IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

Case No.: 7026/2009

In the matter between:

UMZIMKHULU MUNICIPALITY **APPLICANT**

and

KWA NODADA'S FUNERAL SERVICES CC **RESPONDENT**

JUDGMENT

Delivered on: 10 December 2010

SISHI J

INTRODUCTION

[1] This is an opposed application for a final interdict wherein the applicant seeks an order in the following terms:

(a) The respondent is interdicted and restrained from operating a funeral parlour or carrying out any activity in connection with the operation of a funeral parlour on the premises which it currently occupies at the old Capital Radio Building at Clydesdale Mission, Umzimkhulu (or any other premises in the municipal area of Umzimkhulu) without being in possession of a

certificate of compliance issued in terms of the applicant's Funeral Undertaker's Bylaws.

(b) The respondent is ordered to forthwith remove any bodies of parts there of from the said premises to a place where they may be lawfully kept.

(c) The respondent is interdicted and restrained from effecting any alterations to the said premises at Clydesdale Mission without first obtaining the consent of the Applicant.

(d) The respondent is ordered to pay the costs of this application.

[2] The applicant is no longer pursuing paragraph (c) of the notice of motion.

BACKGROUND

[3] The respondent has not disputed that it is operating a funeral parlour on the said premises. The case for the applicant is that the respondent is operating a funeral parlour in circumstances wherein it is in breach of the regulations made under the Health Act 63 of 1977 and the Municipal Bylaws.

[4] These regulations are published in the Government Gazette

dated 30 February 1985 under R237. Regulation 2(1) provides as follows:

"Subject to the provisions of these regulations, no person shall prepare any corpse except on funeral undertakers' premises in respect of which a certificate of competence has been issued and is in effect."

The said Act defines "the Act" as including regulations. Section 57 of the Act makes a contravention or a failure to comply with the provisions of the Act a criminal offence.

[5] Section (2) of the Bylaws provides as follows:

"Unless otherwise provided for in these bylaws, no person shall prepare and/or store any corpse except on a funeral undertakers' premises in respect of which a certificate of competence has been issued and it is in effect."

[6] The applicant contends that the respondent is not in possession of a certificate of competence nor has it been granted exemption from compliance with the regulations.

[7] Clause 3 of the regulations reads as follows:

"A local authority may with the approval of the Director General in writing exempt any person from compliance with

all or any of this regulations where in the opinion of a local authority none compliance does not or will not create a nuisance".

[8] Clause 3 of the bylaws provides as follows:

"A Council may in writing exempt any person from compliance with all or any of these bylaws where in the opinion of the Council non-compliance does not or will not create a nuisance. Such an exemption shall be subject to conditions and valid for such period as the local authority may stipulate in the certificate of exemption".

[9] The operation of a funeral parlour by the respondent is therefore in breach of the regulations made under the Health Act and the municipal bylaws.

[10] It is clear from the respondent's answering affidavit that the respondent is operating a funeral parlour without a certificate of competence.

[11] The respondent does not dispute the fact that it is not in possession of a certificate of competence. What the

respondent says in this regard in the answering affidavit is the following:

11.1 "It may be that strict compliance was not established by me…";

11.2 "I have never deliberately broken any law…";

11.3 "I have made substantial compliance with the requirements of the Bylaws.";

11.4 "… I should be given a reasonable period within which to comply with a strict letter of the law."

[12] It is not in dispute that the respondent has since August 2007, continued and still continuing to run the said funeral parlour.

LIS PENDENS

[13] The respondent contended that the present application is incompetent because the proceedings under Case No. 6787/07 are still *lis pendens.* In August 2007, the applicant brought an urgent application wherein it sought an order, the

terms of which are identical to the orders sought in the present application. A rule nisi was issued which was returnable on 24 September 2007. With that rule, there was an interim order that the respondent not to operate a funeral parlour in the meantime until the return date 24 September 2007. There is a dispute of whether this interim order was served on the respondent. On the returned date, 24 September 2007, there was no appearance by any party in court, and the matter was struck off the roll.

[14] The applicant contends that as the matter was struck off the roll, the effect of the interim order that was granted there, lapsed because the interim order in the 2007 case, was very specific, because it was an interim relief from the date of the order until the return date. When the return date, 24 September 2007 arrived and that order was not confirmed or adjourned *sine die*, nor extended, the rule lapsed. The applicant contends that the whole order fell away.

