410 Voortrekker Road Property Holdings CC v Minister of Home Affairs and Others
2010 (8) BCLR 785 (WCC)

Division:	Western Cape High Court, Cape Town
Date:	03/05/2010
Case No:	**26841/09**
Before:	AG Binns-Ward, Judge

Interdict *– suspension – court's discretion – situation where interdicted conduct amounting to a criminal offence – Court not divested thereby of discretion to suspend the operation of the interdict temporarily – discussed in context of suspension of an interdict granted against government parties in breach of zoning laws and land use restrictions – government parties using premises in question as refugee reception centre – government parties obliged to establish refugee reception centres – Court suspending operation of the interdict so as to afford respondents an opportunity to take steps to redress the unlawfulness that gave rise to the interdict, either by an orderly relocation, or by obtaining an appropriate amendment of the currently applicable land use restrictions.*

Editor's Summary

Section 8 of the Refugees Act 130 of 1998 provides for the establishment of Refugee Reception Offices. The Director-General of the Department of Home Affairs may establish as many Refugee Reception Offices in the RSA as he or she, after consultation with a Standing Committee for Refugee Affairs (established by section 9 of the Act) regards as necessary for the purposes of the Act. The purpose of the Act is to give effect to certain international legal instruments to which the RSA has acceded and which oblige it to receive and treat in the territory of the RSA refugees in accordance with the standards and principles established in international law. The Act is intended to provide for the reception into the RSA of asylum seekers, to regulate applications for and recognition of refugee status.

Applicant was the owner of a property in Maitland, Cape Town, adjacent to premises to which the Department of Home Affairs relocated a refugee reception office. First Respondent was the Minister of Home Affairs; Second Respondent was the Director-General of the Department. Third Respondent the Minister of Public Works; Fourth Respondent was the City of Cape Town cited in its role as the local authority responsible in terms of section 39 of the Land Use Planning Ordinance 15 of 1985 ("LUPO") for the enforcement of the applicable zoning scheme regulations in Maitland. First and Second Respondent opposed the application. Third and Fourth Respondents abided the decision of the court.

Applicant sought orders declaring that the establishment and operation of the Refugee Reception Centre ("the Centre") by the Department at this location was unlawful on the grounds that It contravened the permissible land uses of the properties (and in particular erven 24151, 24165 and part of erf 24129) in terms of LUPO, that it constituted a common law nuisance; and that it constituted an infringement of the constitutional rights of Applicant, its employees, invitees and tenants to equality, dignity, freedom of movement, freedom of trade and security of person. It also sought order reviewing and correcting and setting aside the decisions of Second Respondent, made at some time before 12

October 2009, to establish the Centre on the properties, the decisions of Second Respondent, the Department and the Department of Public Works to lease the properties from their owners or beneficial occupiers, and the decisions of Second Respondent and the Department to allow the continued unlawful operation of the Centre after 12 October 2009. It also sought an order directing First Respondent, Second Respondent, and/or the Department to cease the activities of the Centre at that location and to remove it from the premises within one month of the order.

Applicant also argued that the opening of the office at the Maitland address was *ultra vires* because it had not occurred pursuant to a decision by the Director-General of the Department. This, Applicant contended, was a requirement of section 8 of the Refugees Act.

The relocation of the Cape Town refugee reception office to the premises in question constituted administrative action within the meaning of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). Procedurally fair administrative action generally includes the right to notice of the proposed administrative action to those liable to be affected and the affording of a reasonable opportunity to them to make representations. The entitlement to procedural fairness arises from section 3(1) of PAJA, which provides that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. Applicant's complaint that it was not consulted could arise for consideration only if the administrative action in question materially and adversely affected its rights or legitimate expectations. The Court observed that the only affected rights that Applicant identified in its papers were the right to require that

land in the vicinity of its property should be used only for purposes permitted in terms of the applicable town planning and land use laws and the right against the use of neighbouring property for a purpose that gives rise to nuisance.

The Court observed that the reference to "administrative action" in section 3(1) of PAJA denotes administrative action that is, or would be substantively lawful. If the purported administrative action in question happened to be substantively unlawful, that unlawfulness, by itself, would afford the direct and more absolute basis for an adversely affected party to impugn it. Any procedural flaws would be irrelevant. Therefore, if the land were being used for the purposes of a refugee reception office in breach of the applicable zoning scheme regulations, the failure by First and Second Respondents to consult with the Applicant had no legal import. No amount of consultation could avoid the consequences of the unlawful user and Applicant would in any event be entitled to an interdict prohibiting the unlawful conduct involved.

The Department had understood that its intended use of the properties would be lawful. The duty to give notice and afford an opportunity to make representations in respect of an intended lawful user of the land in question would arise only if it could reasonably be anticipated that the lawful user would nevertheless give rise to a nuisance, or some other cognisable adverse consequence which might reasonably be avoided by the availment of alternatives, or the attachment of safeguarding conditions. However, it remained necessary to determine whether there was a duty on the Department to invite representations notwithstanding the ostensibly lawful character of the intended user.

It remained necessary to determine this issue because First and Second Respondents had argued that if the conduct of the Centre at the Maitland premises gave rise to a cognisable nuisance (which they denied), then such nuisance was authorised by statute. The Court observed that that argument was a self-defeating undertaking because if the statute did, by its provision for the establishment of refugee reception offices, afford statutory authority for the creation of attendant nuisance, there would then have been a duty on Respondents to have complied with section 3(2) of PAJA unless a departure therefrom could be justified in terms of section 3(4).

In order to ascertain whether the Refugees Act provided statutory authority to create a nuisance in respect of the establishment of refugee reception offices, it was necessary to consider the provisions of the Act as a whole, as well as its purpose. The Court set out its

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reasons for finding that there was no merit in Respondents' reliance on statutory authority to create a nuisance.

There was nothing about the establishment of a refugee reception office in terms of section 8 of the Act on appropriately zoned land which, of itself, infringed third party rights. Accordingly, this could not be a basis conferring on Applicant a right to be given notice of the decision to locate the office on the premises in question or the opportunity to make representations.

As to the lawfulness of the use of the premises in question in terms of the zoning scheme regulations, a consideration of the evidence impelled the conclusion that Applicant's complaint about the unlawful use of the properties, in contravention of the applicable zoning scheme, was well made. It followed that Applicant was entitled to interdictory relief prohibiting the continued unlawful use of the properties by Respondents. If the current use of the properties cannot be regularised in terms of the applicable land use regulations, it was clear that the refugee reception office could not continue to operate at that location without causing an unacceptable nuisance to the owners and occupants of the surrounding properties, including Applicant. The use of the properties was therefore an integral feature of the operation of the refugee reception office. The question arose whether it was within the Court's power to suspend the operation of any interdict granted against Respondents so as to afford the latter the opportunity to take steps to redress the unlawfulness that gave rise to the interdict, either by an orderly relocation, or by obtaining an appropriate amendment of the currently applicable land use restrictions.

A refugee reception office in Cape Town was a facility demonstrably essential for the proper discharge of the RSA's obligations in terms of the Refugees Act. This fact militated in favour of granting a period of time for the Department to regularise the situation, either by finding alternative premises, or by bringing the operation of its current premises within the law. The repercussions that would ensue upon an immediate closure of the reception office upon the granting of an interdict would, apart from putting the RSA in breach of international obligations (with which it was obliged by section 231 of the Constitution to comply), also include the exposure of an indeterminate number of asylum seekers to arrest and possible deportation before their applications for asylum could be submitted. Thus, in this case the immediate operation of the interdict to address the unlawfulness of a given land use would give rise to the potential for a different type of unlawfulness, one bearing centrally on basic human rights. This made it necessary to examine the question of whether earlier holdings as to the ambit of the Court's power to suspend the commencement of the operation of an interdict were correct. Earlier authority on this point had been based on the consideration that the discretion of a court to suspend an interdict was excluded where the conduct in question appeared to make out the elements of a criminal offence. It appeared to the

Court that the distinction between the refusal of an interdict in a matter in which the impugned conduct on the face of it constituted a criminal offence and the suspension of an interdict in such a case might be material.

The Court pointed out that the granting of an interdict prohibiting unlawful conduct was entirely inconsistent with any notion of condoning the conduct. On the contrary, the grant of the interdict was an unambiguous condemnation of the unlawful conduct. A temporary suspension of operation of the interdict did not derogate from the condemnation implicit in its grant, nor, if the conduct in question rendered the interdicted party subject to criminal prosecution, did it absolve that party from prosecution. The decision whether or not to institute a prosecution was also a discretionary one. The discretion whether or not to institute a prosecution did not resort in the court, but fell to be exercised discretely by an independent prosecuting authority.

Bearing in mind that the determination of whether a prosecution should ensue (on the basis of the availability of evidence suggesting *prima facie* the commission of an offence) was a discretionary function to be exercised with due regard to the interests of

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justice, it appeared illogical and unsupportable in principle that a court should be constrained to follow an inflexibly *non-possumus* approach in respect of the suspension of the operation of the interdict simply because the conduct in question made out the elements of an offence, when no such constraints fettered the prosecuting authority.

The grant of a suspension of an interdict was not *per se* inimical to, or inconsistent with the rule of law.

Section 172(1) of the Constitution required that "when deciding a constitutional matter within its power, a court –

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including –

  (i) an order limiting the retrospective effect of the declaration of invalidity; and

  (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

The concept of "a constitutional matter" had been widely construed. What had given rise to the instant application was the manner in which the Department of Home Affairs was discharging its statutory obligations in respect of the provision of refugee reception offices. The identified infringement of the zoning scheme regulations has occurred in the context of the Department's discharge of that function. The Department was obliged to discharge its functions subject to the principle of legality. Its infringement of the applicable zoning scheme regulations was not only a contravention of section 39(2) of LUPO, but also constituted conduct in breach of the Department's constitutional obligation to exercise its powers and functions subject to and within the limits of the law. The purported discharge of its functions by operating a refugee reception office in a place where such operation was prohibited by statutory land use restrictions was unconstitutional and consequently invalid within the meaning of section 172(1) of the Constitution. The court is expressly empowered by section 172(1)(b) of the Constitution, consequent upon a finding that any conduct is inconsistent with the Constitution, to "make any order that is just and equitable." Any such order had to be directed at bringing the unlawful conduct to an end. However, there was nothing to suggest that the court's ability to effect that object should exclude the provision of an interval for the breach to be rectified in an orderly manner should considerations of practicality and fairness require that. The court had the power in terms of section 172(1)(b)(ii) to suspend any declaration of invalidity for any period and on any conditions to allow the competent authority to correct the defect.

Compliance with an order might require time. A court would not make an order that could not be complied with.

The question of the ability of a respondent to comply with the order, or the immediacy of an applicant's need for effective relief, are matters of degree. Immediate compliance might be possible in an absolute sense, but the consequences of an insistence thereon so unreasonable as to demonstrate effective unfeasibility. In other cases, the basis for an apprehension of harm justifying the grant of an interdict might be established, but the likelihood of its actual occurrence in the immediate term might be so small as to make it unreasonable not to delay the implementation of the interdict to give the respondent the opportunity to institute effective remedial measures to avoid the occurrence of the apprehended harm. The determination of the formulation of the relief to be granted must be discretionary to permit the court to appropriately address the requirements of reasonableness.

In the instant case, it was clear that it would be impractical and against the public interest to require Respondents to shut the doors of the refugee reception office immediately, and without an opportunity to

relocate in an orderly fashion.

Applicant was entitled to an interdict prohibiting the continued unlawful use of the premises by Respondents for the purpose of the operation of the refugee reception office.

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However, the relief to be granted would have to afford the Department the opportunity to remove the causes of complaint and thereby regularise the operation of the office at its current location.

