THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 080/2012

In the matter between:

EMILEL INVESTMENTS (PTY) LTD	**Appellant**
and	
MARIA GIOCONDA LINDA GIORGIA SILVESTRI	**First Respondent**
IAN DU PLESSIS	**Second Respondent**
BARRY WILLIAM GIE	**Third Respondent**
SEA POINT HIGH SCHOOL	**Fourth Respondent**
GOVERNING BODY SEA POINT HIGH SCHOOL	**Fifth Respondent**
DAVID VAN RENSBURG	**Sixth Respondent**
VICTORY TICKETS 943 CC	**Seventh Respondent**
THE CITY OF CAPE TOWN	**Eighth Respondent**
THE MEC (MINISTER) FOR EDUCATION,	
THE WESTERN CAPE PROVINCIAL GOVERNMENT	**Ninth Respondent**
THE MEC (MINISTER) FOR TRANSPORT AND PUBLIC WORKS, WESTERN CAPE PROVINCIAL GOVERNMENT	**Tenth Respondent**

Neutral citation: *Emilel Investments v Silvestri & Others* (080/2012) [2012] ZASCA 181 (29 NOVEMBER 2012)

Coram: Lewis, Cachalia, Malan, Petse JJA and Plasket AJA

Heard: **26 November 2012**

Delivered: **29 November 2012**

Summary: **Interdict – zoning scheme regulations – promulgated in terms of Land Use Planning Ordinance 15 of 1985 – school property zoned general residential – place of instruction – soccer centre – five-a-side soccer pitches with club house constructed on school property – commercial use of centre – not permissible.**

ORDER

On appeal from: The Western Cape High Court, Cape Town (Le Grange J sitting as court of first instance):

1 The appeal is dismissed with costs;

2 The cross-appeal is upheld with costs;

3 The order of the court below is replaced by the following:

'(a) It is declared that the first respondent's operation of the Gianluca Vialli soccer centre and the fourth respondent's conducting of a craft market on erven 718 and 1445 Sea Point East are unlawful.

(b) The first and fourth respondents are ordered to cease performing the said activities forthwith.

(c) The first and fourth respondents are ordered jointly and severally to pay the applicants' costs including the cost of two counsel and the qualifying fees of Mr T B Brümmer.'

JUDGMENT

Malan JA (Lewis, Cachalia, Petse JJA and Plasket AJA concurring)

[1] The Gianluca Vialli Soccer Centre is named after the famous Sampdora, Juventus and Italy striker as well as former Chelsea coach. The centre is located in Cape Town on erven 718 and 1445 Sea Point, on the grounds of the Sea Point High School. The centre consists of two five-a-side astroturf soccer pitches with bright flood lights and a club house. The Sea Point High School lies between Main, Beach, Norfolk and St James Roads, Sea Point, Cape Town. Several blocks of flats adjoin these roads. The school has existed on the property for more than 126 years. The property itself belongs to the government of the Western Cape.

[2] In an application brought by the first to third respondents against the appellant and various other parties, Le Grange J in the Western Cape High Court declared that

the operation by the appellant of the centre and the use of the school grounds by the sixth respondent for the conducting of a craft market were unlawful. He issued an interdict prohibiting the continuation of these activities but suspended its operation for 90 days. He ordered each party to pay its own costs.

[3] The parties appealed: the appellant, the operator of the centre, against the interdict granted and the first three respondents, owners of properties around the school, against the costs order made despite their having been successful. In what follows I shall refer to the first to third respondents as 'the respondents'.

[4] The respondents applied for the interdict on two grounds. First, that the appellant's use of the property was in breach of the zoning scheme regulations of the City of Cape Town as promulgated under the Land Use Planning Ordinance 15 of 1985 (LUPO). Secondly, that the use of the property constituted a common-law nuisance, and included the illegal sale of liquor on the property. In view of my conclusion it is only necessary to refer to the first ground relied upon.

[5] The City of Cape Town (the eighth respondent), the Provincial Minister for Education (the ninth respondent) and the Provincial Minister for Transport and Public Works (the tenth respondent) abided the decision of the High Court. The City, however, filed an affidavit confirming that no formal consent had been furnished by it in terms of the scheme regulations for any consent use in respect of the property, and that no consent had been granted for use of the property for non-school purposes. An affidavit was filed on behalf of the Minister for Transport and Public Works, the custodian of the property in terms of the Government Immovable Asset Management Act 19 of 2007 stating that, if the school continued to utilise the property for the purpose for which it was allocated, namely school related activities, there would be no need to rezone the property. It added that,

'if the [Minister] were compelled, by way of application or other related process, to apply for rezoning, then the application would only be considered on the basis, and to the extent, that it is necessary for school purposes and/or related activities.'