[15] The applicant contends that in the present application, it seeks an interdict on the basis that the respondent has since August 2007, conducted a funeral parlour without a

certificate of competence. On the other hand, the proceedings under Case No. 6787/07 related to conduct prior to the launching of those proceedings, in other words, conduct prior to August 2007.

[16] The respondent on the other hand, contends that the order granted did not lapse. The order remains unenforceable presently until an application is brought by the applicant to remove the striking off the roll order.

[17] There is a distinct difference between an order granted which has lapsed and an order granted which is unenforceable because it is struck off the roll.

[18] The respondent contends that the general rule in regard to the occasion where a defence of *lis pendens* is raised is that the first case ought to be proceeded with. There is from a convenience perspective, no reason why Case No. 6787/07, ought not be proceeded with because if it is, the respondent is entitled after proper service of the application papers in that application upon it, to oppose the relief sought and in deed to anticipate it within the meaning of rule 6(12)(c) of the

rule nisi upon notice.

See: Van As v Appollus & Andere 1993(1)SA 606(C)

[19] The respondent contended that there is no evidence nor is it averred by the applicant that the interim order under Case No.6787/07 alternatively the entire case under that case number was withdrawn.

See: RSA Factors Ltd v Braamfontein Township Developers (Pty) Ltd and others 1981(2) SA 141(O).

[20] The respondent further contended that the two applications are between the same parties, and concern the same subject matter and is founded upon the same cause of complaint.

[21] In the alternative, the respondent submitted that a court of this division under Case No.6787/07 has already determined the issues arising in this case and consequently, issued an interim interdict. In the premises, the issue of such an interdict is presently *res judicata*.

[22] It is trite that the plea of *lis pendens* will be successful where the same dispute between the same parties is pending elsewhere in a court.

See: Nestle SA (Pty) Ltd v Mars Incorporated 2001 (4) SA 542 (SCA)

[23] The onus of proving the requisite rests on the party raising the defence.

See: Dreyer v Tuckers Land and Development Corporation (Pty) Ltd 1981 (1) SA 1219 (T) at 1231.

[24] In order to succeed in a plea of *lis pendens*, the following four requirements have to be established:

(a) Pending litigation;

(b) Between the same parties;

(c) Based on the same cause of action;

(d) In respect of the same subject matter;

[25] The applicant has submitted that although the conduct of the respondent before August 2007 may be the same as his conduct after 2007, the two interdict sought are based on different time periods. Therefore, the cause of action underlying the seeking of the interdict differs materially. The submissions on behalf of the applicant that the causes of action differ in the two applications is too artificial if one looks at the founding affidavit and the prayers sought in the notices

of motion in respect of both applications being the same. This distinction falls to be rejected. The three requirements, namely, between the same parties, based on the same cause of action and in respect of the same subject matter, have been satisfied in this matter. The only issue is whether there is pending litigation. The issue therefore is whether the application under Case No. 6787/07 is still pending.

[26] It is clear from the court order that the interim interdict under Case No. 6787/07 was granted until 24 September 2007. On that day it was neither extended nor adjourned *sine die*, the application was simply struck off the roll for non appearance by both parties. The *rule nisi* was never extended until it is confirmed or discharged. If the rule nisi is not extended, it lapses. There is also no suggestion that the applicant has attempted to revive the rule in terms of the Rules of Court. The issue of the interim interdict in a subsequent application is therefore not *res judicata*, as the interim order lapsed.

[27] In any event, this Court has a discretion whether to allow the application under Case No. 6787/07 or the present case to proceed. In my view, it is in the interest of justice in the

matter that the application before Court be proceeded with than the application under Case No.6787/07.

[28] In my view, the considerations of convenience and fairness are decisive in determining this issue.

See: Geldenhuys v Kotze 1964 (2) SA 167 (O) and
Van As v Appollus & Andere 1993 (1) SA 606 (C)

[29] I, therefore exercise my discretion in favour of proceeding with the present application.

THE LAWFULLNES OF THE RESPONDENT'S CONDUCT

[30] Section 12 of the bylaws expressly criminalises any operation of a funeral parlour without a certificate of competence. A fine of R1000 or imprisonment for a period not exceeding 12 months or both fine and imprisonment is provided as a criminal sanction for any offender.

[31] It is the applicant's case that the operation of this funeral parlour without the certificate of competence, is both unlawful

and constitute criminal conduct.