The Court made an order declaring that the operation by the Department of Home Affairs of its Cape Town refugee reception office at the premises in question was unlawful by reason of the resultant infringement of the LUPO read with section 13 of the Legal Succession to the South African Transport Services Act 9 of 1989. First and Second Respondents were interdicted from continuing with the operation of the refugee reception office at those premises until and unless the applicable land use restrictions were amended so as to permit the lawful operation of the office at the premises. The operation of the interdict was suspended for a period of six months on certain conditions. An order was also made declaring that the current operation by the Department of Home Affairs of a refugee reception office at the premises had given rise to an actionable nuisance. First and Second Respondents were interdicted from continuing with the operation of the refugee reception office at the premises until certain specified measures were taken to abate the nuisance.

Judgment

Binns-Ward J:

[1] The influx of large numbers of political and economic refugees into this country during recent years is a well enough known phenomenon to render a description of it in this judgment unnecessary. As happens in such situations, it has given rise to peculiar social and economic problems within the host country. The issues connected with the phenomenon are neither unique, nor unprecedented, and in some respects they have international repercussions; which no doubt explains the existence of a range of international legal instruments to address these matters.

[2] The long title and preamble of the Refugees Act 130 of 1998 reflect the object of the statute as being to give effect within the Republic of South Africa to this country's obligations consequent upon its accession to the 1951 (United Nations) Convention Relating to the Status of Refugees, the 1967 (United Nations) Protocol Relating to the Status of Refugees and the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, "as well as other human rights instruments."1 An important consequence of the Act is that, subject to the qualifications set out therein, no person qualifying for asylum as a refugee may be refused entry to the Republic, or expelled, extradited or returned to any other country. An essential component of the effective administration of the Act is the provision of facilities to process the applications of the large numbers of people entering the country allegedly as refugees so as to be able to determine which of them, apparently a minority, properly qualify for asylum.2 The establishment of such facilities is provided for in terms of section 8 of the Act.

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[3] Section 8 of the Refugees Act provides:

> "8(1) The Director-General may establish as many Refugee Reception Offices in the Republic as he or she, after consultation with the Standing Committee, regards as necessary for the purposes of this Act.
>
> (2) Each Refugee Reception Office must consist of at least one Refugee Reception Officer and one Refugee Status Determination Officer who must –
>
> (a) be officers of the Department, designated by the Director-General for a term of office determined by the Director-General; and
>
> (b) have such qualifications, experience and knowledge of refugee matters as makes them capable of performing their functions.
>
> (3) The Director-General must, with the approval of the Standing Committee, ensure that each officer appointed under this section receives the additional training necessary to enable such officer to perform his or her functions properly."

[4] Seven refugee reception offices have been established in various centres throughout the Republic. One of these is in Cape Town. History shows that the location and equipping of the Cape Town refugee reception office have given rise to problems of their own. The relevant history has been narrated in a number of earlier judgments of this Court: see in particular *Kiliko and Others v Minister of Home Affairs and Others*

Ltd and Others v Minister of Home Affairs and Others [2009] ZAWCHC 100 (24 June 2009).3 In terms of the judgment given in the latter case, the Minister of Home Affairs (who is cited in her official capacity as the first respondent in the current matter, the Director-General of the Department being the second respondent) was interdicted from using certain premises at Airport Industria for the purposes of the refugee reception office established in Cape Town. The order made by the Court was premised on findings that the conduct of the refugee reception office at the given address was unlawful because it contravened the applicable zoning scheme regulations and, in addition, gave rise to an irremediable nuisance.

[5] The Department of Home Affairs was afforded a period of three months to relocate the refugee reception office; and the operation of interdict granted was suspended to permit this.4 The Department investigated a number of alternative sites for the office and ultimately settled on one in Maitland. The office opened for business at its current address on 12 October 2009. Its relocation to Maitland came as an unpleasant surprise to some of its immediate new neighbours. The owner of erf 24123, situate at 410 Voortrekker Road, Maitland, which is the applicant in this case – and, it would seem, several of its tenants – first learned of the relocation when they were confronted with some of the chaotic consequences

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attendant on the first week of operations of the reception office at the new address. Salient amongst these were traffic congestion and traffic-related lawlessness in Voortrekker Road immediately outside the applicant's premises, tightly packed lines of people queuing for admission to the office's premises blocking the entrance to the applicant's premises. The area was strewn with litter. There were other unsatisfactory consequences attendant on the presence of large crowds of asylum applicants without appropriate sanitation facilities in place to cope with the demands. In addition, a significant number of people, desperate for their applications to be attended to, took to sleeping on the pavement outside the applicant's property, with foreseeable adverse consequences for the condition of the neighbourhood. Some of the unwholesome consequences that attended the opening of the refugee reception office at the Maitland address are graphically depicted in a series of photographs annexed to the applicants' founding papers. From the data imprints reflected thereon, it would appear that most of these photographs were taken on 21 October 2009.

[6] The current application was launched on 22 December 2009. In terms of the notice of motion, orders are sought:

> "2. Declaring that the establishment and operation of the Refugee Reception Centre ('the Centre') by the Department of Home Affairs ('the Department'), situated at Voortrekker Road, Maitland on the properties known as erven 24125, 24129, 24151 and 24165, Cape Town ('the properties') is unlawful on the grounds that:
>
> 2.1 It contravenes the permissible land uses of the properties (and in particular erven 24151, 24165 and part of erf 24129) in terms of the *Land Use Planning Ordinance* 15 of 1985 and the Fourth Respondent's zoning scheme;
>
> 2.2 It constitutes a common-law nuisance; and
>
> 2.3 It constitutes an infringement of the constitutional rights of the Applicant, their employees, invitees and tenants to equality (section 9 of the Constitution [of the Republic of South Africa, 1996 – Ed]); dignity (section 10 of the Constitution); freedom of movement (section 12 of the Constitution); freedom of trade (section 22 of the Constitution) and security of person (section 23 of the Constitution).
>
> 3. Reviewing and correcting and setting aside:
>
> 3.1 The decisions of the Second Respondent, made at some time before 12 October 2009, to establish the Centre on the properties;
>
> 3.2 The decisions of the Second Respondent, the Department and the Department of Public Works to lease the properties from their owners or beneficial occupiers; and
>
> 3.3 The decisions of the Second Respondent and the Department to allow the continued unlawful operation of the Centre after 12 October 2009.
>
> 4. Directing the First Respondent, Second Respondent, and/or the Department to cease the activities of the refugee centre at the said address and to remove the said centre from the said premises within one month of any order of this Court."

[7] The relief sought was predicated on the following allegations in the founding papers:

(i) That the use of part of the premises of the refugee reception office infringed the applicable land use restrictions, determined in

terms of the City of Cape Town zoning scheme regulations, read with section 13 of the Legal Succession to the South African Transport Services Act 9 of 1989 (hereafter referred to as "the SATS Act").

(ii) That the decision to locate the office at the premises in Maitland infringed the applicant's right to fair and reasonable administrative action; in particular, because it had not been preceded by appropriate consultation.

(iii) That the conduct of the business of the office on the property gave rise to a legally cognisable private nuisance. 5

Arising from its assessment of the answering papers, the applicant also argued at the hearing that the opening of the office at the Maitland address was *ultra vires* because it had not occurred pursuant to a decision by the Director-General of the Department, which, so the applicant contended, was a requirement of section 8 of the Refugees Act.6

[8] Only the applicant and the first and second respondents actively participated in the litigation. The third respondent (the Minister of Public Works) initially indicated an intention to oppose the application, but subsequently decided to abide the decision of the court. The City of Cape Town, which was cited as the fourth respondent in its role as the local authority responsible in terms of section 39 of the Land Use Planning Ordinance 15 of 1985 ("LUPO") for the enforcement of the applicable zoning scheme regulations in Maitland, also abided the decision of the court.

[9] It is convenient to deal first with the issues of compliance by the Department with section 8 of the Act and the consequences of any lack of consultation by the Department with the applicant in regard to locating the office at the Maitland premises.

Compliance with section 8 of the Refugees Act

[10] The most relevant consideration in the making of any decision in terms of section 8 of the Act is the provision of the facilities necessary to fulfil the purposes of the Act. In this regard, it is significant that the Director-General is required to consult with the Standing Committee for Refugee Affairs established in terms of section 9 of the Act in respect of any decision to establish a refugee reception office. Regard may therefore be had to the powers and duties of the Standing Committee, which are set out in section 11 of the Act, for an indication of the level of considerations with which the Director-General must concern him/herself in making a decision in terms of section 8. It is evident that the Committee's role is to perform supervisory, regulatory, monitoring and advisory functions. Nothing in these functions suggests that the Standing Committee should interest itself in the precise, rather than the general, geographical location of any

office which it might consider the Director-General would be justified in establishing.

[11] A consideration of the Refugees Act as a whole does not support the contention that the Director-General was required to decide the precise location of any office established in terms of section 8 of the Act. In my view, the considerations to be weighed by the Director-General in deciding in terms of section 8 whether to establish an office lie at what might be called a macro-management level of decision-making. A decision by the Director-General in terms of section 8 to establish an office in any city or region of South Africa falls to be distinguished from the consequent micro-level management decisions as to the obtaining of premises to house the office at such place. The latter decisions follow upon an originating decision to establish the office. They are consequences of the decision to establish an office within the meaning of section 8. They are related to, but discrete from the antecedent establishment decision. The delegation by the Director-General of consequent micro-level management decisions to subordinate ranks of departmental management would be entirely consistent with the principles recorded in Part II of Chapter 1 of the Public Service Regulations. Those principles enjoin heads of department to facilitate the effective and efficient management of departments by means of appropriate delegations and authorisations to employees in the department.7

[12] Having regard to the basis for any decision by the Director-General to exercise the power invested in him by section 8 of the Refugees Act, it is evident that the considerations to which he/she would have regard in deciding whether the provision of a facility should be made would be the number of asylum seekers to be processed at any time and their geographic distribution within the Republic. The provision and training of the staffing resources required by the Act to operate any such office would also be material

on precisely where in a particular town or city in which it might be decided that an office should be established, its premises should be located. The latter consideration would be only incidental to any decision to establish an office and would not arise unless the antecedent decision had been made.8

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[13] It is evident from the history referred to earlier that a decision to establish a refugee reception office in Cape Town had been taken several years ago. In the intervening years the business of the office established in Cape Town has been conducted at a number of different addresses within the City's metropolitan area. It is also apparent that the Department of Public Works, rather than the Department of Home Affairs, was primarily responsible for the provision of land and buildings to house the activities of the Cape Town office at various of the places at which the office has from time to time operated.

[14] In the current matter, it is in any event clear that the Director-General played an active role in meetings with the local authority and other interested bodies in regard to the relocation of the office from Airport Industria to Maitland. It is therefore evident that in this particular case he was party to the decision as to where the office should be relocated. It does not follow, however, that he regarded the decision as one taken in terms of section 8 of the Act. Indeed the contention of the first and second respondents is that it was not. The contention is that the move to Maitland involved the relocation of an existing office; not the establishment of a new office. In my view, the contention is well-founded. The evidence is to the effect that the then Director-General of Home Affairs established five refugee reception offices throughout the country in terms of section 8(1) of the Act on 1 April 2000. The Cape Town office was one of these; and it has remained in existence ever since.

Lack of consultation

[15] Counsel for the applicant and for the first and second respondents were agreed that the relocation of the Cape Town refugee reception office from Airport Industria to premises in Maitland constituted administrative action within the meaning of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). PAJA, of course, is the legislation the enactment of which is enjoined in terms of section 33(3) of the Constitution to give effect to the fundamental right of everyone to administrative action that is lawful, reasonable and procedurally fair. I shall treat later, and separately, in connection with the land use issues, with the legality of the action in the substantive sense. It is convenient first to consider whether, even it is assumed that the relocation of the office to Maitland complied with applicable land use legislation and was therefore substantively lawful, the action was nevertheless vitiated by procedural flaws.