[6] The governing body of the school and the seventh respondent (Victory Tickets) concluded an agreement of lease on 21 January 2010 in terms of which the latter hired from the school a portion of the property, consisting of two tennis courts

to be converted into two football pitches, two change rooms, a car park, a grass field on which the lessee intended constructing an additional three five-a-side pitches and a club house. Victory Tickets in turn sublet the property to the appellant. The lease was for a period of ten years with two options for renewal of ten years each. The rental payable was R100 000 per annum with no provision for escalation. Should the lessee, however, operate more than two football pitches an additional R50 000 per annum would be payable. The lease gave the lessee use of and access to the property on weekdays between 14h00 and 23h00, on Saturdays, Sundays and public holidays between 10h00 and 23h00 and, in addition, on weekdays from 09h00 to 14h00 unless the school formally indicated by giving two weeks' notice that it required the property specifically during those times. The school had the use of and access to the property on weekdays between 09h00 and 14h00 only, provided it booked the centre by giving two weeks' notice. The school could use the rented property only on three weekends per year.

[7] The appellant redeveloped the property. During June 2010 corporate soccer league games commenced. In addition, the pitches and the club house were hired out for five-a-side football events. The improvements were effected at the expense of the appellant and at a cost of approximately R2 million.

[8] The property is subject to the City's zoning scheme regulations. The general purpose of a zoning scheme is to determine land use rights and to provide for control over those rights and the use of land within the area of jurisdiction of a local authority (s 11 of LUPO). Section 39(2)(a) of LUPO provides that no person shall contravene or fail to comply with the provisions incorporated into a zoning scheme. A contravention or failure to comply is an offence. The Premier is empowered to make regulations in respect of all land in the Province (s 8). The object of the regulations is the 'control over zoning', and the regulations may authorise the granting of departures and subdivisions by a council (s 9(1)).

[9] Regulation 15(1) of the Municipality of Cape Town Zoning Scheme: Scheme Regulations (as amended on 19 November 2007) defines 'use' in relation to land to include 'the erection thereon of any structure not being a building'. Sub-regulation 2 continues:

'No land falling under a Use Zone (whether or not such land is or is not part of the site of a building) shall be used for a purpose for which a building may not be erected or used on such land; provided that where a building may be erected or used for a particular purpose on land with the consent of the Council, such land may be used for such purpose with such consent.'

In terms of reg 15(3), the categories of buildings which may be erected or used, and those which may be erected or used only with the consent of the Council in each of the use zones specified in the table following reg 15(3) are prescribed in columns 2 and 3 respectively. Where the property is zoned general residential the permitted buildings are:

'Blocks of flats; Double Dwelling Houses; Dwelling Houses; Groups of Dwelling Houses; Places of Worship; Residential Buildings.'

'Places of instruction' are permitted in a general residential zone but only with the *consent of the Council*. A 'place of instruction' is defined in the scheme regulations as:

'a school, college, or other educational building and any boarding establishment appurtenant thereto, whether or not on the same site as such school or other building, and a crèche, nursery school, monastery, convent, public library, public art gallery, museum or *place of instruction in sport where the primary purpose of the activity is instruction as opposed to participation or spectating by the public*.' (The words emphasised were inserted in 2007 and replaced the word 'gymnasium').

[10] From the main report of Mr T A S Turner, the appellant's town planning consultant, it emerges that the school predated the first town planning scheme by more than half a century. The utilisation of the property for the purpose of a school was therefore lawful use as contemplated by LUPO. Turner stated that since the school was permitted in a general residential zone the use of the property for a school was a lawful consent use to which the City had tacitly consented. There is no evidence of an express or formal consent. This is common cause.

[11] After the replying papers had been filed Mr Turner filed a supplementary affidavit in which he stated that the current scheme regulations were preceded by a town planning scheme in terms of the previous Townships Ordinance 33 of 1934. That scheme was referred to as the 1964 Revised Final Statement and in terms of it

the property was zoned general residential. A place of instruction was listed as one of the categories of building which could be erected and used in this zone. In other words, it was a *permitted* and not a consent use. A 'place of instruction' under the 1964 scheme meant:

'a school, college, or other educational building meaning boarding establishment appurtenant thereto, whether or not on the same site as such school or other building, and a crèche, nursery school, monastery, convent, public library, art gallery, museum or gymnasium.'