[32] That this Court has no discretion but to interdict and stop the respondent from continuing his unlawful and indeed criminal conduct find support from the following cases:

United Technical Equipment Co. (Pty) Ltd v Johannesburg City Council 1987 (4) SA 343 (T) at 344 J

Huisamen and Others v Port Elizabeth Municipality 1998 (1) SA 477 (E)

Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC and Others 2004 (2) SA 81 (SE)

Bitou Local Municipality v Timber Two Processors CC AND Another 2009 (5) SA 618 (C)

[33] The cases referred to above have been cited with approval in the case of ***Bitou Local Municipality v Timber Two Processors CC and Another, supra,*** as follows at paragraphs 27 to 30.

"(27) In the full bench division in ***United Technical Equipment Co. (Pty) Ltd v Johannesburg City Council 1987 (4) SA 343 (T),*** Harms J (as he then was) analysed the

law in this regard at 347 G, the learned Judge concluded:

> *"It follows from an analysis of these cases that the Court does not have a general discretion to defer the operation of an interdict. Such discretion can, if at all, only arise under exceptional circumstances. Furthermore, I am not aware of any authority that would entitle the Court to suspend the operation of an interdict where the wrong complained of amounts to a crime. The Court would thereby be abrogating its duty as an enforcer of the law*."

[34] (28) The full bench of the Eastern Cape Division in ***Huisamen and Others v Port Elizabeth Municipality 1998 (1) SA 477 (E)(1997)2 ALL SA 458)*** accepted without discussion that a Court in general has a judicial discretion whether or not to issue an interdict, however the following was said at 483 J -484 B:

> *"the appellant's use of the property in contravention of the zoning scheme constitute a criminal offence and whether that discretion can be exercised in favour of a respondent whose conduct amounts to criminal offence under a statute seems to me to be somewhat debatable unless the contravention may be said to be diminimis, as a Court which refused to interdict criminal conduct would, in effect, sanction it. Perhaps it is a*

question of degree but, in the light of the facts of the present case, I do not consider it necessary to consider the topic further.

[35] "(29) In ***Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC and Others, supra,*** Plasket AJ (as he then was) refused to suspend an interdict contrary to the zoning thereof and held as follows at 110 F (paragraph 94):

"I am of the view that the Court does not have a general discretion, having found conduct of the respondent to be unlawful and criminal, to suspend its order that would put an end to that conduct. I am therefore in respectful agreement with Harms J in ***United Technical Equipment Co. (Pty) Ltd v Johannesburg City Council, supra,*** *in this regard..."*

[36] "(30) Finally I have to refer to the judgment of Binns-Ward AJ, in ***Laskey and Another v Showzone CC and Others 2007 (2) SA 48 (CPD),*** where the learned Judge in a application to interdict the respondent from contravening Noise Regulation, proceeded on the assumption of the existence of the discretion to suspend the operation of a final

interdict. In paragraph 46 of the judgment, Binns-Ward AJ did comment on the discretion to suspend the operation of an interdict in the light of the criminal conduct as follows:

> *"Mr Fitzgerald submitted that a suspension of the interdict would be tantamount to condonation of criminal conduct and accordingly contrary to public policy. This was a consideration which in the context of the facts of the* ***United Technical Equipment Co. (Pty) Ltd and Nelson Mandela Metropolitan*** *cases weighed heavily against the exercise of the assumed discretion against the respondents, and for good reasons. In my view, however, whereas it was plain in those matters that the respondents had wittingly embarked on unlawful conduct, the same cannot be said of the respondent in this case…"*

I am in full agreement with the sentiments echoed by the various Judges in the cases referred to above regarding this issue.

[37] In the answering affidavit the respondent suggests amongst other things that it was given permission by the Municipal Manager to operate its funeral parlour. A somewhat similar defence was raised in ***Bitou case, supra***, where the

respondents contended to have been given permission by the Mayor of Bitou Local Municipality to operate a sawmill in contravention of the applicant's zoning regulations. This was not considered to be a valid defence and the Court concluded as follows:

> *"It accordingly follows that, if I were to accede to the request of the first and second respondents to suspend the operation of the interdicts sought by the applicants, I would condone their ongoing criminal behaviour and abrogate the duty of the Court as an enforcer of the law. A suspension would also undermine sound and effective local government and be contrary to public policy." (paragraph 34)*

[38] The respondent has averred *capris*, malice and bias on part of the applicant in its failure to approve his business and has relied on his constitutional rights that he alleges have been abused by the applicant.