[16] Procedurally fair administrative action generally includes the right to notice of the proposed administrative action to those liable to be affected and the affording of a reasonable opportunity to them to make representations. The entitlement to procedural fairness arises from section 3(1) of PAJA, which provides:

> "Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair."

It follows from this provision that the applicant's complaint that it was not consulted can arise for consideration only if the administrative action

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in question materially and adversely affected its rights or legitimate expectations.9

[17] The only affected rights that the applicant identifies in its papers are the right to require that land in the vicinity of its property should be used only for purposes permitted in terms of the applicable town planning and land use laws and the right against the use of neighbouring property for a purpose that gives rise to nuisance.

[18] The reference to "administrative action" in section 3(1) of PAJA denotes administrative action that is, or would be substantively lawful. If the purported administrative action in question happens to be substantively unlawful, that unlawfulness, by itself, will afford the direct and more absolute basis for an adversely affected party to impugn it; any procedural flaws will be irrelevant. Therefore, if the land is being used for the purposes of a refugee reception office in breach of the applicable zoning scheme regulations, the failure by the first and second respondents to consult with the applicant has no legal import. No amount of consultation could avoid the consequences of the unlawful user and the applicant would in any event be entitled to an interdict prohibiting the unlawful conduct involved; see eg *BEF (Pty) Ltd v Cape Town Municipality and Others* 1983 (2) SA 387 (C) at 400–401 [also reported at [1983] 3 All SA 613 (C) – Ed] and *Esterhuyse v Jan Jooste Family Trust* 1998 (4) SA 241 (C) at 252C–I.

[19]

user of the land in question would arise in this case only if it could reasonably be anticipated that the lawful user would nevertheless give rise to a nuisance, or some other cognisable adverse consequence which might reasonably be avoided by the availment of alternatives, or the attachment of safeguarding conditions. In the *Diepsloot* case (*supra*),[10] for example, the choice of land for the settlement of the Zevenfontein squatters was lawful, but in the context of the availability of a number of alternative sites it would have been unfair, having regard to the obviously foreseeable adverse consequences of the establishment of the township on the value of neighbouring properties, to deny the affected neighbouring landowners the opportunity to make representations on the appropriateness of the selection of the particular site. It is not surprising therefore to find on the facts of that case surrounding owners were given an opportunity to make representations before the relevant decision was taken.

[20] In the current case, the Department understood that its intended use of the properties was lawful and did not give rise to cognisable adverse consequences to the applicant. In the context, however, of the contention, albeit advanced contingently and in the alternative, by the first and second

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respondents that their intended use of the property for a refugee reception office constituted a statutorily authorised nuisance it is necessary to determine that question in order to decide, should the alternative argument be correct, whether there was a duty on the Department to invite representations notwithstanding the ostensibly lawful character of the intended user.

[21] The facts of the *Diepsloot* judgment (*supra*) exemplify the operation of the principles of statutory nuisance. As pointed out by the Appellate Division at 349I (SALR) of the *Diepsloot* judgment:

> "It must … have been within the contemplation of the Legislature that the exercise by the Administrator of his powers … with regard to the settlement of homeless persons might result in interference with the common-law rights of third parties."

The exercise of the power was nevertheless lawful because:

> "[I]nherent in the grant of such powers is statutory authority for any such interference."[11]

[22] In the absence of any provision in the statutory authority in question particularising exactly where the interference in question is permitted (*cf Herrington v Johannesburg Municipality* 1909 TH 179 and *Tobiansky v Johannesburg Town Council* 1907 TS 134[12]), administrative justice would in general require that the power be exercised only after a process of consultation with those whose rights are liable to be materially and adversely affected thereby. (Statutory authority can never grant a licence to cause foreseeable harm to third parties that could, by the taking of appropriate measures, reasonably be avoided or mitigated; *cf Local Transitional Council of Delmas and Another v Boschoff* [2005] ZASCA 57; [2005] 4 All SA 175 (SCA) at paragraph 25.)

[23] As mentioned, in the current matter counsel for the first and second respondents submitted that if the conduct of the refugee reception office at the Maitland premises gave rise to a cognisable nuisance (which was denied), then such nuisance was authorised by statute. The argument was a self-defeating undertaking because it follows on what has been stated above that if the statute does, by its provision for the establishment of refugee reception offices, afford statutory authority for the creation of attendant nuisance, there would then have been a duty on the respondents to have complied with section 3(2) of PAJA,[13] unless a departure therefrom could be justified in terms of section 3(4).[14]

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[24] In the context of the contingent defence of statutory authority advanced by the respondents, the relevant enquiry was described as follows by Innes CJ in *Johannesburg Municipality v African Realty Trust Ltd* 1927 AD 163 at 171–2:

> "Whenever the exercise of statutory powers is alleged to have resulted in injury to another the enquiry must always be – what was the intention of the Legislature? Did it intend that immunity from consequences should accompany the grant of authority, or did it intend that the authority should either not be exercised at all to the legal prejudice of others, or that if so exercised there should be an accompanying liability to make good any consequential damage?"

[25] In order to ascertain whether the Refugees Act provides statutory authority to create a nuisance in respect of the establishment of refugee reception offices, it is necessary to consider the provisions of the Act as a whole, as well as its purpose. The exercise is one of construction. In undertaking it I find nothing in the Act that expressly or impliedly authorises the exercise of the power to establish refugee reception offices in any manner or any locality so as to impose adversely on the rights of third persons. Nothing in the nature

neighbouring properties should be exceptionally affected thereby. There is nothing in the Act to suggest that the operation of refugee reception offices should in relevant respects be any different from that of many other government offices, such as, for example, those responsible for the issue of passports and identity documents, or the payment of pensions and allowances. On the contrary, the establishment of refugee reception offices in terms of section 8 of the Act falls to be contrasted with the provisions of section 35 of the Act, which appear to be directed at regulating the exceptional reception of refugees in the event of a mass influx. It is not necessary to make a finding, but it seems to me that whereas the designation by the Minister of centres for the temporary reception and accommodation of refugees in terms of section 35 might arguably give rise to a situation of statutory authority akin to that found to exist in the *Diepsloot* judgment (*supra*), the provisions of section 8, which authorise the establishment by the Director-General of refugee reception offices in the ordinary course, do not.15

[26] If the management of a refugee reception centre is undertaken reasonably in an appropriately zoned locality it should not give rise to an unreasonable

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interference with the rights of neighbours. In the current matter it is conceded by the applicant that the erf on which the reception office is substantially housed (erf 24129), and which is zoned General Commercial 2 in terms of the City of Cape Town zoning scheme regulations, is appropriately zoned for the land uses entailed in the operation of the facility. (To the extent that erf 24129 might be subject to a "split zoning", I do not think that the zoning of the part which would not be General Commercial 2 has been established. For present purposes I have, therefore, treated the entire erf as zoned General Commercial 2. As will be apparent even if I am wrong in this regard, the result of the application is not affected thereby.) The applicant's allegation of an infringement of applicable land use restrictions pertains only to erven 24165 and 24151, which accommodate a parking lot, drop-off area, outside lavatories (so-called "portaloos") and a shed used as a waiting and sorting area from which asylum applicants are directed into the main building on the adjoining erf 24129. (It seems that what the applicant described as erf 24151 actually includes a small area in fact separately designated as erf 24150.)

[27] In my judgment, there is no merit in the respondents' contingent reliance on statutory authority to create a nuisance. Rogers AJ's *obiter* remarks in the *Intercape Ferreira* case (*supra*) at paragraph [146], suggest that he too was, at least *prima facie*, of the same opinion.16 In *Intercape Ferreira*, the question of nuisance was approached by the court "in the ordinary way". As a consequence of the finding made on the issue of statutory authority, the same approach will be adopted in the current matter. (Inherent in these findings is a rejection of the argument by the applicant's counsel that legally cognisable adverse consequences on the neighbours of the operation of any refugee reception office are unavoidable and foreseeable. Indeed, it was impossible to reconcile that argument with the applicant's equally strongly advanced contention that nothing in the Refugees Act licensed the creation of a nuisance.)

[28] In the context of the finding that there is nothing about the establishment of a refugee reception office in terms of section 8 of the Act on appropriately zoned land which, of itself, infringes third party rights, the applicant has not persuaded me that it enjoyed a right to be given notice of the decision to locate the office on the Maitland property or the opportunity to make representations.

The lawfulness of the use of the Maitland premises in terms of the zoning scheme regulations

[29] As mentioned, apart from an access driveway running over part of erf 24125, the refugee reception office in Maitland occupies three erven: erf 24129, which is zoned Commercial 2, and erven 24165 and 24151 (including erf 24150) in respect of which the applicable land use restrictions in terms of the zoning scheme are a matter of dispute between the parties.

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The uses to which erven 24165 and 24151 are put have already been described.17 Erven 24165 and 24151(including erf 24150) are the property of the Passenger Rail Agency of South Africa, which is the current name of the Corporation – previously known as the South African Rail Commuter Corporation – established in terms of section 22 of the SATS Act. I shall hereafter refer to these erven as "the railway properties."

[30] It is common ground between the parties that the land use rights applicable to the railway properties are determined with reference to section 13 of the SATS Act.18 Section 13 of the SATS Act is a somewhat complicated provision, an understanding of which has not been assisted by its history of amendment and substitution. Its object, as its current heading suggests, has always been the integration of land owned by

[31] The provision, as originally enacted, was amended in a respect not currently relevant in terms of section 69(1) of the General Law Third Amendment Act 129 of 1993. The Amendment Act came into effect in September 1993, but the relevant amending provision was deemed to have been in effect from 1 April 1990, the date upon which the relevant parts of the SATS Act itself had come into operation. In terms of section 1 of the Legal Succession to the South African Transport Services Amendment Act 43 of 1995, the provisions of section 13 of the SATS Act, as they then were, were substituted by an entirely reformulated provision. The substitution took effect on 23 September 1995 (with retrospective effect in material respects from 1 April 1995).

[32] Prior to its substitution in 1995, section 13 provided:

> "Section 13 – Property Development
>
> (1) Subject to the provisions of subsection (2), the Company19 shall be entitled, up to a date five years after the date referred to in section 3(1), to develop, to cause to be developed, to use and to let its immovable property for any purpose, including the construction and exploitation of buildings and structures for commercial purposes, notwithstanding the fact that the immovable property concerned is either not zoned or is zoned or intended for other purposes in terms of an applicable township construction or development scheme, guide plan or statutory provision.
>
> (2) Immovable property may be developed in terms of subsection (1) only –
>
> (a) after an agreement has been reached with the local authority concerned; or
>
> (b) should such agreement not be reached, in terms of permission granted by the Administrator of the province concerned subject to such conditions as he may consider appropriate; or
>
> (c) should the development be in conflict with an approved guide plan, with the approval of the Administrator referred to in section 6A (12) of the Physical Planning Act [88 of] 1967.

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> (3) The local authority –
>
> (a) with which an agreement is reached in terms of subsection (2) or with which an agreement was reached in terms of section 9 (26) of the South African Transport Services Act [65 of] 1981, prior to the operative date of this Act; or
>
> (b) which exercises jurisdiction over property in respect of which permission or approval is obtained in terms of subsection (2) from the Administrator concerned,
>
> shall record, in connection with the use of the immovable property agreed upon or in respect of which permission or approval is obtained in terms of subsection (2), a suitable zoning for such immovable property, whereafter such zoning shall be regarded as the zoning of the property for all purposes."

