the evolving standards of decency that mark the progress of a maturing society, or which involve the infliction of unnecessary suffering, is repulsive. "*

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44 In *Makwanyane* Didcott J at para [178] and Kentridge AJ at para [196] cited the celebrated statement by Stewart J in *Furman v State of Georgia* (1972) 408 US 238 at 306 when describing the death penalty as:

*".....unique ...in its absolute renunciation of all that is embodied in our concept of humanity."*



This broader concept of humanity as a value system underlying our legal foundation, finds expression in national legislation concerning animals. Firstly section 3 of the Societies for the Prevention of Cruelty to Animals Act, no 169 of 1993 (SPCA Act) includes as the objects of the National Council:

*“(c) to prevent the ill-treatment of animals by promoting their good treatment by man;*

10 *(f) to do all things reasonably necessary for or incidental to the achievement of the objects mentioned in paragraphs (a) to (e)”.*

45 The Animal Protection Act no 71 of 1962 and the Performing Animals Protection Act no 24 of 1935 similarly provide for the care of animals while section 57 of the National Environmental Management: Biodiversity Act 10 of 2004 attempts to prevent the inhumane breeding, hunting and killing of protected species by prohibiting “a restricted activity”. As appears from the judgment in *SA Predator Breeders Association and Others v Minister of Environmental Affairs and Tourism* [2010] ZASCA 151 at para [25] in June 2005 the  
20 responsible Minister appointed experts to advise on drafting norms and standards for professional and recreational hunting because of certain malpractices in the hunting industry “particularly through so-called ‘canned lion hunting’”.

46 However for present purposes it appears adequate to confine the enquiry to national legislation such as the SPCA Act in regard to the inhumane treatment of domestic animals. The purpose of the predecessor to this Act, the Prevention of Cruelty to Animals Act 8 of

1914, was held by the Natal Full Bench, per Miller J (at the time), while " *not ... to confer human status on animals it was assuredly part of its purpose to prevent degeneration of the finer human values in the treatment of animals*" .Cameron JA's minority judgment which approved this case (at para [38] fn 2) appears, with respect, to remain unaffected by the majority decision.

47 While the entitlement of the City to enforce its bye-laws is self evident, the evidence before the court confirms that if the order is  
10 implemented with immediate effect an indeterminate number of young animals are likely to be put down. This would be contrary to the SPCA Act which has as its object, through the Council, the "*good treatment by man*" of animals and to prevent their "*ill treatment*". The unnecessary killing of an animal would fall within the provisions of the sub-section.

48 In the present case the likely killing of some of the 200 animals would be unnecessary and the object of the bye-law can be achieved without the inhumane killing of the young animals. This can easily be  
20 achieved by delaying the enforcement of the order. The delay in the enforcement of orders for specific performance is not uncommon and finds as its base the interests of justice. There is nothing in the Ordinance which precludes a court from delaying the enforcement of the bye-law in the interests of justice, particularly where a failure to do so would result in the contravention of animal protection laws, laws which in turn ought to be broadly construed and applied by reason of

its foundational value based on humanity.

## THE ORDER

49 The following order was made:

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- a. This matter is postponed pending the outcome of the Simultaneous Removal of Restrictions and Rezoning Application: Portion 64 of 724 Kew (the “Rezoning Application”) and may be set down by the Applicant on notice to the Respondents*
- b. Pending the outcome of the Rezoning Application:*
- i. Kitty and Puppy Haven shall with effect from 12<sup>th</sup> December 2012 cease to house adult dogs at Portion 64 of Erf 724 (“premises”);*
- ii. All adult dogs currently housed on the premises will be re-homed by the 12<sup>th</sup> December 2011;*
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- iii. No adult dogs brought in for emergency treatment shall be kept on the premises for more than 24 hours;*
- iv. Pest control will attend at the premises every 8*

*(eight) weeks.*

*c. Once the Rezoning Application has been finalised (including any review proceedings), the provisions of paragraph 2 cease to have effect and Kitty and Puppy Haven will abide by the conditions of the Rezoning Application.*

*d. No order as to costs.*

**DATES**

**HEARINGS: 26/07/2011, 12/08/2011 and 26/08/2011**

**ORDER: 31/08/2011**

10 **REVISED: 29/11/2011**

**LEGAL REPRESENTATIVES**

**APPLICANT; ADV MAGANO**

**MOJELA HLAZO PRACTICE**

**RESPONDENTS: ADV M WELZ on 12/08/2011**

**ADV D WHITTINGTON on 26/08/2011**

**EVERSHEDS**