[39] The applicant submitted, correctly in my view, that it is trite law that to be suited with the final interdict, an applicant must show:

i) a clear right established on a balance of probabilities;

ii) An act of injury or interference must have been committed or there must at least be a reasonable apprehension that such an act will be committed;

iii) There must be no other ordinary and satisfactory remedy available affording similar protection to the applicant.

See: ***Setlogelo v Setlogelo 1914 AD 221***
Meyer v Administrater Transvaal 1961 (4) 55 at 57
Free State Gold Areas Ltd v Merriespruit Co (OFS) Gold Mining Co. Ltd and Another 1961 (2) SA 505 (W)

[40] It was then submitted that the speculative basis upon which the act of injury or interference is predicated upon falls short of the second prerequisite. Nor is there any evidence (whether cogent or not) justifying an interference being drawn that the act of injury or interference is reasonably apprehended.

[41] More importantly, the applicant relies on its by-laws and the provisions of the Health Act to establish a basis for its approach for an interdict. Unfortunately, both the by-laws and the Health Act contain their own in-built mechanism to police and enforce non-compliance with the provisions. A

sanction of prosecution and if successful, the imposition of rather severe penalties of either or both fines and imprisonment is competent in those laws.

[42] This submission according to the respondent is the existence of some other ordinary and satisfactory remedy available affording similar protection to the applicants

[43] There isn't a shred of evidence in the founding papers wherein Ngcobo suggest that any alternative remedy available to applicant would be incompetent, inadequate or defeasible. This is significant against the background of the law in application procedure, which determines that an applicant stands or falls by its founding averments.

See*: **Bayat v Hans 1955 (3) SA 547 N, 553***

[44] Non-compliance with statute according to the respondent is not a basis for the securing of an interdict, particularly where the statute imposes its own sanctions, which the applicant never considered using. Clearly, the applicant was misled into believing that it could move directly for an interdict when there were alternative remedies available to it. This is a

significant factor when considering against the background of the respondent averring malice, bias and corruption on the part of Municipal officials and Councillors. This instance is completely distinguishable from the cases applicant relies upon because the act of interference reasonably apprehended e.g. in the ***United Technical Equipment Co. case*** was the effect town planning violations would have on residential suburbs.

[45] Counsel for the respondent referred to paragraph 10 of the founding affidavit were the deponent says:

"The premises are in close proximity to a running stream which is a minor tributary to Umzimkhulu river and the applicant fears that the water in the stream could become contaminated. This is so because the premises are not property equipped to ensure that it does not constitute a danger to health. It should be mentioned that persons living downstream in the applicant's district use the untreated water from the stream for domestic consumption".

[46] Counsel for the respondent submitted that the act of interference or the reasonable apprehension of harm to its constituency is that the water would be contaminated by the operation of a funeral parlour business that has not been

issued with the certificate of competence because a septic tank was not installed. He submitted that this is the basis of the application. He further submitted that that averment comes from paragraph 11 and 12 of the founding affidavit. It comes from information passed on to the technical manager, Mr Ngcobo, he obtained from Counsellor Mhatu and another counsellor or committee member working and employed by the Municipality whose name is Mdyori. The affidavit deposed to by Ngcobo was deposed to in August 2009. The confirmatory affidavit was deposed to by Vuyiswa Mhatu on 22 August 2007, and that is confirmed also by the stamp, by the Policeman who functioned as a commissioner of oaths. The confirmatory affidavit by Thembisile Deograsia Mjoli was deposed to on 26 August 2007. The issue raised by the respondent's Counsel was whether it was possible for Mjoli and Mhatu to have confirmed two years before Ngcobo deposed to the affidavit, what he says about his concerns. This refers to the contamination of the river water and the consequent threat to the endangerment of the lives of the constituents of this Municipality, if they consume water from the stream river as alleged in paragraph 10, 11 and 12 of the founding papers referred to earlier on in this judgment. The

two confirmatory affidavits having confirmed something in 2007 which was known but could not have been known by them in 2007 as a fact which was going to be said by Ngcobo who made his affidavit in 2009. Counsel for the respondent submitted that all evidence shows that this is a half baked applicaition. He submitted that what they did here is rather to get Mjoli and Mhatu to confirm the averments of Ngcobo in 2009, they used all the affidavits from the 2007 application. This is clear from the fact that the two confirmatory affidavits of Vuyiswa Mhatu and Thembisile Deograsia Mjoli bear the Case Nos. 6787/07 and yet the Case No. of the present Case is. 6702/09.