[33] After the aforementioned legislative substitution, section 13 provided (insofar as currently relevant):

> "Section 13 Integration of Company's land into conventional land use control systems
>
> (1) In this section –
>
> (a) 'ancillary uses' means the use of land, a building or a structure which is ancillary to the transport uses of such land, building or structure, or which is directly related to or incidental to serving the interests of the commuting public, including the use of such land, building or structure for offices, shops and recreational, business and residential purposes;
>
> (b) 'competent authority' means any person or body administering a zoning scheme in terms of any law;
>
> (c) 'effective date' means 1 April 1995;
>
> (d) 'existing use' means the actual use of land owned by the Company as at the effective date;
>
> (e) 'other zone' means any land use zone in terms of a zoning scheme within the operation of which the land in question is situated, and which is not a land use zone permitting specifically transport uses or ancillary uses;
>
> (f) 'transport uses' means the use of land, a building or a structure for the operation of a public service for the transportation of goods (including liquids and gases) or passengers, as the case may be, by rail, air, road, sea or pipeline, including the use of such land, building or structure as a harbour, communication network, warehouse, container park, workshop, office or for the purposes of security services connected with the aforegoing;
>
> (g) 'zoning scheme' means any town planning or zoning scheme administered by a competent authority relating to the zoning or reservation of land into areas or zones to be used exclusively or mainly for residential, business, industrial, local authority, governmental or any other purposes.

(2) As from the effective date, all land owned by the Company and shown on maps of a competent authority or otherwise described in terms of a zoning scheme –

(a) as land used generally for transport or railway or harbour or pipeline purposes or related activities, but which is not so shown or described as being part of any other zone, shall be deemed to have been zoned for transport uses in terms of such zoning scheme as of right and without having to obtain the consent of any competent authority;

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(b) as being part of any other zone, shall be used in accordance with the uses which are permitted in respect thereof and be deemed to have been zoned also for transport uses in terms of such zoning scheme as of right and without having to obtain the consent of any competent authority.

(3) As from 12 months after the effective date, the land referred to in subsection (2) shall also be deemed to have been zoned for ancillary uses in terms of the zoning scheme in question as of right and without having to obtain the consent of the competent authority in question.

(4) (a) Any competent authority contemplated in subsection (2) shall –

(i) with effect from the effective date, be deemed to also have consented in terms of an applicable zoning scheme to existing uses if the existing uses at that date exceed the ambit of uses permitted in terms of subsection (2); and

(ii) with effect from 12 months after the effective date, be deemed to also have consented in terms of an applicable zoning scheme to existing uses if the existing uses at that date exceed the ambit of uses permitted in terms of subsections (2) and (3).

(b) The onus of proving existing uses shall be on the Company.

(c) The competent authority in question shall classify any proven existing uses in terms of the land use zones provided for in terms of the applicable zoning scheme and the classification shall be deemed to be a zoning of the land for all purposes.

(d) In addition to any such existing uses, any use which is not an existing use but which falls within the scope of uses permitted in relation to the relevant land use zone into which the existing use has been classified, shall also be permitted in relation to the land in question without further consent being required: Provided that any major expansion of an existing use in respect of the extent of the floor area or of the intensity of the existing use shall require the prior consent of the competent authority in question.

(5) (a) Subsections (2), (3) and (4) shall not apply to land owned by the Company in respect of which a local authority was, in terms of section 13(3) as it applied prior to the date of the commencement of the Legal Succession to the South African Transport Services Amendment Act, 1995, obliged to record a suitable zoning, and such local authority shall, to the extent that such recording was not yet effected as at that date, remain so obliged.

(b) Any recording effected pursuant to the said section 13(3) or paragraph (a) shall be deemed to be a zoning of such land for all purposes.

(6) …

(7) …"

[34] The first and second respondents adduced evidence by a commercial and industrial property broker who has been familiar with the area in which the railways properties are situate for more than 20 years. On the basis of this evidence, it may be accepted that the railway properties have been leased and used as private parking lots for at least 15 years. The shed on one of the properties that is currently used as a waiting and sorting area by the refugee reception office would appear to have been used at some

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undetermined time as a workshop and office by a trucking company, which sublet the property.

[35] With reference to the historic use of the railway properties just described, the respondents' counsel submitted that "commercial use rights" for zoning purposes had accrued in terms of section 13 of the SATS Act, as the provision read before its substitution in 1995. Counsel further submitted that the historic use of the property gave rise to use rights as "existing uses" within the meaning of section 13(4) of the provision as substituted. The applicant's counsel contended on the other hand that the use rights in question would have become integrated in the properties' land use restrictions in terms of the applicable zoning scheme only if there had been an agreement between the South African Rail Commuter Corporation and the City of the nature contemplated in terms of section 13(2) of the SATS Act, as it read prior to substitution. The

between the Commuter Corporation and the City, the applicable land use restrictions were "transport uses" and "ancillary uses" as defined in the substituted section 13(1).

[36] The effect of the initially applicable version of section 13 of the SATS Act was that the zoning of affected land fell to be determined by agreement with the local authority, subject to the overriding say of the Administrator in the event that such agreement could not be reached. The substituted section 13 conserves the effect of any agreement reached under the initially created regime; see section 13(5). The zoning of land in respect of which an agreement in terms of the initially applicable version of section 13 had not been concluded falls to be determined in terms of section 13(2)–(4) of the currently applicable version of section 13 of the SATS Act. The result is that the railways properties are zoned for "transport uses" and "ancillary uses", as defined in section 13(1) of the SATS Act in its current form, and that they may, to the extent justified by the facts, in addition be used for "existing use", as defined in section 13(1)(e).

[37] The evidence establishes as a matter of probability that the railway properties were being used for parking lot and related purposes as at 1 April 1995 (being the "effective date" as defined in the substituted section 13(1)). Accordingly, their use for those purposes by the Department of Home Affairs is authorised as an "existing use" by the provisions of section 13(4)(a) of the SATS Act. That conclusion does not hold true, however, for the use of the shed as a waiting room-cum-sorting area; nor does it permit the use of the properties as a holding area for persons queuing to obtain entry to the shed. It also does not permit the use of the properties to provide toilet facilities to persons waiting for attention in the refugee reception office.

[38] The notion that the fact the owner of the railways properties used them "commercially" by leasing them to be put to the various historic uses described earlier does not give rise to a use right to lease the property for any use (as I understood the respondents' counsel to contend). The expression "existing use" in section 13(4) has a narrow connotation; namely one relating to actual physical use. The evidence does not establish

whether part of the shed was being used as an office as at 1 April 1995. It is therefore not necessary to decide whether, if it did, that would permit the use of the structure for the purpose to which the Department is putting it today.

[39] It remains to be considered whether the use of the shed qualifies as an "ancillary use" as defined in section 13(1) of the SATS Act, as also contended by the respondents' counsel. In this connection counsel stressed what she submitted was the open-ended effect of the phrase "including the use of such land, building or structure for offices, shops and recreational, business and residential purposes" (the word "including" is underlined to convey the non-exclusive connotation of the participle emphasised in the argument). The phrase is nevertheless limited by its context. The context has the effect of confining "ancillary uses" to a broad category of uses "directly related to or incidental to serving the interests of the commuting public." The "commuting public" is itself a concept that if it were not construed contextually could embrace almost the entire public, or at least that part of it which travels regularly from home to work. It would not however be consistent with either the basic tenets of statutory construction, or the apparent object of the provision to construe the term in that way. In respect of land owned by the South African Railway Commuter Corporation, the term must be confined to that portion of the public that habitually or regularly uses the railway network for commuting purposes. In this regard, it perhaps bears mentioning that the verb "commute" denotes "to travel some distance between one's home and place of work on a regular basis."[20]

[40] A wide variety of uses can readily be conceived that would qualify as directly related to or incidental to serving the interests of that part of the general public. It is obvious, however, that a refugee reception office is not one of them. That is not the sort of facility that any member of the public will ordinarily use as an incidence of his/her regular journey to and from work. The persons attending on the refugee reception office, if they use the railway network (or indeed any other mode of transport) to travel there, will in the vast majority of cases be embarked on a special journey for a narrowly dedicated purpose. On the evidence, it would be a journey that, if they are efficiently attended to, they should not have to undertake on more than a few occasions, with intervals between each trip of several months.

[41] In the result, the applicant's complaint about the unlawful use of the railways properties, in contravention of the applicable zoning scheme, is well made. It follows that the applicant is entitled to interdictory relief prohibiting the continued unlawful use of the railway properties by the respondents.

[42] It is apparent that the use of the railways properties for the purposes to which they are being put is essential to the operation of the refugee reception office in a manner that would seek to avert the

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the operation of the office at the premises formerly occupied by it at Airport Industria. Indeed it is evident that the Maitland premises were carefully selected by the Department with a view to avoiding the critical shortcomings of the previous address. In this respect, the railway properties afforded off-road space where a large number of vehicles could be parked, and in which taxi drop-offs could be accommodated. They also afforded off-road space where persons queuing for admission to the office could stand without interfering with ingress to neighbouring properties. If the current use of the railways properties cannot be regularised in terms of the applicable land-use regulations, it is clear that the refugee reception office cannot continue to operate at the current address without causing an unacceptable nuisance to the owners and occupants of the surrounding properties, including the applicant. The use of the railways properties is therefore an integral feature of the operation of the refugee reception office.

The court's power to suspend the operation of an interdict

[43] Counsel on both sides appeared to accept that it was within the court's power to suspend the operation of any interdict granted against the respondents so as to afford the latter the opportunity to take steps to redress the unlawfulness that gave rise to the interdict; either by an orderly relocation, or by obtaining an appropriate amendment of the currently applicable land-use restrictions (see *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C) at paragraphs [40]–[46] [also reported at [2007] 4 All SA 1162 (C) – Ed], *Intercape Ferreira* at paragraph [184] and *Bitou Local Municipality v Timber Two Processors CC and Another* 2009 (5) SA 618 (C) at paragraph [31] [also reported at [2008] JOL 22630 (C) – Ed]). In the latter case, however, Fourie J held (at paragraph [32]) that:

> "in the event of a court finding that a respondent is guilty of criminal conduct, … no discretion exists (except possibly where the contravention may be regarded as *de minimis*) to suspend the operation of a final interdict prohibiting such conduct."21

The learned Judge proceeded:

> "I am in respectful agreement with the decisions in *United Technical Equipment Co (Pty) Ltd*22 … and *Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC*23…. As held by Harms J in the first-mentioned case, the suspension of an interdict in these circumstances would be tantamount to a court abrogating its duty as an enforcer of the law."24

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[44] The infringements involved in the current case cannot properly be regarded as *de minimis*. If the dictum of Fourie J in *Bitou* (*supra*) is a correct statement of the law then, because the use of land in contravention of the applicable zoning scheme regulations is a criminal offence (in terms of section 39(2) read with section 46(1)(a) of LUPO), I would, notwithstanding the provisions of Uniform Rule 45A,25 not have the power to suspend the operation of the interdict to which the applicant is entitled. Counsel's agreement that there should be such a suspension would not cure the incapacity.

[45] The judgment in *Bitou* which was reported some months after judgment was delivered in the *Intercape Ferreira* case (*supra*), does not appear to have been drawn to the attention of the learned Judge in the latter case. It will be recalled that in *Intercape Ferreira* the court, having found that the use of the land in issue in that matter was in contravention of LUPO, suspended the operation of the prohibitory interdict that followed for three months to enable the Department to make alternative arrangements for the housing of the refugee reception office. It is nevertheless evident that Rogers AJ was acutely conscious that the order suspending the interdict could be seen "as condoning the perpetuation of unlawful behaviour" and that he should therefore be circumspect in granting the indulgence. The learned Judge considered however that "in the very special circumstances of this case . . . a modest extension would be appropriate, not so much because the Department by its conduct has deserved an indulgence but in the interests of asylum seekers." He evidently accepted that the court was vested with the discretionary power to temper the effect of the interdict to meet the justice of the case despite the fact that the conduct in question was susceptible to sanction in criminal proceedings. If Fourie J's approach is sound in law, there can be no doubt that the court in *Intercape Ferreira* acted beyond its powers in suspending the operation of the interdict granted.