However, as was demonstrated by Mr T B Bümmer, the respondents' consultant, the 1964 town planning scheme was amended on 19 August 1985 (by amendment 484 as promulgated in terms of s 35*bis* of Ordinance 33 of 1934) the effect of which was to make the consent of the City a requirement for use of property zoned general residential as a place of instruction.

[12] The 1964 town planning scheme was, when LUPO came into effect on 1 July 1986, deemed to be a zoning scheme that was in force in terms of s 7(1) of LUPO. It was replaced in 1990 by the current scheme regulations which were promulgated in terms of s 9(2) of LUPO in Provincial Gazette 4649, 29 June 1990. The definition of 'place of instruction' was amended with effect from 18 May 2007 replacing the word 'gymnasium', as I have indicated in paragraph 9 above.

[13] Le Grange J did not deal with the alleged nuisance but based his judgment on the applicable zoning regulations. First, he noted that it was common cause that at the time the 1990 regulations came into force and replaced the 1964 regulations the school's property enjoyed general residential zoning rights. The 1990 regulations could not detract from those rights. When the 1964 regulations were replaced in 1990, any further rights accruing to a landowner could only have accrued in terms of the 1990 regulations. It followed, he said, that after the amendment in 2007 the right to use the property as a gymnasium continued (it being an accrued right (s 7(1) of LUPO)). In addition, by virtue of the 2007 amendment, the property could also be used as a 'place of instruction' in sport. It was common cause that the Council did not at any time consent to the use of the school's property as a place of instruction in sport. However, the use of its property for the purpose of a school was lawful consent use to which the City had tacitly consented.

[14] Le Grange J found that the appellant's use of the property did not amount to instruction in sport but rather to participation and spectating by the public in sport. The operation of both the five-a-side soccer enterprise and the market amounted to use of the property for commercial purposes.

'Objectively viewed, these facilities, whatever the noble purpose between the School and the relevant Respondents that prompted their development, can never be regarded as a place of instruction in sport where the primary purpose of the activity is instruction. The primary activity is for commercial purposes where there is participation and spectating by the public.'

I agree with this.

[15] In this court it was argued on behalf of the appellant that the school, having acquired and exercised a right to operate as such before 1990, could not be required to seek consent from the City to continue to operate as a school. The right of the school to use the property as a school included all school related activities including instruction in sport. The school could also use the property as a place of instruction as a permitted use (in terms of the 1964 Revised Final Statement). It was accordingly submitted that the school had the right to use its property for any of the purposes reflected in the definition of a place of instruction from time to time.

[16] In addition, it was argued that in determining whether use of the property constitutes a breach of the scheme regulations regard must be had to the use of the buildings itself and the nature of the activities conducted there, rather than to the use by a particular person or persons. In this regard it was emphasised that the court below erred in considering the activities of the appellant and not the overall activities carried out at the centre and determined by its primary purpose. The court, therefore, wrongly determined the primary purpose of the appellant's activities by relying on the lease agreement and the fact that the corporate league was the primary revenue generator of the centre.

[17] These contentions are difficult to follow. The essential question is whether the appellant's use of the property for its five-a-side soccer centre is permitted in terms of the property's zoning. The property is zoned general residential and this zoning does not allow for its use for the purposes of the appellant's business. The injunction in s 39 of LUPO not to contravene and to comply with the zoning regulations binds

everyone, including the appellant. The school's historical use of the property as a school does not assist the appellant: the right to use the property as a school accrued to the school itself. Nor does the appellant's use of the property fall within the definition of a 'place of instruction'. Even if consent for this use had been obtained the primary purpose of the centre's activity is not instruction in sport but participation in and spectating by the public. The appellant's five-a-side soccer enterprise is a commercial activity the primary purpose of which is not instruction in sport.

[18] Nor do the zoning rights accruing to the property under the 1964 regulations assist the appellant. These rights included the right to use the land as a 'school' as a permitted use. In May 1985 the right to use the property as a place of instruction was altered to require the council's consent. The 1990 regulations replaced the 1964 regulations. In these circumstances the only right that 'accrued' to the school was the right to use the property as a 'school' without the council's consent being necessary. This right survived the repeal of the 1964 regulations and their replacement by the 1990 regulations. The 1990 regulations after their amendment in 2007 provided for the use of the property as a place of instruction in sport as a consent use. Such consent use is based on the 1990 regulations and was never a right that accrued under the 1964 regulations. The school never obtained the consent of the council to use the property as a place of instruction in sport. The only right it enjoyed was to use the property as a 'school'.