[47] Counsel for the respondent submitted that the 2009 affidavit by Ngcobo is not confirmed by Mhatu and Mjoli, who gave him the material with which he attempts to tell this Court that in regard to the requirements for the final interdict particularly requirements 2 and 3 which is an act of interference or a reasonable apprehension of harm or the availability of reasonable alternative remedy, that evidence comes from Mhatu and Mjoli and before Court there is no confirmation of that evidence which renders Mhatu's and Mjoli's evidence

put in through the mouth of Ngcobo, hearsay evidence that offends against the hearsay rule and consequently they should be struck out.

[48] Counsel for the respondent submitted that they then based this interdict, in fact there is a change in tact and one can see from the replying affidavit that there is no longer any mention of danger to the health of the constituents in that municipality anymore, but they say they based this on the fact that there is a statute. The regulations to that statute prescribe that if you are not in possession of a certificate of competency, the operation is illegal. The statute goes further and the statute say that such conduct is by statute criminalised. He submits that counsel for the applicants says that irrespective of the other requirements for an interdict, if you establish a right that should be sufficient. He has referred the Court to four cases in the pre-constitutional context.

[49] It may be mentioned that in the four cases referred to by counsel for the applicant, only one of them was decided before 1996, that is the case of, ***United Technical***

Equipment Co. (Pty) Ltd v Johannesburg City Council, supra, the rest of the cases were decided after 1996.

[50] Council for the respondent submitted that the law as it was preceding 1996 and the advent of our Constitution in regard to in rendering criminal conduct, which is incongrous with the statute has been declared unconstitutional. He submitted that the right upon which counsel for the applicant relies has been rendered nugatory in consequence of the Constitutional Court judgment in ***Occupiers of 51 Oliver Road vs. City of Johannesburg 2008 (5)BCLR 475 (CC) at pgs 492 & 493.*** Counsel submitted that the case dealt with the issuing of a notice to vacate the premises occupied by persons who did not have the direct and express consent of the landlord. These were dilapidated buildings in the City of Johannesburg, homeless people, moved into and occupied and what happened was that the City of Johannesburg issued a notice in terms of section 12(4)(b) of the National Building Regulation and Building Standards Act.

[51] In dealing with the criminal sanction, the full court of the Constitutional Court, agreed with the judgment of Jacoob J

and said that as to such criminalising of conduct by statute, the Constitutional Court rejected such statutes where criminalising conduct without court orders and declared section 12(6) of the National Building Regulation and Building Standards Act to be unconstitutional.

[52] Counsel for the respondent submitted that section 12(6) is on par with the regulations of the Health Act and the by-laws which the Municipality relied on and section 12(6) of the NBR Act provides as follows:

> *"Any persons who contravenes or fails to comply with the provisions of this section or any notice issued hereunder shall be guilty of an offence and in case of the contravention of the provisions of section 5 be liable on conviction to a fine not exceeding one thousand Rands (R1000-00) for each day on which he so contravened."*

[53] Counsel for the respondent submitted that regulations to the Health Act and the by-laws upon which the applicants relies are even more extensive than the NRB Act, because they not only impose a higher fine, they also suggests an alternative of imprisonment and further alternative of both a fine and imprisonment.

[54] Dealing with such statute against the background of ***Olivier Road case, supra,*** of the municipality having issued a section 12(4)(b) Notice which is the requisite statutory notice that a municipality is obliged to issue before they require a person whose conduct they complained about to be evacuated or terminated. The ***Olivier Road case*** was in the Supreme Court of Appeal before it went to the Constitutional Court and in the Supreme Court of Appeal the case referred to as ***City of Johannesburg vs. Rand Properties and Others 2007 (6) BCLR 693 (SCA)*** and in which the Supreme Court of Appeal held that the provision like section 12(6) which criminalises conduct which is contrary to Statute without a court order, is the preserve of our statutory dispensation and that it is constitutional. In the ***Olivier Road case, supra,*** the Constitutional Court says the following at 492 H:

> *"There is however one finding that does occasion sufficient Constitutional consent to render it in the interest of justice for it to be considered. It is the conclusion of the Supreme Court of Appeal that there is nothing objectionable about a legislative provision that permits the issuing of an administrative order to*

vacate and in the event of non-compliance for a criminal sanction. It would have been noticed that the criminal sanction is imposed by section 12(6).