[46] Both sides in the current case accepted that in the context of any finding by this Court adverse to the respondents, the exigencies of the operation of a refugee reception office in Cape Town – a facility demonstrably essential for the proper discharge of the country's obligations in terms of the Refugees Act – enjoined the granting of a period of time for the Department to regularise the situation, either by finding alternative premises, or by bringing the operation of its current premises within the law. The

interdict would, apart from putting South Africa in breach of international obligations (with which it is obliged by section 231 of the Constitution to comply), also include the exposure of an indeterminate number of asylum seekers to arrest and possible deportation before their applications for asylum could be submitted. In this case the immediate operation of the interdict to address the unlawfulness of a given land use would give rise to the potential for a different

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type of unlawfulness, one bearing centrally on basic human rights. The facts in the *Bitou* case (*supra*) did not confront the judge with such a difficulty. It is therefore necessary to examine the question of whether the statement in *Bitou* concerning the ambit of the court's power to suspend the commencement of the operation of an interdict is correct.

[47] In *Bitou*, the court refused the respondent's request to suspend the prohibitory interdict granted to the applicant, so as to afford the respondent an opportunity to obtain a rezoning of its land to regularise the use thereof. There is no basis to criticise the result. 26 I find myself in respectful disagreement, however, with Fourie J's statement of the law to the effect that a discretion of a court to suspend an interdict is excluded where the conduct in question appears to make out the elements of a criminal offence. The learned Judge appears to have considered that the *United Technical Equipment* (*supra*) and *Nelson Mandela Metropolitan Municipality* (*supra*) judgments afforded authority for the proposition. That is not so. The relevant views expressed by the learned Judges27 in those cases that were philosophically supportive of Fourie J's approach were expressed *obiter*. Both cases were in fact decided on the basis of an assumption that a discretionary power to suspend the interdict indeed subsisted.

[48] The judgment in *Bitou* does acknowledge the existence of judgments going the other way: *CD of Birnam (Suburban) (Pty) Ltd and Others v Falcon Investments Ltd* 1973 (3) SA 838 (W) [also reported at [1973] 2 All SA 436 (W) – Ed]; *Huisamen and Others v Port Elizabeth Municipality* 1998 (1) SA 477 ([1997] 2 All SA 458) (E) were cited. Coincidentally, both of those judgments resulted in orders temporarily suspending the operation of interdicts granted to prohibit the use of land in contravention of the applicable zoning restrictions. In *Huisamen* (*supra*) which also concerned conduct constituting an offence in terms of section 39(2) read with section 46(1) of LUPO, Leach J (as he then was) referred to those provisions at 483I–484B. Despite mentioning that it was "debatable" whether a court had a discretion to *refuse* an interdict where the conduct in question would constitute an offence "unless the contravention may be said to be *de minimis*", the learned Judge (Kroon and Mpati JJ concurring) had no difficulty in suspending the interdict granted to enable the respondent "to make alternative arrangements." In *CD of Birnam* (*supra*) in which both sides were represented by senior counsel, the judgment suggests that extensive consideration must have been given to the legislation pertinent in the matter, and the ambit of the court's discretionary powers in regard to interdictory relief was identifiably a matter in issue in argument. Al-

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though the fact the conduct in issue was susceptible to penal sanction was not mentioned in the judgment, I consider it unlikely in the circumstances that the court would have been unaware of that consideration.

[49] It seems to me, with respect, that the distinction between the *refusal* of an interdict in a matter in which the impugned conduct on the face of it constitutes a criminal offence and the *suspension* of an interdict in such a case may be material. As I pointed out in *Laskey* (*supra*) at paragraph [45], the authority to which Harms J referred in the discussion in *United Technical Equipment* (*supra*) at 346–7 was more concerned with the mootness of the court's discretionary power to refuse a final interdict when an applicant had satisfied the requirements for such relief.28 On the question of the court's power to temporarily suspend the operation of such an interdict, even the dictum in the judgment in *Peri-Urban Areas Health Board v Sandhurst Gardens (Pty) Ltd* 1965 (1) SA 683 (T) [also reported at [1965] 2 All SA 211 (T) – Ed], referred to at 346J–347A of *United Technical Equipment*, was uttered relying on certain dicta of Broome J in *Ostrawiak v Pinetown Town Board* 1948 (3) SA 584 (D) at 590–591 [also reported at [1948] 3 All SA 74 (D) – Ed], which afforded no clear authority for the proposition that the commencement of the operation of an interdict may not be suspended where the conduct involved is susceptible to penal sanction. It was the peculiar facts of those matters, judged in the context of legal policy considerations, that in both the *Peri-Urban Areas Health Board* and the *Ostrawiak* cases (*supra*) evidently determined the decisions by the court not to accede to the request to suspend the commencement of the interdicts granted. In my respectful view it was perhaps not surprising therefore that in *United Technical Equipment* Harms J chose in the end to leave the question open.

[50] The granting of an interdict prohibiting unlawful conduct is entirely inconsistent with any notion of condoning the conduct. On the contrary, the grant of the interdict is an unambiguous condemnation of the

condemnation implicit in its grant, nor, if the conduct in question renders the interdicted party subject to criminal prosecution, does it absolve that party from prosecution. The decision whether or not to institute a prosecution is also a discretionary one (and it should not be overlooked for present purposes that the discretion in question does not resort in the court, but falls to be exercised discretely by an independent prosecuting authority).

[51] Section 179 of the Constitution provides for the determination by the National Director of Prosecutions, after consultation with the Directors of Public Prosecutions, and with the concurrence of the Cabinet member

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responsible for justice, of prosecution policy.[29] Paragraph 4(c) of the Prosecution Policy is instructive in the relevant respect.[30] It sets out:

> "There is no rule in law which states that all the provable cases brought to the attention of the Prosecuting Authority must be prosecuted. On the contrary, any such rule would be too harsh and impose an intolerable burden on the prosecutor and on a society interested in the fair administration of justice."

The paragraph continues by identifying a non-exhaustive list of factors to be considered in the determination whether a prosecution should be instituted. It is unnecessary to enumerate them here. Suffice it to say, that it is evident that in the ultimate analysis the determination of whether a prosecution should ensue on the basis of the availability of evidence suggesting *prima facie* the commission of an offence is a discretionary function to be exercised with due regard to the interests of justice. It seems illogical and unsupportable in principle that a court should be constrained to follow an inflexibly *non-possumus* approach in respect of the suspension of the operation of interdicts simply because the conduct in question makes out the elements of an offence, when no such constraints fetter the authority responsible for the indictment of criminal offenders. I am not aware of anything in the constitutional framework that would support the existence of such a legal paradox.

[52] The exclusion of discretionary power suggested in the *Bitou* judgment (*supra*) is certainly not reflected in the dispensations obtaining in England or Australia; especially in respect of injunctions granted for contraventions of land use regulation and planning laws. *Cf* eg *Wrexham County Borough Council v Berry* [2003] UKHL 26 [2003] 3 All ER 1 (HL) at paragraphs 27–29; *Warringah Shire Council v Sedevcic* (1987) 10 NSWLR 335 (*per* Kirby P, as he then was) and *NRMCA (Qld) Ltd v Andrew* (1993) 2 Qd R 706 (CA).[31] I mention this conscious of the material differences between the peculiar legal frameworks in effect in those jurisdictions in which orders suspending the commencement of injunctions have been granted[32] and that which is in place here. The point remains, however, that notwithstanding dicta in many cases in those jurisdictions which reflect a consciousness by the judges that the grant of any such dispensation must be weighed carefully in the balance with the need to enforce the law, rather than to appear to tolerate its infringement,[33] the grant

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of a suspension of an injunction is not considered, without more, or by itself, to be inimical to, or inconsistent with the rule of law.

[53] It was a concern going to the rule of law, and the duty of the courts to uphold it, that appears to have inspired the contrary approach in *Bitou* (*supra*). It is undeniably a relevant concern; and one that no doubt explains why in those cases in which interdicts have been suspended it is apparent that the decision has not been taken lightly or without careful deliberation. The supremacy of the Constitution and the rule of law are amongst the founding values of the democratic South Africa. In terms of section 165(2) of the Constitution the courts are bound to apply the Constitution and the law impartially and without fear or favour. This obligation is reflected in the oath or affirmation of office which judicial officers must make before beginning to perform their official functions.[34]

[54] It is apparent, however, from the text of the Constitution itself that nothing about these obligations unduly inhibits the capacity of the courts to administer the law practicably, fairly and justly in the interest of justice. Thus in terms of section 172(1) of the Constitution –

> (1) When deciding a constitutional matter within its power, a court –
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> (b) may make any order that is just and equitable, including-
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

[55] The concept of "a constitutional matter" has been widely construed. In the current case the issue that has given rise to this application is the manner in which the Department of Home Affairs is discharging its statutory obligations in respect of the provision of refugee reception offices within the Republic. The identified infringement of the zoning scheme regulations has occurred in the context of the Department's discharge of that function. The Department is obliged to discharge its functions subject to the principle of legality. Its infringement of the applicable zoning scheme regulations in the current case is not only a contravention of section 39(2) of LUPO, but also constitutes conduct in breach of the Department's constitutional obligation to exercise its powers and functions subject to and within the limits of the law. The purported discharge of its functions by operating a refugee reception office in a place where such operation is prohibited by the applicable statutory land use restrictions is unconstitutional and consequently invalid within the meaning of section 172(1) of the Constitution.[35] The court is expressly empowered by section 172(1)(b)

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of the Constitution, consequent upon a finding that any conduct is inconsistent with the Constitution, to "make any order that is just and equitable." Any such order must be directed at bringing the unlawful conduct to an end, but there is nothing to suggest that the court's ability to effect that object should exclude the provision of an interval for the breach to be rectified in an orderly manner should considerations of practicality and fairness so commend. On the contrary, the power granted to the court in terms of section 172(1)(b)(ii) to suspend any order declaration of invalidity for any period and on any conditions to allow the competent authority to correct the defect points the other way. Compare also the wide powers afforded the court in terms of section 8 of PAJA to make any order that is just equitable consequent on the judicial review of administrative action.

[56] If I am misdirected in characterising the issue as a constitutional matter within the meaning of section 172(1) of the Constitution, I consider that as the court is entitled in a constitutional matter to make any order that is just and equitable, including an order suspending the effect of a declaration of invalidity, then, *a fortiori*, it can do so when the legal implications are of a more general nature. In my view this must be so having regard to the Constitution's role as the supreme law in the legal order and to the fact that the validity of all law in this country depends on its consistency with the Constitution.

[57] Justice and equity enjoin regard to the particular characteristics of the case in the determination of appropriate relief. As Harms J observed in *United Technical Equipment* (*supra*) at 347, it is accepted on any approach that compliance with an order might require time; and a court will not make an order that cannot be complied with. In my view, trying to distinguish between a decision delaying the issue of an interdict because of practical considerations bearing on the degree of its immediate remedial necessity, as was done in the matter of *Rivas* v *The Premier (Transvaal) Diamond Mining Co Ltd* 1929 WLD 1, and deciding to suspend the commencement of the operation of an interdict because of the practical exigencies, as was done in *Intercape Ferreira* (*supra*) is to essay a distinction of principle where there is no difference.

[58] In many cases the questions of the ability of the respondent to comply with the order, or the immediacy of the applicant's need for effective relief will be ones of degree. Immediate compliance might be possible in an absolute sense, but the consequences of an insistence thereon so unreasonable as to demonstrate effective unfeasibility. In another case the basis for an apprehension of harm justifying the grant of an interdict might be established, but the likelihood of its actual occurrence in the immediate term might be so small as to make it unreasonable not to delay the implementation of the interdict to give the respondent the opportunity to institute effective remedial measures to avoid the occurrence of the apprehended harm. The determination of the formulation of the relief to be granted has to be discretionary to permit the court to appropriately address the requirements of reasonableness.