[19] However, it was contended by the appellant that to determine whether a contravention of the zoning regulations had taken place one had to have regard to the overall activities carried out at the facility and not to a particular user in question. As counsel for the respondents demonstrated, this contention is flawed: for example, the use of a house on property zoned single residential for two hours per day to run a bar and restaurant cannot be lawful. It follows that the use of school property for a few hours a day to run a restaurant or a five-a-side soccer enterprise cannot be made lawful by the use of the property as a school during school hours.

[20] The appellant also invoked s 20(2) of the South African Schools Act 84 of 1996 which permits the governing body of a school to allow the reasonable use of the school facilities for community, social and fund-raising purposes. This argument

was correctly rejected by the court below. The section does not release a school from compliance with other laws (*Die Ferdinand Postma Hoërskool v Die Stadsraad van Potchefstroom & others* [1999] 3 All SA 623 (T) at 634-5).

[21] The court below suspended the operation of its order for a period of 90 days to ameliorate the disruption an interdict would cause. In its heads of argument the appellant seeks a further suspension by order of this court to allow for an application for rezoning of the property. No case had been made out in the appellant's papers for any suspension and certainly not for a further suspension by this court. There is no indication that the tenth respondent, the owner of the property, intends bringing a rezoning application. On the contrary, as I have pointed out, the tenth respondent indicated that if he was compelled to apply for rezoning he would only do so to the extent necessary to permit educational and related school activities. The tenth respondent cannot be compelled to apply for rezoning. Nor can the outcome of such application be predicted with any confidence. Suspending any order would merely prolong the appellant's illegal conduct. Le Grange J resolved to make the order of suspension because of what he regarded as the 'inexcusable delay' in launching the application. He also referred to the advantages accruing to the school and to the fact that some members of the public supported the establishment of the centre and revamping of the tennis courts. As I will show, there was no undue delay in launching the application. Nor can the fact that some members of the public support the centre provide a justification for the continuation of an illegal state of affairs. Le Grange J exercised his discretion to suspend his order for the wrong reasons where there were indeed no facts justifying a suspension. The suspension should be set aside and, a fortiori, the request for a further suspension declined.

[22] The court below ordered that, in view of what it regarded as an unreasonable or inexcusable delay in launching the application, each party should pay its own costs. The application was launched on an urgent basis on 15 December 2010 and set down for hearing on 27 January 2011 when it was postponed by agreement to 23 March 2011. Constructing the soccer pitches commenced in March 2010 and the applicants were aware in June 2010 that the school grounds were being upgraded. They were also aware in June 2010 that corporate league soccer matches were played at the centre. On 17 July 2010 a function which was described as 'most disruptive' was held. Liquor was sold during August 2010 and the market introduced

in December 2010. Because the applicants had known since June 2010 that games were played on the pitches they should, the court found, have investigated the matter and taken action much sooner. Because of their failure to explain why activities they had known of since June 2010 became urgent in December 2010 the court deprived the applicants of their costs.

[23] Although a court will seldom interfere on appeal with the costs order of the court below interference in this matter is required. The City initially took the lead in enforcing the scheme regulations by serving two notices on the appellant on 7 October 2010 and 5 November 2010. Before then the applicants had to ascertain the identity of the appellant, who owned the property, the relevant zoning provisions and the different legal interests of the various organs of state. The appellant launched an urgent application on 1 November 2010 and the applicants took steps to intervene. The appellant's attorneys informed the applicants on 23 November 2010 that the appellant was no longer pursuing the urgent application. No prejudice was suffered by the appellant during the time of the delay. The court should have made a costs order in favour of the successful party.

[24] In the result the following order is made:

1 The appeal is dismissed with costs;

2 The cross-appeal is upheld with costs;

3 The order of the court below is replaced by the following:

> '(a) It is declared that the first respondent's operation of the Gianluca Vialli soccer centre and the fourth respondent's conducting of a craft market on erven 718 and 1445 Sea Point East are unlawful.
>
> (b) The first and fourth respondents are ordered to cease performing the said activities forthwith.

(c) The first and fourth respondents are ordered jointly and severally to pay the applicants' costs including the cost of two counsel and the qualifying fees of Mr T B Brümmer.'

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F R MALAN
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	BK Pincus SC and IC Bremridge
	Instructed by: Biccari Bollo Mariano Inc Cape Town
	Van der Merwe & Sorour Bloemfontein
For 1st, 2nd & 3rd Respondents:	SP Rosenberg SC
	Instructed by: Minde Shapiro & Smith Bellville Cape Town C/o Gerald Shnaps Attorneys Cape Town
	Symington & De Kok Bloemfontein