Section 12(4(b) of the NRB Act authorises the municipality concerned by notice to order any person occupying any building to vacate it immediately.

Section 12(6) provides that any person who continues to occupy despite the order is liable on conviction for a maximum fine of one hundred Rands (R100-00) for each of unlawful occupation.

At 439B the Court went on to say that it means that in effect that no person may be compelled to leave their home unless there exists an appropriate court order."

[55] The Judge in the above case went on to deal with the situation where a statute prescribes or describes the conduct as criminal, and therefore imposes a direct sanction like a fine or imprisonment or a combination of both without a court order. This was declared unconstitutional against the background of the Bill of Rights, and there Counsel referred to section 23 of the constitution dealing with the rights to housing.

[56] In actual fact it is section 26 of the Constitution which deals with housing. The section provides as follows:

> *"26 (1) Everyone has the right to have access to adequate housing;*
>
> *(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.*
>
> *(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."*

[57] The case of ***Olivier Road, supra,*** referred to by counsel for the respondents dealt with evictions from residential premises. It is therefore distinguishable from the facts of the present case. Furthermore, section 22 of the Constitution provides that every citizen has a right to choose their trade, occupation or profession freely. The practise of trade, occupation or profession may be regulated by law. Section 22 can be distinguished from the provision of section 26 of the Constitution especially section 26(3) which deals with evictions. Section 22 of the Constitution does not have

provisions like those referred to in section 26(3) of the Constitution dealing with arbitrary and evictions without a court order.

[58] I may as well mention that the PIE Act dealing with evictions from residential premises was enacted as a constitutional imperative in response to the provisions of section 26(3) of the Constitution. The provisions of section 22 of the Constitution cannot be equated to the provisions of section 26 of the Constitution dealing with evictions from residential premises. The argument, by counsel for the respondent equating the provisions of section 22 and 26 of the Constitution is therefore misplaced.

[59] Furthermore, the Constitutional Court case the ***51 Olivier Road vs. City of Johannesburg, supra,*** dealt with the provisions that compelled people to leave their homes at the pain of a criminal sanction in the absence of a court order. The Constitutional Court said that these people cannot be evicted without a court order, declared in a statute that people are criminals if they live in their own homes. One has to get a court order first, that is all what the Constitutional

Court say according to counsel for the applicant. What the Constitutional Court said in that case was that continued occupation of property should not be a criminal offence in the absence of a court order for eviction.

[60] The basis upon which they approached the court in that case was that it is the contravention of the building regulations to live in condemned buildings. It is also a criminal offence. They use the criminal offence to throw them out of the property. The Constitutional Court told them that they cannot do that, they needed to get an eviction order.

[61] Counsel for the applicant submitted, correctly in my view, that that Constitutional Court case is not authority for the proposition that a municipality may not apply for an interdict to stop conduct declared unlawful by its by-laws or health regulations.

[62] The respondent's approach that the Constitutional Court case is the authority for the proposition that the municipality can do nothing because there is a criminal sanction in their by-laws or because there is a criminal sanction in the health regulations, they cannot approach the court anymore, this

approach is wrong and fallacious.

[63] The crux of the applicant's case is based on the lawfulness of the conduct the respondent. That is clearly set out in paragraph 8 of the founding affidavit and not paragraph 10 and the following paragraphs, which deals with the running stream as suggested by counsel for the respondent. It is clearly stated in paragraph 7 of the founding affidavit that:

> *"The operation of a funeral parlour is in breach of the regulations under the Health Act as well as the by-laws"*

[64] It is clearly stated in paragraph 8 of the founding affidavit that the respondent is not in possession of a certificate of competence nor has it been granted exemption from complying with these regulations. The crux of the applicant's case is not about the running stream as suggested by counsel for the respondent. It is about the respondent's unlawful activity of operating a funeral parlour without the certificate of competence.

[65] The suggestion by the respondent that the speculative basis upon which the act of injury or interference is predicated

upon falls short on the second prerequisite of a final interdict is wrong. He further suggests that there is no evidence justifying an inference being drawn that the act of injury or interference is reasonably apprehended. This is again fallacious for the reasons set out in the paragraph below.