[59] In the current case it is manifest that it would be impractical and against the public interest to require the respondents to shut the doors of the

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refugee reception office immediately, and without an opportunity to relocate, if needs be, in an orderly fashion. Indeed it is apparent from the manner in which the applicant has framed its prayers for relief that it accepts that the immediate operation of the interdict it seeks would be unreasonable. The requirements of reasonableness in this respect fall to be determined with regard to all the relevant facts of the given case. On the facts of the current matter it might be that if there is a realistic prospect that the current unlawful use of the property might be regularised, it would be reasonable to afford the respondents an

opportunity to put matters in order. That consideration must, of course, be weighed with other features of the case that bear on any decision to delay the operation of the interdict. Regard must also be had to alleged nuisance factors about which the applicant complains. If the nuisance complaints are established and it appears that they cannot be effectively abated, which was the finding in *Intercape Ferreira* (*supra*), that must have a bearing on the decision as to whether the operation of the interdict should be suspended, and, if so, for how long and on what terms. I turn then to deal with the issue of nuisance.

Nuisance

[60] In *Allaclas Investments (Pty) Ltd and Another v Milnerton Golf Club and Others* 2008 (3) SA 134 (SCA) at paragraph [15] [also reported [2008] 2 All SA 1 (SCA) – Ed], Farlam JA rendered an English translation of two passages from Steyn CJ's judgment in *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) at 106H–107B and 107E–G [also reported at [1963] 1 All SA 203 (A) – Ed], which seem to me, with respect, to distil to its essence the law of private nuisance in South Africa. They go as follows in translation from the Afrikaans original:

> "1. [106H – 107B] We are concerned here in the main with what can be called neighbour law. As a general principle everyone can do what he wishes with his property, even if it tends to be to the prejudice or irritation of another but as concerns adjacent immovable property it almost goes without saying that there is less room for unlimited exercise of rights. The law must provide regulation of the conflicting proprietary and enjoyment interests of neighbours and it does this by limiting proprietary rights and imposing obligations on the owners towards each other. Some of the limitations arise directly from the fact that an owner's rights of ownership end on his boundaries (Dernburg *System* 1 para. 162). Although it is not a rigid rule it is not permitted for him to perform an action which causes something to come on to his neighbour's land or has a direct result thereon. He acts for example wrongfully if he breaks stones on his property in such a way that chips fall on his neighbour's land (Dig 8.5.8.5) . . . .
>
> 2. [107E – G] The usual disturbance by smoke one has to endure from the other, but not excessively (Dig 8.5.8.5 and 6). So also the normal dampness caused by a bath against a common wall, but not constant moisture which arises from all too frequent use thereof (Dig 8.2.19). It is obvious that the same principle would be able to find application as regards other disturbances such as noises or smells. (*Cf Christenaeus, In Leg. Mechl*. 14.29; 14.32 and 33; 14.43). In *Malherbe v Ceres Municipality*,

> 1951 (4) S.A. 500 (A.D.) at p 517, it is accepted 'that the consequences of the usual use of a piece of ground by its owners cannot be regarded as an unlawful interference of his neighbour's land."

[61] A similarly instructive insight, quoted with approval by Harms ADP (as he then was) in *PGB Boerdery Beleggings Edms Bpk v Somerville 62 (Edms) Bpk* 2008 (2) SA 428 (SCA) [also reported at [2008] JOL 21129 (SCA) – Ed],36 was afforded by Prof JRL Milton in Joubert (ed) *The Law of South Africa* vol 19, paragraph 189:

> "An interference with the property rights of another is not actionable as a nuisance unless it is unreasonable. An interference will be unreasonable when it ceases to be a 'to-be-expected-in-the-circumstances' interference and is of a type which does not have to be tolerated under the principle of 'give and take, live and let live'. The determination of when an interference so exceeds the limits of expected toleration is achieved by invoking the test of what, in the given circumstances, is reasonable. The criterion used is not that of the reasonable man but rather involves an objective evaluation of the circumstances and milieu in which the alleged nuisance has occurred. The purpose of such evaluation is to decide whether it is fair or appropriate to require the complainant to tolerate the interference or whether the perpetrator ought to be compelled to terminate the activities giving rise to the harm. This is achieved, in essence, by comparing the gravity of the harm caused with the utility of the conduct which has caused the harm."

[62] Inasmuch as some of the allegations concerning the facts alleged to constitute an unreasonable interference with the enjoyment by the applicant are disputed, it is necessary in the context of the final relief sought by the applicant on paper to treat with the evidence applying *Plascon-Evans* principles.

[63] The applicant's property fronts onto Voortrekker Road at its junction with Prestige Drive. It is well known that Voortrekker Road is one of the main arterial roads servicing the commercial areas of the suburbs lying between Maitland and Bellville, to the north of central Cape Town. Prestige Drive affords access from the commercial area of Maitland to the adjoining industrial area of Ndabeni and the nearby suburb of Pinelands. The applicant has suggested that vacant property in the direction of Ndabeni might be more appropriately developed for the purpose of affording a refugee reception office. The properties in the area, on both sides of Voortrekker Road, are zoned for commercial purposes. It would appear on the evidence that they are used for a wide variety of enterprises, including a fried food outlet, a fishmonger and a supermarket. There is also an indication that the area was characterised by the presence of some informal traders even before the opening of the refugee reception office at Maitland. It is in dispute whether the

property is used to provide 12 "industrial units", which are let to six tenants. To the rear of the applicant's property is a railway line.

[64] The premises at which the refugee reception office is situated are adjacent to the applicant's property. There is no direct access from Voortrekker

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Road to the buildings in which the refugee reception office is housed. Access is obtained from the rear of the structure facing onto Voortrekker Road. One gets to the rear of the property by using a tarred lane which runs directly along the boundary between the applicant's property and erf 24125, which is owned by the fifth respondent. The tarred lane is demarcated for use by two lanes of vehicles. It is subject to a separate lease from those which pertain to the parts of the premises on which the buildings and parking lot used for the purpose of the reception office. As mentioned earlier, the parking lot and the waiting shed are situated on land owned by the Passenger Rail Agency. This area is also used for the temporary toilet facilities ("portaloos") mentioned earlier. The main hall of the reception office is housed in part of what used to be a warehouse at the rear of erf 24129, which is owned by the sixth respondent.

[65] It needs mentioning that the Department experienced difficulty in locating suitable premises to house the reception office within the limited time afforded in terms of the order made in *Intercape Ferreira* (*supra*), which required it to vacate the premises at Airport Industria. Some consideration has been given to redeveloping erf 24125 with the object of providing a specially designed facility to house the office more efficiently than the current structures do. It is evident, however, that for a number of reasons, including the current litigation, nothing concrete is being done to advance these ideas; indeed there is frequent reference in the answering papers to the current set-up being a temporary one with the prospect of the eventual relocation of the refugee reception office to some quite different area altogether. I have, therefore, approached the determination of this application on the basis that, subject to the result of this case, the refugee reception office is likely to continue to operate at its current address for some time to come.

[66] I propose to consider the nuisance issues in the same order and using the same characterisation as they were dealt with in the applicant's heads of argument.

[67] It is admitted by the respondents that there is a problem caused by numbers of asylum seekers who choose to sleep on the pavement outside the reception office so as to be assured of admission to the office's premises as soon as the gates open. It is admitted that this is particularly problematic on the eve of days on which asylum seekers from Zimbabwe, who apparently constitute the by far biggest category by nationality, are attended to.37 The unwholesome consequences of significant numbers of people camping on the pavement overnight with no ablution facilities are axiomatic. The applicant complains in particular about the resultant litter and the smell and filth that follow from people being obliged to use the pavement and surrounds as an open toilet.

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[68] To try to address this problem the respondents have arranged that the gates to the office premises are now opened at 4am, with the result that applicants for asylum are able to move to the large off-road holding area long before the office opens for business. The office has furthermore instituted a regime of flexitime for its employees, which results in it being able to be open for extended working hours every day. The respondents have also employed a cleansing service with instructions to remove litter from the pavement first thing in the morning before the businesses in the area, including those of the applicant's tenants, open for business. The respondents aver that they have employed guards who have been instructed to do everything possible to discourage asylum seekers from camping overnight on the pavements. While I am prepared to accept that the litter issue has been largely addressed, it is nevertheless evident that the fundamental problem caused by people camping on the pavement remains.

[69] One can understand the basis of the problem if the facility is unable to cope with the number of desperate people who flock there to regularise their residence status. It is common ground that many of these unfortunates are economically deprived and quite unable to afford the cost of transportation to the office on repeated visits. It is understandable that people in such plight would decide to sleep outside the premises to try to ensure that they are at the head of the queue when the office opens. It seems to me that the problem will not be remedied unless the Department employs sufficient staff to ensure that the average number of asylum seekers attending on the office on any day can be comfortably processed. The director in charge of the office, Mr Sikakane, has deposed to an affidavit which shows that the office is understaffed in comparison with the Johannesburg office, having regard to the number of persons it has to

(excluding "interns") in Johannesburg. He has applied for the situation to be addressed but, bureaucracy being what it is, nothing concrete has yet been done in this regard to resolve the evident insufficiency of resources. A further remedial measure that has been introduced by the Department in an attempt to ameliorate the situation is the extension of the period of the validity of the provisional permits issued in terms section 22 of the Refugees Act to persons whose applications for asylum in terms of section 21 of the Act are still in the process of being considered.

[70] The various efforts of the Department to address the problem are laudable, but, for the reasons given by Rogers AJ in *Intercape Ferreira* (*supra*) at paragraphs [154]–[162], I am unable to accept the respondents' contention that it cannot be held responsible for the problem of people sleeping on the pavement and that this is really the responsibility of other organs of government, such as the police and the local authority to deal with. In taking this view, I do not overlook the vital social and legal utility served by the provision of a refugee reception office. My approach is premised on the findings made earlier in this judgment that nothing about the establishment or operation of such offices warrants the creation of a nuisance; and that the reasonable operation of such facilities requires of

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the Department to take into account the logistical demands of dealing with the numbers and socio-economic conditions of the persons who might be expected to use them. I accept that it is difficult to predict the numbers of refugees who will seek to use the office, but the evidence is clear that the established trend is an upward one. Until this changes the Department must expect to devote ever increasing resources to the function, certainly while the current statutory framework applies.[38]

[71] Mr Sikakane, who made the principal answering affidavit, has testified that "the size of the waiting crowd almost inevitably surpasses the daily capacity of the officials at the centre." As mentioned, he has applied for the staff complement at the Maitland office to be increased to approximate that that deployed at the Johannesburg (Crown Mines) refugee reception office. I was informed from the bar by the respondents' counsel that the appointment of extra staff to the Cape Town office had recently been approved and that such staff could be in position at the office within three months. I was not informed exactly how many additional staff had been provided for in terms of this approval, but the implication was that Mr Sikakane's application had been approved.

[72] In the result, the conclusion is impelled that the operation of the Cape Town refugee reception office is unreasonably under-resourced; and that, in consequence, it is unable to deal adequately with the average number of asylum seekers who present themselves daily at the office for the purposes required by the Refugees Act. I find that the unacceptable situation of a significant number of persons sleeping on the pavement outside the office is directly attributable to this lack of capacity and that the operation of the office in this way has resulted in an unreasonable and unlawful impingement on the amenities of the owners and occupiers of neighbouring property, including the applicant.

[73] The issue of traffic congestion and attendant problems was graphically illustrated in a set of photographs put in by the applicant. The photographs in question were taken during the second week of the operation of the office at its current address. The respondents do not deny that there were problems during this period, caused in large part by a large crowd of asylum seekers gathering outside the gates to the office premises in the early hours of the morning with the intention of gaining admission as soon as the gates opened. To address this problem, as already mentioned, the gates have for some time now been opened at 4am, with the result that applicants for asylum are able to move to the large off-road holding area long before the office opens for business. The respondents dispute that there is exceptional traffic congestion in Voortrekker Road and I am unable to dismiss this evidence on the papers. I can accept that there may well be frequent incidences of taxi's stopping to pick up or drop-off

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passengers at places where stopping or parking is prohibited by traffic regulation. Regrettably this is a phenomenon that is commonplace in many places in the City and is a problem that in the circumstances cannot be laid at the respondents' door. In the absence of empirical evidence by a traffic expert to support this ground of complaint I find myself unable to uphold it.

[74] Turning to other issues of "hygiene and litter." I am unable to find that the pavement cleaning system which the respondents say has been introduced to clear the litter left by those who sleep or congregate on the pavements before the office gates open in the early morning is ineffectual. It does seem to me, however, that the complaint about the inadequate provision of toilet facilities for the office is probably well-founded, and if that is so one can understand that persons visiting the office will find themselves

situation would give rise to the malodorous situation of which the applicant complains would follow. The evidence is that there are 12 "internal toilets" and 10 so-called "portaloos" available to service the office. When regard is had to the numbers of persons attending on the office daily (it is not disputed that this can be up to about 1500), this strikes one as quite inadequate, especially when account is taken that a large part of this number are present on the premises for many hours at a stretch. The number of toilets that would be required to adequately service the demands imposed by the use of the office is not established empirically on the evidence, but common experience of the ratio of toilets to capacity in office buildings and places like schools and theatres allows me to find with sufficient confidence that there is an inadequate provision on site for the sanitary requirements of the persons using the facility. I am satisfied that this state of affairs, which is unreasonable, gives rise to the complaint by the applicant that the enjoyment of its property is being unlawfully and adversely affected. It seems appropriate that the respondents should be required to make available so many additional toilets as may be determined by the City of Cape Town's Chief Medical Officer of Health to be sufficient for the requirements of an office servicing up to 1500 asylum seekers per day on the basis described earlier in this judgment and to be compliant with the applicable provisions, in particular Part Q, pertaining to non-waterborne means of sanitary disposal, of the National Building Regulations.

[75] The evidence put in by the respondents from the local police station makes it impossible to find that the operation of the office has given rise to an increased level of crime and violence in the area. I decline to have regard to the hearsay content of newspaper reports put in by the applicant in reply. Rather like the indiscipline of road users, mentioned earlier, it is well known that unacceptable levels of crime and violence exist in many areas of the country. The problem, if it obtains in Maitland, will not be addressed by closing down the refugee reception office. For similar reasons, bearing in this instance on the unemployment problem which also weighs heavily on the land, I am unimpressed with the complaint that the applicant's tenants have to put up with persons frequently ringing the doorbell to enquire whether there is work available.

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[76] I am also not satisfied that the complaint about noise nuisance has been established. The applicant's premises are in a busy area and relatively high noise levels are to be expected. If the applicant had sought to establish that the noise levels had been raised to unacceptable levels, even for the milieu in which its premises are situated, it should have adduced appropriate expert evidence based on appropriate sound level testings.

Summary of findings

[77] In summary, therefore, it has been established that the operation of the refugee reception office at Maitland is unlawful by reason of the infringement thereby of the land use restrictions applicable in terms of LUPO read with the SATS Act and by reason of it giving rise, in the respects identified above, to an actionable nuisance.

Relief

[78] The applicant is entitled to an interdict prohibiting the continued unlawful use of the premises by the respondents for the purpose of the operation of the refugee reception office. The position in the current case is, however, distinguishable from that which obtained in *Intercape Ferreira* (*supra*). It seems to me that there may be a prospect that the applicable land use restrictions might be amended so as to remove the basis of complaint on that ground. By this I should not be misunderstood to be expressing any view which could be interpreted as in any manner anticipating or supporting such amendment. Whether there is to be an amendment is a decision for the competent authority in terms of LUPO. It falls to be taken if there is an appropriate application; no doubt, after considering any objections from persons who might be affected thereby. The relevant distinguishing feature between this case and that in *Intercape Ferreira* is that in the latter matter it was clear that the premises were not only being used in contravention of the zoning scheme regulations, but also that the unwholesome consequences of their use could not be addressed by any amendment to the applicable land use restrictions. In the current case I am not convinced that the identified nuisances attendant on the use of the Maitland premises are beyond abatement, as they were in respect of the premises in issue in *Intercape Ferreira*.

[79] These aspects of the current matter, assessed in the context of the utility of the facility, impel the conclusion that the relief to be granted should afford the Department the opportunity, if it wishes, to seek to remove the causes of complaint and thereby regularise the operation of the office at its current location. Such a course will not impose too harshly or inequitably on the applicant, which, as mentioned, has accepted from the outset that it would be impracticable to order the office to be closed immediately.

rather than to find alternative premises. In this regard, I also take into account the repeated averments by the deponent to the founding affidavit that he understands the need for a refugee reception office and has great sympathy for the plight of those who have to have resort to the facility. These commendable sentiments, which I

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accept are sincerely expressed, would be empty if divorced from any willingness to realistically contribute in a relative "give and take" way towards a solution to the reasonable and lawful accommodation of the office. I say this without derogation from the applicant's right to object to any application that might ensue to amend the applicable land use regulations. I suggest only that the applicant should be accepting of the decision to suspend the operation of the interdict that is to be granted so as to enable, amongst other things, this avenue to be explored. The findings I have made recognise that the applicant was entitled to complain that the issue was not being reasonably addressed, but those findings do not equate to a conclusion that it might not be possible to effectively address it.

[80] In deciding to suspend the operation of the interdict I have in addition taken into account that it does not appear that the relocation of the refugee reception office to the premises at Maitland involved a witting breach by the Department of the provisions of the zoning scheme. On the contrary it is apparent that the Department consulted in some depth with the local authority responsible for the enforcement of the scheme without any demur from that authority regarding the legality of the intended use of the land. It also seems to me that in the selection of the premises the Department sought conscientiously to avoid a repetition of the shortcomings identified in its use of the Airport Industria premises in the judgment in *Intercape Ferreira* (*supra*).

[81] For completeness, and lest it be thought that I might have overlooked the relief sought in terms of paragraph 3 of the notice of motion, I should perhaps record that in the exercise of my discretion I consider that the interdictory relief that is to be granted is sufficient to meet the unlawful conduct proven by the applicant and that no purpose would be served in the peculiar circumstances by reviewing and setting aside the various decisions described in the said paragraph.39

Application to strike out

[82] At the commencement of the hearing the respondents' counsel handed up an application to strike out numerous passages in the applicant's replying affidavits, as well as certain annexures to those affidavits, including the press reports to which I made passing reference earlier. The applicant's counsel had inadequate opportunity to properly consider the application. Notwithstanding this disability, and despite the striking-out application including a prayer that the respondents be afforded an opportunity to file further affidavits if the application to strike out not be granted, counsel on both sides agreed that the striking-out application be dealt with *en passant* argument on the principal application. The respondents in any event put in a further set of affidavits at the commencement of the hearing without objection from the applicant. Virtually no argument was addressed in support of the striking-out application.

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[83] In the circumstances, just described I have found it unnecessary to deal with the application to strike out. Suffice it to say that I am satisfied that the outcome of the proceedings has been arrived at on a consideration of the papers which has not prejudiced the respondents in any relevant way.

Costs

[84] The applicant has achieved substantial success in the application and is therefore entitled in the ordinary course to an order that the respondents should pay its costs of suit. The parties were agreed that the employment of two counsel was justified.

Orders

[85] The following orders will issue:

1. It is declared that the operation by the Department of Home Affairs of its Cape Town refugee reception office at the premises situate at erven 24125, 24129, 24150, 24151 and 24165, Cape Town, is unlawful by reason of the resultant infringement of the land-use restrictions applicable to erven 24150, 24151 and 24165 in terms of the City of Cape Town zoning scheme regulations, read with section 13 of the Legal Succession to the South African Transport Services Act 9 of 1989.

2.

reception office at the said premises until and unless the land use restrictions applicable to erven 24150, 24151 and 24165, Cape Town, are amended so as to permit of the lawful operation of the office at the premises.

3. The operation of the interdict granted in terms of paragraph 2 is suspended-

3.1 for a period of six months on condition that the Department procures the submission within two months of the date of this order of an application to the competent authority in terms of the Land Use Planning Ordinance 15 of 1985 by the owner of erven 24150, 24151 and 24165 for an appropriate amendment of the applicable land use restrictions to enable the lawful use of the said erven for the purposes of the operation of a refugee reception office at the said premises, and serves a copy of any such application on the applicant at the address of its attorneys of record within three days of the lodgement of any such application with the competent authority; alternatively,

3.2 for a period of four months in the event that an application for an amendment of the land use restrictions is not submitted within the period stipulated in sub-paragraph 3.1.

4. Without derogation from the aforegoing, it is further declared that the current operation by the Department of Home Affairs of a refugee reception office at the said premises has given rise to an actionable nuisance of the nature described in the reasons for judgment.

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5. The first and second respondents are interdicted from continuing with the operation of the refugee reception office at the said premises until the following measures are taken to abate the said nuisance:

5.1 The on-site staff complement dedicated to the administrative work of the office at the said premises is to be increased from the current number of 44 (excluding interns) to not less than 90 (excluding interns);

5.2 The number of lavatories available for use by persons attending at the office is to be increased to a number determined in writing by the Medical Officer of Health of the City of Cape Town as being appropriate to address the demands of up to 1 500 daily visitors and as being compliant with the requirements of the National Building Regulations, and in particular Part Q thereof pertaining to non-waterborne means of sanitary disposal.

6. The operation of the interdict granted in terms of paragraph 5 is suspended on condition that –

6.1 the abatement measure described in sub-paragraph 5.1 is effected within four months of the date of this order;

6.2 an affidavit by the second respondent confirming compliance with the abatement measure described in sub-paragraph 5.1 is filed with the Registrar of this Court and a copy thereof served on the applicant at the address of its attorneys of record within three days of the expiry of the period of four months provided for in terms of sub-paragraph 6.1 of this order;

6.3 the abatement measure described in sub-paragraph 5.2 is effected within two months of the date of this order;

6.4 an affidavit by the second respondent confirming compliance with the abatement measure described in sub-paragraph 5.2 is filed with the Registrar of this Court and a copy thereof served on the applicant at the address of its attorneys of record within three days of the expiry of the period of two months provided for in terms of sub-paragraph 6.3 of this order.

6.5 The first and second respondents shall be liable, jointly and severally, the one paying the other being absolved, to pay the applicant's costs of suit, including the costs of two counsel.