[66] The requirements for a final interdict have been set out earlier on in this judgment, insofar as the requirements for an interdict are concerned the clear right pertains to the statutes involved, the Health Act, its regulations, the by-laws and its provisions. The injury committed and ongoing, being committed is that the respondent is operating without a certificate of competence. That is the injury committed. It is not the injury the applicant is referring to, namely, that the contaminated water is going to seep into the river. The injury committed is the conduct, which is contrary to a statute and the by-laws. No other satisfactory remedy is dealt with in the same way in the four cases referred to earlier on in this judgment, at para 32, where it is said that once it is established not only that the conduct is unlawful and it is unlawful the moment it is against the statute but also that it is criminal. Not all unlawful conducts are necessary criminal,

conduct is only criminal if the statute declares it specifically criminal conduct where those cases say the moment that happens that there is a statute that says conduct is not only unlawful but also criminal, the court no longer has any discretion. It has to order an interdict to stop that conduct straight away that is what those cases are all about. Otherwise that would be condoning the ongoing criminal and unlawful behaviour and abdicate the duty of the duty of this court as an enforcer of the law.

[67] On the issue of the confirmatory affidavit deposed to in 2007, which is confirmed in the affidavit deposed to in 2009, counsel for the applicant submitted, correctly in my view, that all that would have been relevant if there was a dispute about the conduct complained of, but the conduct complained is not in dispute. The fact that those two people in the 2007 confirmed that there is this conduct but it is now irrelevant because it is admitted. It is common cause before this court that there is such conduct. Counsel for the applicant however conceded and took the point that this was sloppy, work and it did not look well but what we are dealing with here is the substance and not the form. In substance,

one has the operator that does not have a certificate of competence and that is common cause in this matter.

[68] If the applicant unreasonably refused to grant the respondent a certificate of competence as it was alleged, the respondent had a remedy to approach this court for a *mandamus*, for an application to compel the applicant to grant such a certificate of competence. Even in the present application for a final interdict, there is no counter application by the respondent for a *mandamus* or an application to review the decision of the applicant in failing to grant the respondent the said certificate. The respondent has continued to act unlawfully for more than three (3) years. It is clear from the papers that the respondent is well aware of the fact that such a certificate is required in terms of the law. If the respondent felt that it was being frustrated by the applicant in obtaining the said certificate, it had a remedy in law then and still has a remedy today.

[69] In my view any suggestion that the respondent's right to freedom of trade, or its right in terms of the Constitution has been violated by the applicant is without foundation. A right

to freedom of trade in terms of section 22 of the Constitution does not include a right to trade illegally or in contravention of any laws, by-laws or regulations

[70] There are no disputes of facts in this matter on the issue before this court, namely that the respondent is trading illegally. The disputes of facts relates to issues which are not relevant for the determination of the issues before this court. It is therefore not necessary to refer this matter to oral evidence as suggested by the respondent.

[71] In my view the applicants has satisfied all the requirements for the grant of a final interdict in this matter. In the premises, I am satisfied that the applicant has made out a case based on the prerequisite for an interdict to be granted a final interdict.

[72] In the circumstances, it is not necessary to do deal with the other issues raised by the respondent in the heads of argument and those that were raised orally.

[73] In the circumstances, I am satisfied that the application should succeed. Furthermore, there is no reason why the

costs should not follow the result in this matter.

[74] In the premises, I make an order in the following terms:

(a) The respondent is interdicted and restrained from operating a funeral parlour or carrying out any activity in connection with the operation of a funeral parlour on the premises which it currently occupies at the old Capital Radio Building at Clydesdale Mission, Umzimkhulu (or any other premises in the municipal area of Umzimkhulu) without being in possession of a certificate of compliance issued in terms of the applicant's Funeral Undertaker's by-laws.

(b) The respondent is ordered to forthwith remove any bodies of parts there of from the said premises to a place where they may be lawfully kept.

(c) The respondent is ordered to pay the costs of this application.

Judge T. A Sishi

Representation

Applicant's Counsel	:	**A. De Wet**
Instructed by:	:	Venn Nemeth & Hart Inc. 281 Pietermaritz Street **PIETERMARITZBURG** Ref: H Govender/Natasha/02 **Tel: 033 355 3100**
Respondent's Counsel		**R. Padayachee SC**
Instructed by	:	Mbele Dube & Partners C/O Zondi & Shangase Attorneys Suite G62 Laager Centre 88 Church Street **PIETERMARITZBURG** **Tel: 033 3459226**