For the parties:

None indicated

The following cases are referred to in the above judgment:

South Africa

Allaclas Investments (Pty) Ltd and Another v Milnerton Golf Club and Others [2008] 2 All SA 1 (2008 (3) SA 134) (SCA) – **Referred to** 811

Arse v Minister of Home Affairs and Others 2010 (7) BCLR 640 (SCA) – **Referred to** 789

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BEF (Pty) Ltd v Cape Town Municipality and Others [1983] 3 All SA 613 (1983 (2) SA 387) (C) – **Referred to** 795

Bitou Local Municipality v Timber Two Processors CC and Another [2008] JOL 22630 (2009 (5) SA 618) (C) – **Compared and Distinguished** 804

CD of Birnam (Suburban) (Pty) Ltd and Others v Falcon Investments Ltd [1973] 2 All SA 436 (1973 (3) SA 838) (W) – **Referred to** 806

Diepsloot Residents' and Landowners' Association v Administrator, Transvaal [1994] 2 All SA 299 ([1994] ZASCA 24; 1994 (3) SA 336) (AD) – **Referred to** 793

Esterhuyse v Jan Jooste Family Trust 1998 (4) SA 241 (C) – **Referred to** 795

Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others (Grey's Marine) 2005 (10) BCLR 931 ([2004] ZASCA 43; 2005 (6) SA 313) (SCA) – **Referred to** 795

Herrington v Johannesburg Municipality 1909 TH 179 – **Referred to** 796

Huisamen and Others v Port Elizabeth Municipality ([1997] 2 All SA 458 (1998 (1) SA 477) (E) – **Referred to** 806

Intercape Ferreira Mainliner (Pty) Ltd and Others v Minister of Home Affairs and Others [2009] ZAWCHC 100 (24 June 2009) – **Referred to** 790

Johannesburg Municipality v African Realty Trust Ltd 1927 AD 163 – **Referred to** 797

Kiliko and Others v Minister of Home Affairs and Others 2007 (4) BCLR 416 (2006 (4) SA 114) (C) – **Referred to** 790

Laskey and Another v Showzone CC and Others [2007] 4 All SA 1162 (2007 (2) SA 48) (C) – **Referred to** 804

Local Transitional Council of Delmas and Another v Boschoff [2005] 4 All SA 175 ([2005] ZASCA 57) (SCA) – **Referred to** 796

Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening) 2001 (7) BCLR 652 (2001 (3) SA 1151) (CC) – **Referred to** 793

Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC and Others [2003] JOL 10796 (2004 (2) SA 81) (SE) – **Referred to** 804

Ostrawiak v Pinetown Town Board [1948] 3 All SA 74 (1948 (3) SA 584) (D) – **Referred to** 807

Peri-Urban Areas Health Board v Sandhurst Gardens (Pty) Ltd [1965] 2 All SA 211 (1965 (1) SA 683) (T) – **Referred to** 807

PGB Boerdery Beleggings Edms Bpk v Somerville 62 (Edms) Bpk [2008] JOL 21129 (2008 (2) SA 428) (SCA) – **Referred to** 812

Regal v African Superslate (Pty) Ltd [1963] 1 All SA 203 (1963 (1) SA 102) (A) – **Referred to** 811

Rivas v The Premier (Transvaal) Diamond Mining Co Ltd 1929 WLD 1 – **Referred to** 810

Three Rivers Ratepayers Association v Northern Metropolitan Council and Another 2000 (4) SA 377 (W) – **Referred to** 792

Tobiansky v Johannesburg Town Council 1907 TS 134 – **Referred to** 796

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United Technical Equipment Co (Pty) Ltd v Johannesburg City Council [1987] 4 All SA 409 (1987 (4) SA 343) (T) – **Referred to** 806

Walele v City of Cape Town and Others 2008 (11) BCLR 1067 ([2008] ZACC 11; 2008 (6) SA 129) (CC) – **Referred to** 795

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Woolworths Ltd v Caboolture Shire Council & The Warehouse Group (Australia) Pty Ltd; Woolworths Ltd v Caboolture Shire Council & Makro Warehouse Pty Ltd [2004] QPEC 026 – **Referred to**	808

United Kingdom

Wrexham County Borough Council v Berry [2003] UKHL 26 [2003] 3 All ER 1 (HL) – **Referred to**	808

Footnotes

1 Such as the 1948 (United Nations) Universal Declaration of Human Rights.

2 For a succinct summary of the relevant workings of the Act, see *Arse v Minister of Home Affairs and Others* [2010] ZASCA 9 (12 March 2010) at paras [14]–[19] [reported at 2010 (7) BCLR 640 (SCA) – Ed].

3 This judgment may be accessed on the SAFLII website at http://www.saflii.org.za/za/cases/ZAWCHC/2009/100.html. The history through a series of judgments related to the structural interdict granted in *Kiliko* (*supra*) is described in *Intercape Ferreira* at paras [21]–[25], [29]–[30] and [180]–[181].

4 See *Intercape Ferreira Mainliner* (*supra*) at paras [184]–[186].

5 It might be that some characteristics of the alleged nuisance relied upon by the applicant, for example the alleged traffic chaos in Voortrekker Road would qualify to be described as a public nuisance. Nothing turns on this because the principles of law involved in the determination of the case remain the same; *cf Three Rivers Ratepayers Association v Northern Metropolitan Council and Another* 2000 (4) SA 377 (W) at 380F–G.

6 S 8 of the Act is quoted in para 3 above.

7 See the Public Service Regulations, 2001 published in GNR 1, dated 5 January 2001 (*Government Gazette* No. 21951) and *cf* s 7 of the Public Service Act, 1994.

8 *Cf Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho Intervening)* 2001 (3) SA 1151 (CC) at paras [58]–[59] [also reported at 2001 (7) BCLR 652 (CC) – Ed]. The position falls to be contrasted with that which obtained in *Diepsloot Residents' and Landowners' Association v Administrator, Transvaal* [1994] ZASCA 24; 1994 (3) SA 336 (AD); [1994] 2 All SA 299 (A), in which the three phases of implementation of the decision in terms of the Less Formal Township Establishment Act 113 of 1991 to make land available and settle the Zevenfontein squatters on land at Diepsloot fell to be treated, for the purpose of an assessment of their legality, as inextricably interlinked. As the Appellate Division observed in *Diepsloot* (*supra*) at 348B–349B (SALR), all three phases of administrative action involved in that matter (expropriation, designation and settlement) were directed at a single object *viz*. the establishment of a particular community of informal settlers on a particular piece of land. In the current case, by contrast, the decision to establish a refugee reception office in Cape Town was not inextricably bound up with any decision as to the precise location of the office's address in Cape Town.

9 *Cf Grey's Marine Hout Bay* (*Pty*) *Ltd and Others v Minister of Public Works and Others* (*Grey's Marine*) [2004] ZASCA 43; 2005 (6) SA 313 (SCA); 2005 (10) BCLR 931 (SCA) at paras [29]–[31] and *Walele v City of Cape Town and Others* [2008] ZACC 11; 2008 (6) SA 129 (CC); 2008 (11) BCLR 1067 (CC) at paras [28]–[32] (*per* Jaftha AJ, as he then was) and paras [122]–[132] (*per* O'Regan J).There was no reliance by the applicant on any legitimate expectation.

10 See fn 8.

11 The power of the Legislature to afford statutory authority for the infringement by any person of the right by another to the reasonable enjoyment of his/her property is limited by the relevant provisions of the Constitution; see particularly ss 22, 25 and 36.

12 Both judgments are summarised in the *Diepsloot* judgment (*supra*) at 349J–350 (SALR).

13 S 3(2) of PAJA provides:

> "a) A fair administrative procedure depends on the circumstances of each case.
> b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1) –
> a) adequate notice of the nature and purpose of the proposed administrative action;
> b) a reasonable opportunity to make representations;
> c) a clear statement of the administrative action;
> d) adequate notice of any right of review or internal appeal, where applicable; and
> e) adequate notice of the right to request reasons in terms of section 5."

14 S 3(4) of PAJA provides:

> "a) If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the

requirements referred to in subsection (2).

b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including –

a) the objects of the empowering provision;
b) the nature and purpose of, and the need to take, the administrative action;
c) the likely effect of the administrative action;
d) the urgency of taking the administrative action or the urgency of the matter; and
e) the need to promote an efficient administration and good governance."

15 *Cf Intercape Ferreira* (*supra*) at para [175].

16 Statutory authority was not raised as a defence in Intercape Ferreira, but it is evident that the learned Judge gave some thought to the issue.

17 See para [26], above.

18 By reason of the provisions of s 31 of the SATS Act, the provisions of s 13 apply to land owned by the South African Rail Commuter Association.

19 The "Company" is Transnet Limited. As to the application of the provision to the "railway properties" in the current case, see fn 18.

20 See The Concise Oxford English Dictionary 10ed revised (2002).

21 It seems clear from the context that the finding by the court "that the respondent was guilty of a criminal conduct" that Fourie J had in mind was not a guilty verdict in criminal proceedings, but rather a finding in the context of interdict proceedings that the respondent was engaged in conduct that could give rise to the institution of criminal proceedings.

22 United Technical Equipment Co (Pty) Ltd v Johannesburg City Council 1987 (4) SA 343 (T) [also reported at [1987] 4 All SA 409 (T) – Ed].

23 Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC and Others 2004 (2) SA 81 (SE) [also reported at [2003] JOL 10796 (SE) – Ed].

24 In the Bitou case the primary basis on which the court refused the respondent's request for a suspension of the interdict appears to have been because of a finding that there was an absence of any power in law for the court to accede to the request. The court did however also hold in the alternative, and in any event, that even assuming the existence of a discretionary power to suspend the interdict, no proper basis for the exercise of the discretion in the respondent's favour had been made out on the facts.

25 Uniform R 45A provides:

"The court may suspend the execution of any order for such period as it may deem fit."

26 The respondent in the *Bitou* case (*supra*) had persisted for a considerable period of time in the unlawful use of its property in contravention of the applicable zoning scheme regulations notwithstanding repeated notice by the local authority to cease its unlawful activity and it took no steps to apply for the rezoning necessary to regularise its use of the land in question until two months after the institution of proceedings for a prohibitory interdict by the local authority. The facts in the *United Technical Equipment* and the *Nelson Mandela Metropolitan Municipality* cases (*supra*) were broadly comparable with those in *Bitou* as instances of reckless and flagrant breaches of the law.

27 Harms J and Plasket AJ, respectively, as they then were.

28 It is unnecessary to decide the point, but, as I had occasion to observe in *Laskey* (*supra*) at paras [41]–[43], there is a body of authority which appears to hold that the court has a general discretion to withhold the grant of an interdict even in cases in which the legal requirements for its grant are satisfied.

29 See also s 21(1)(a) of the National Prosecuting Authority Act 32 of 1998.

30 The paragraph is quoted *in extenso* in Du Toit *et al* Commentary on the Criminal Procedure Act (Juta) loose-leaf ed. 1-4R-1-4S [Service 43, 2009].

31 *Warringah* and *NRMCA (Qld) Ltd*, as well as other judgments in point, are reviewed in *Woolworths Ltd v Caboolture Shire Council & The Warehouse Group (Australia) Pty Ltd; Woolworths Ltd v Caboolture Shire Council & Makro Warehouse Pty Ltd* [2004] QPEC 026, which is accessible on the AUSTLII site at http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/qld/QPEC/2004/26.html

32 See s 187B of the Town and Country Planning Act 1990 (Eng.) read with s 37(1) of the Supreme Court Act 1981. See also s 124 of the Environmental Planning and Assessment Act 1979 (New South Wales) and ss 4.1.21 and 4.3.25 of the Integrated Planning Act 1997, Act 69 of 1997 (Queensland) (recently replaced by the Sustainable Planning Act, 2009).

33 *Cf Wrexham County Borough Council* (*supra*) at para 29; *Woolworths Limited v The Warehouse Group (Australia) Pty Ltd* (2003) LGERA 341 at 348; and *Warehouse Group (Australia) Pty Ltd v Woolworths Ltd* (2003) NSWCA 270.

34 See s 174(8) of the Constitution.

35 It was no doubt that conclusion that provided the basis for the application by the applicant for the review and setting aside of the decisions to lease the railway properties and the consequent conclusion of the leases. See para 3 of the notice of motion quoted in para 6, above.

36 At para [9].

37 The Department has found it expedient, so as to avoid the tensions that sometimes manifest between asylum seekers from different nationalities, to stipulate that persons from identified countries are dealt with only on given days of the week; so, for example, only Zimbabweans are dealt with on Thursdays and Fridays.

38 There has been talk for some time now about the introduction of statutory amendments to address the demands occasioned by large numbers of economic refugees from Zimbabwe, but nothing has yet been done in this respect. This aspect was mentioned in *Intercape Ferreira*, but the Department agreed that this case should be determined on the basis of the currently obtaining situation, and without regard to the prospect of any possible amendments to the law.

39 Para 3 of the notice of motion is quoted in para 6, above.